

Amy VonMacek: [Silence from 0:00:00 to 0:00:30]

We're a couple minutes past, so, let's go ahead and get started. My name is Amy VonMacek, and I am the director of council programs here at the Dramatists Guild. I also help out in business affairs by helping to put on these panels for you, and today we're gonna be talking about fair use and educational fair use. I know that we have a lot of new people here today, some of you who are playwrights, some of you who are educators, and some of you who work in the nonprofit industry, so thank you all for joining us today. During today's session, if you do have questions, please put them down in the Q&A. The first 35 to 40 minutes probably will be panel, and then after that, we'll question-and-answer. So, any questions that you have, use the Q&A at the bottom of your screen.

With that, I would like to introduce our executive director for business affairs, Ralph Sevush. Thank you, Ralph.

Ralph Sevush:

Thank you, Amy. Welcome, everybody. I'd like to welcome our guests, today: Jordana Rubel, from the copyright office; and Billie Davis, from Concord Publishing; and Karen Hartman, a teacher, currently – where are you, currently? Last time I saw you, you were in Washington State. [Laughs]

So, we're here to talk about the use of copyrighted materials in the classroom, what that looks like, what's appropriate, what's illegal, [laughs] what the standards are. And I think the first thing to start with – before I turn it over to Karen to talk about her experience using copyrighted material in the classroom, which I guess is the natural place to start this discussion – I just wanted to give us all some context, which is copyright as it relates to playwrights and musical theater writers. Playwrights are unique in the sense that, unlike writers for screen or television, playwrights and musical theater writers own their own copyrights. They are not employees, they are independent contractors, therefore, they don't have a labor union, _____ the Writers Guild of America is a labor union. Instead, they have a trade association.

That's what the Dramatists Guild is: a trade association of over 8,000 members who write for the stage, and have been around – the guild has been around since 1912, not so much its members. The Guild's main focus on the ownership of copyright is because that's what writers have instead of a union: they have ownership

and control over their work. And the rights and revenues they can earn from those plays are what they have instead of collective bargaining, instead of health insurance, instead of a pension. And so, it is necessary for playwrights to guard their work with, you know, extreme intensity, because that's how they make a living.

The market for educational work is huge. The stock and amateur market, which is licensed by companies like Concord, which Billie is from, represents the ongoing revenue stream that playwrights live on. So, when work is used illegally, it forces playwrights into other careers, essentially. And it's amazing to me always that the most – often, the ones who are most likely to infringe and artist writer work are those who most love that writer's work. So, but copyright is not an absolute right. Copyright came about under provided by the constitution, and then copyright law was passed to execute that. And over the years, it's evolved and it's changed.

But copyright says that an author owns and controls a specific expression of speech. But there's another part of the constitution, the First Amendment, and the First Amendment says congress shall make no law abridging the freedom of speech. So, it would seem that these two laws are in conflict, because copyright gives an exclusive monopoly over certain speech, to an individual, author who created it. So how is this conflict resolved? Well, originally, it was resolved through case law, but eventually incorporated into the copyright law, the doctrine of fair use. There is a safety valve, a First Amendment safety valve in the copyright law, that allows for, among other uses, educational use of copyrighted work.

So, before we talk about those specifics, I'd like, now, to talk about how material is used in the classroom, how students and teachers approach material, what are their common experiences. And for that, I'm going to turn to our resident teacher, Karen Hartman.

Karen Hartman:

Hi. Thanks, Ralph. I am so pleased that there are so many people on this call, and that it sounds like a lot of you are educators, which is awesome. And myself, I'm primarily a playwright, but I also teach. And I have taught, actually, in – I was just counting, I've taught in about three undergraduate and two graduate programs, just in the last five years. So, I feel very much on the ground in the state universities, in private universities, in professional programs in terms of how things go down. And honestly, you know, I started teaching 20 years ago, and it wasn't that different; there were still a

whole lot of – I remember, in one university that shall not be named, an entire new play library that was all xeroxes.

So, it's not new to the Internet, but what I think is so exciting about having this conversation is that, when we on the Copyright Committee at the Dramatists Guild, where I also serve, talk about copyright violators, a lot of those people are, you know, pirates, bad actors who are on the Internet, who are stealing songs, you know, like, for personal profit. And we as educators are not ever motivated by personal profit. We're motivated by access. So we're motivated by access for our students, and that's where these two values come into conflict is that, we are people who are trying to get these plays into the hands of the readers and students who need them.

And the students, we're up against both kind of a money limitation and then another kind of just culture of, we are so far away from purchasing physical books and holding them in our hands as a means of distributing texts, that it feels like almost impossible to actually buy a script, and then you can have it for free in ten seconds on the Internet. So, it's, like, what do we do *[laughs]*, as educators? And what I noticed is that, the ease of downloading plays for – and I'm talking mainly for classroom readings use, not for production, 'cause I think that's not as widespread. I think people do generally obtain permission for productions, in university setting. I mean, like, a play on a syllabus, a play taught in a classroom, in an eighth-grade class, in a college class.

Oh, I lost my train of thought, but – it's so much easier to get the thing, plus, it's free. And who is being harmed by that? Well, playwrights, because, you know, we get a couple shekels every time you pay us, so that's good. But also, the kind of, the culture, because some of these programs are training professional actors, professional directors, and some are training, you know, younger people, elementary, high school, future audiences. And every time something's traded for free that's not really legally free, it degrades the understanding of who made it and how it all works.

So, I'm just concerned about all of it, and I'm interested in figuring out how all the good people who are teaching theater and all the good people who are protecting writers can come together. And also, because one of the things we've also discussed on the Copyright Committee is that writers of color, people writing about

marginalized communities, women, these are some of the works that are the most sought-after by the schools and the students who have the least money and have the least access. So, for example, Native American and black writers are routinely asked, "Can we just have PDFs of your stuff for free, to meet the needs of our kids who can't buy your material?" And so then, that puts those writers back on their heels in a more difficult position, because they're being asked to give something that usually isn't even theirs legally to do, if it's been published.

So, because when a writer has a work published, I'm actually promising not to send – like, I have some plays published by Concord, so I'm not supposed to send PDFs of those works even to a classroom, because I told Concord I wouldn't. They get to sell that play. *[Laughs]* So it's not even necessarily mine anymore to distribute, once it's published. So, my hope is to just raise a sense of – a broader sense of ethics and awareness, because we tend, as educators, to be so focused on our own students, and also hear more about the nitty-gritty of the law. So that's what's exciting me about being here, and I appreciate being invited.

Ralph Sevush: Thanks a lot, Karen.

Karen Hartman: Yeah.

Ralph Sevush: To talk about the law – and _____ relieved it doesn't have to be me tonight – Jordana Rubel from the copyright office has graciously agreed to talk to us all. And we can, as I said, we talked about fair use doctrine and its incorporation into the Copyright Act, and the educational exceptions that the Copyright Act provides. The copyright office also has a circular, I think, on guidelines **recommended** for that. So, I turn it over to Jordana, to explain to us what's going on.

Jordana Rubel: Good afternoon, everybody, and thanks so much for having me. I'm also really pleased to see that there's so much interest in this topic, and hopeful that I can shed some light on the legal standards, and help think through some of the practical problems that Karen just touched on. I wanna talk quickly about three different parts of the Copyright Act that may be relevant to you as an educator, that relate to educational fair use. And the first one is what we refer to as the fair use doctrine.

For better or for worse, the term "fair use" does include the word "fair." And I think that sometimes people focus on maybe their personal interpretation of fairness as they're thinking about whether a proposed use or a potential use of copyrighted material might fit in the fair use exception, and I wanna caution you away from using that approach. What is fair? In your regular life, nonlegal, fair might seem like, "Well, I don't have a lot of money, so it is fair for me to copy something from the Internet without paying." That is not what the fair use doctrine says.

Or fair might be, "Well, it was really hard. I looked for, like, 15 minutes, to try to find a copy of it somewhere, and I couldn't find it. And then this other copy was right there for the taking on the Internet, so I think it was fair for me to take it." Those are maybe ways that we use the word "fair" in our everyday lives, and that should not be confused with the fair use doctrine, which is a term of art. That means that, like, it's a word with legal significance, and there's a legal standard that's attached to it. So I'm gonna walk you through what is that legal standard, and what are the things you should be thinking of if you're contemplating a use and trying to figure out if it fits in the fair use exception.

So, as Ralph mentioned, fair use is part of the Copyright Act, it's Section 107 of the Copyright Act, and that section lists out 4 specific factors that should be considered when you're trying to decide if something is fair use. The first factor is the purpose and character of the use. And within that factor, one thing that you should consider is whether the use is commercial. So, if your use is an educational use that is noncommercial, that's gonna be one subfactor that weighs in favor of it being a fair use. Another subfactor in that purpose and character of the use factor is whether the use is transformative. And that usually refers to whether you've done anything to change the work, whether you've added additional content to it, whether you've changed the message of it somehow, that's usually what we mean by the term "transformative."

Ralph Sevush: That's a somewhat controversial area of the law. We can talk more about that, afterwards.

Jordana Rubel: For sure. The second factor is the nature of the work, and that refers to, really, whether the work is a creative work or a more factual work. And if we're talking about literary works like plays,

probably, we're in the camp of a more creative work, and that would weigh against a finding of fair use. The more creative the work is, the less of a need somebody might have to use it without authorization. The third factor is the amount and substantiality of the portion that is used in relation to the copyrighted work as a whole.

Which is to say, how much of the work are you using? Are you using a few sentences? Are you using a chorus? Are you using the most important portion of the work? The more you're using or the more of the heart of the work that you're using, the less likely the use is to be considered a fair use. And finally, the fourth factor is the effect of the use upon the market for or the value of the original. So, is your potential use, or if lots of people started using the work in the same way that you're proposing to use it, would that damage the market for the original work.

Ralph Sevush: And this is probably the most critical factor, I think, in this particular analysis. But everybody should realize none of these factors are determinative in and of themselves. The courts look at it as a balancing test.

Jordana Rubel: Exactly, that's what I was just gonna say, that the court then balances the four factors and anything else that the court might find relevant, and decides is it, on balance, fair use or not fair use. There's a court, recently, in Georgia tried to assign percentage values to each one of the factors, and the court of appeals struck that down, they said, "You can't do it that way." It really is a case-by-case analysis, depending on the context of the proposed use, how you decide how important factor one is compared to factor three, or factor four is compared to factor two. You can't assign – you can't even – you can't assign a number value to those things, and it might be different from one case to the next.

So, a couple sort of general things that I'll say about educational fair use. Teaching, scholarship, and research are listed in the statute as examples of uses that are more likely to be fair use. But like I just said, fair use is a case-specific analysis. There is no blanket rule. You can't say, "I'm planning to use this for an educational purpose, and it says teaching or research in the statute, so I'm allowed to do it." If anybody tells you that, "Oh, no, that's definitely fair use," please do not believe them. There is no blanket rule that any specific type of use is fair use.

Ralph Sevush: It's often said that you'll know if a use is fair or infringing when the judge drops the gavel at the end of the case.

Jordana Rubel: *[Laughs]* Yeah, that's absolutely right, you know, I've counseled many individuals and companies about this, there is no – it's very fact-specific, courts are, you know, up and down, they sometimes will come up with really surprising rulings. One rule that I've heard about, it's sort of like a rumor, maybe, is a three-change rule. I don't know if anybody else has heard this, but please don't believe it if you have. I have heard, "Well, if you make three changes to something, then it's a fair use." Not true. There is no rule. It would make all of our lives probably a little bit simpler if there was a cut-and-dry rule, but there is no such thing of a three-change rule.

Ralph Sevush: We often get questions at the Guild, "Well, if I use three bars, is that, you know, fair use?" Well, what if the song is four bars long? *[Laughs]* So, there is no number of words or notes that is or is not fair use.

Jordana Rubel: Absolutely. I can give you maybe a few general conclusions or guidelines to consider, to try to be practical. I know it's not very helpful to just say, like, "Well, we're never gonna know, so good luck." I do think you can take a few things away from just the four factors as they're listed and as they're, of course, evaluated by the courts. One thing is: tread carefully before using something, if there's an established licensing market for that work. If people are, you know, earning revenue by licensing that work, and your plan is to just use it without paying for it, that should be a big warning sign.

Another thing to keep in mind: the more you change the work, the more likely that your new work will not function as a substitute for the original, and will be found to be transformative. So, if you're using the original exactly as it was written by the original author, you've kind of got two strikes against you on the four-factor test. Because it's not gonna be considered transformative, and it's likely to function as a substitute for the original in the marketplace. So, the more you can change it, the more likely you sort of affect the analysis of those two factors. A third thing, a third general guideline is: if you can accomplish your goal by using just a portion of the work and not the entire work, you should do that. Don't use any more of it than you need to, to accomplish your

purpose.

And the fourth thing I would say, and I think is a really important reminder that people don't think about as often as they should: if you think there's a compelling argument that your proposed use is a fair use, ask for permission. Find the copyright owner or the person who has the authority to grant you permission, if you think you've got a good argument of why you should be able to use it for free, ask them. And then you'll have at least the certainty of whether you are able to use it with their blessing, or whether they're gonna object if you do so. Any work that is registered with the copyright office, it's a matter of public record, who you can approach for rights and permissions. And a lot of copyright owners are willing to grant permission, even for free, if the circumstances are right.

So, if you think you've got a good argument that it's a fair use, ask. One last thing I'll say about fair use is that the copyright office keeps a fair use index where we review all cases that are decided by federal district courts and federal appellate courts that discuss fair use. And any case where we think the court has said something interesting or important or useful about fair use, we write, like, a really short one-pager describing the facts of the case, and providing information about how the court decided the case. They're really easy to read, they're really easy to understand, you don't have to be a lawyer to understand it. So, if you're interested in seeing, like, "Well, has there been a case that's kind of similar to what I'm proposing to do?" that would be a good resource for you to review.

I do wanna talk quickly about Section 110 – should I do that now, Ralph, or should I hold that? Okay. So I mentioned, at the beginning, that I wanted to talk about the fair use doctrine. There's also two other types of educational uses that could fall into exceptions of the copyright, in the Copyright Act, to copyright infringement. So, the other two that I wanted to discuss quickly specifically relate to the use of a work for educational purposes. The first one is Section 110 (1), and that section allows for public performance or display of a copyrighted work for educational purposes. There's a few conditions that you have to meet in order to fall into that category.

You have to be performing or displaying the work, it has to be an

instructor or a student, in the course of face-to-face teaching activities. And it has to be done in the context of a nonprofit educational institution. So, it's gotta be some sort of classroom with face-to-face teaching done by the teacher or the students, and nonprofit educational institution. You have to be using copies of the work that were not unlawfully made, so that you have no reason to think that they were made unlawfully. And if you fit into that exception, there's no restriction on the amount of a motion picture or a piece of artwork or a play that you can show. You could do short clips, you could show an entire movie – it's a pretty broad exception, if you meet those conditions.

The second exception that you could potentially fall into, if you're using a work for educational purposes, is Section 110 (2), which is sometimes called the Teach Act. And that applies to uses of copyrighted works for public performance and display, but those are not in in-person face-to-face teaching activities but in distance learning. So, this Teach Act came in quite handy for some people during the last year-and-a-half, when we've really been focused on distance education. So, there's also a few conditions that you have to meet, to qualify for those Teach Act exceptions. It doesn't apply to works that are produced or marketed primarily for performance or display in digital instructional activities.

So, you can't use a work that is meant to be used in distance learning, and provide it for free to students under the Teach Act. It also doesn't apply if the copies were unlawfully made, just like Section 110 (1). Here, the transmitter has to either be a government body or an accredited nonprofit educational institution. The use has to be made at the direction of an instructor who's teaching a class session as a regular part of "systematic mediated instructional activities." So it has to be part of some sort of distance learning class session. The only people who are able to receive the transmission should be students who are officially enrolled in a course, and the transmitting body has to apply technological measures to try to limit the dissemination of the work to anybody else.

And for this exception, for nondramatic literary works or musical works, you can show the entire work. For other works, including motion pictures or dramatic literary works, you can only show reasonable limited portions. And the last requirement is, the institution that's using that exception also has to have policies

about copyright protection, that they distribute to students and faculty and any other relevant staff members. So, you may fit – you know, you should consider, if you're thinking about using a copyrighted work, whether you fit under Section 110 (1) or Section 110 (2) or the fair use doctrine. And you could fit under more than one, but if you think that you fit under any of them, those would be exceptions from copyright infringement. So, even though you are using the work without authorization, you would not be found liable for copyright infringement.

Ralph Sevush: Okay, thank you for that, Jordana. The copyright office has circulars, informational circulars, and I believe there's one on this. So if we can put a link to that in the chat, Amy or Jordana, if you could find it, that would be great [*crosstalk*].

Jordana Rubel: Sure, I can add a link to that.

Ralph Sevush: Great. So, let's say, instead of stealing, uh, I mean, using a work without authorization, you decided to use one with authorization. I'd like to turn to Billie Davis, now, from Concord, to talk about how do you license works for the classroom.

Billie Davis: Great, thank you. Thanks for having me today. I'm really also very happy to see so many people, because my team talks about this all day to people and it's very exciting to reach a broader audience.

So, as the publisher, it is really our main goal to protect the work of the playwright, and to ensure that they're being paid for their work. So, you know, there's lots of variations within that, but in terms of fair use, I think we have things – it falls into sort of two areas. There's the material area and providing that printed material to teachers for use in the classroom, but then there's also the area of fair use in performance. I mean, in terms of the material, as Karen has said, it's certainly easy to get things for free on the Internet, but we do provide class sets to teachers, and desk copies and things like that. But, you know, we do our best to get the work out there as much as possible, looking at other ways of distribution for that going forward.

In terms of performance fair use, so, there's a lot of high school competitions that happen across the country, and within those, there's a question sometimes of, "Can my students perform in this competition, and have that fall under use?" And for the majority of

the beginning of that process, it is possible. So it is possible to have a performance in front of an adjudicator. So, if the judge is – only the judge is in the room, they can watch those performances and no fees are due at that point. What happens is, if that performance moves on to be shown at the competition and it moves into an audience outside of that adjudicator, that's when a fee will be due. So the playwright is paid for the work that's being performed in front of an audience.

A lot of times, there's questions about that in just a classroom setting, as well, in terms of, "We're studying this script in class. Can the class next-door come in and listen to us read it?" And at that point, they're considered an audience, so it would no longer fall under fair use, therefore, the playwright deserves to be paid for their work. So, you know, we do a lot of communication with playwrights, every day, about their work. You know, people come to us to ask to change lines, if it's okay if they can just make changes to scripts. And, you know, we often go to the playwright for that permission, and sometimes it's okay and sometimes it's not. You know, and our main goal is really to protect that work, and to get it out to an audience where it's performed and seen.

We do have a compliance department that helps us be able to sort of police that sort of stuff when it does happen, because, sure, there are performances that happen that aren't properly licensed, often. But, you know, we often have – with educators, we really do want to be able to have our materials in your classroom. And as we go through the process, we have many partnerships with, like, EDTA, we do a natural disaster script relief where we send scripts to classrooms after a national disaster, to build up their library, and things like that. But, you know, if there's any question about what you should be doing with the material that you have, you should always ask. And the first place to start with that question is with the publisher.

And then, if we don't hold those rights – 'cause sometimes you're asking us questions to things we don't hold the rights to – Ralph had mentioned often the playwrights retain those rights – we reach out to agents, playwrights, to get that permission for you. So we're oftentimes a middleman in the scenario of getting permission for you to use it or not use it. But I would just say that in terms of, when it comes down to fair use, if there's any question, to always reach out to the publisher and ask, first, so.

Ralph Sevush: Thank you, Billie. All right, before we start moving into questions, I'd like to ask Amy to share the screen. Because some years ago, the Guild created a music video, produced by Stephen Schwartz, written by Alan Menkin and Craig Carnelia. And it was in response to the fans downloading songs illegally. Amy, do you wanna play that?

Amy VonMacek: Do I? Yes, I do. *[Laughs]* Hold on just a moment while I pull it up.

Ralph Sevush: And we have all the rights to allow this to be played.

Amy VonMacek: We do.

[Multimedia playing]

Ralph Sevush: That black box in the middle isn't actually part of the video. But any opportunity I get to play that song, I play it. So, Amy, I'd like to open the floor to the questions.

Amy VonMacek: Sure, we have a couple of questions, here. Again, if anybody has any questions, use the question-and-answer, or use the chat, feel free to ask those questions. So, we get this first question a lot: "If a college student produces a play for a class project that is performed for an audience, no admission fee, not open to the public but open to the school, should they contact the playwright for the rights to the play? And if they need to pay for fees, who's responsible for paying those fees?"

Ralph Sevush: Well, that's a question Billie just answered, I think. Once you invite an audience, it doesn't matter whether you're charging admission or not, it's no longer fair use, it's not an educational use, even though it has educational value. And that's why there's an amateur licensing market. So, you would contact the publisher of the work, and you would enter into a licensing agreement with them.

Amy VonMacek: Can you, maybe Billie or Ralph, speak to the types of fees or how much these – like, a range of fees? How much are we talking?

Billie Davis: That actually will depend. Most licensing houses base fees on details of your production, so it will take into consideration your estimated audience size, your ticket price – and, you know, if there's a zero ticket price, we take that into consideration, as well –

and then it's calculated based on that. Most licensing houses do start with a minimum fee, so the playwright's guaranteed at least a certain set fee for that production, but it really depends on, also, the type of production you're doing. If you're doing a play versus a musical, a musical is gonna be much more expensive. Plays can fall under \$100.00 – it just really depends on the material.

Amy VonMacek: Sure. And if somebody is licensing it, do they have to buy scripts for each of the people that need them?

Billie Davis: It's not necessarily required. Oftentimes, especially in the high school market, a teacher will inherit a set of scripts. And we just ask for proof of purchase that they have purchased the script somewhere, to ensure that, you know, the playwright's getting paid for the material aspect of it, too.

Amy VonMacek: Great. From David: "Can copywritten work be changed without a playwright's permission?" So, Jordana, you were talking about changing a work in fair use, that might get you closer to an exception of fair use. Can you talk a little bit about that?

Ralph Sevush: This is that area that, when Jordana was talking before about transformative use, I said it was a controversial area and we'd talk about it a little bit more, later. I think this is that later. If it's a fair use, then changing it is not a violation of anything. If, however, you're claiming it as a fair use because you've changed it, that gets into the definition of transformative use. And transformative use is a court-made doctrine – I guess it comes out of the *Pretty Woman* case, I guess, originally. The band 2 Live Crew did an adaptation of Roy Orbison's *Pretty Woman*, and Roy was not happy with their version of it. But the court said it was a fair use, because they transformed it, its nature, its purpose, its – you know, it was a critique of the song as much as of the culture.

So, when you do that, it's not anticipated that you would ever be able to get permission from the rights user to critique their work, so it falls under sort of general criticism fair use. But the doctrine has been taken and expanded by courts to such a degree that it's really muddied the waters about, you know, one of the rights a copyright owner has is the right to license derivative works. Derivative works are adaptations of your work. Like, if you wrote a play, you can license the right to make a movie out of it, or a novelization, or some other version in some other medium. What

happens to that right, if, you know, somebody can just call a derivative work a transformative work, you know, it renders that right moot.

So, there are a lot of more recent pushback against transformative use doctrine, but it's still a very hard thing to determine when it is and when it's not. Or even whether there should be done.

Jordana Rubel:

Yeah, I agree with everything Ralph said. I can give you an example of a recent case in California. There was a show choir that put together a medley of a number of different songs into a performance that was – it had some sort of, like, dustbowl theme – don't ask me. *[Laughs]* And one of the songs they took was an Olivia Newton-John song from *Xanadu*. So, they took, like, certain lines, including a piece from the chorus, and they used it as part of a larger work, with a whole different theme instead of. Like, the roller situation *[laughs]* in *Xanadu*, we're now talking, like, Oklahoma. And it was used as part of a medley by a show choir.

And the question there was, in part, was that a transformative use or a derivative work. And the court found, under those facts, that that was transformative, because it did use exact pieces from the song, but they did, you know, a small enough portion of it and changed the entire work so much that it was really telling a different story and having a different message. Just to give a little color, that's the kind of analysis a court might make. But it's not cut-and-dry. You know, you have a potential problem if you're talking about a play, where there might be licensing terms that specify that the author does not want anything changed. So you're actually digging a deeper hole, if not only have you used the work but you've used it and it's now not the way the copyright owner would like for it to be performed.

That's different than, you know, taking a portion and, you know, like 2 Live Crew, you know, commenting or creating, like, a parody of the original. Or using just a piece of it within a larger performance that is unlike the original.

Ralph Sevush:

There was a recent case, actually a theater case, there was a play called "Hand to God," which was about a puppet *[laughs]* and a puppeteer whose puppet gets possessed by a demon. So, at one point during the play, the character, trying to impress a girl that he's in this puppeteering class with, uses his puppet to do a

selection from the Abbott and Costello routine *Who's on First?* It was actually a pretty large chunk of the bit. He was pretending that he had just made it up, and the woman didn't know the bit, so she was very impressed.

The Abbott and Costello folks sued. They did not license that use, and the use was – it was used exactly as it was written. The claim of transformative was that the character was claiming to have written it, and that it was being performed in a play as – you know, obviously, that was not a transformative use. The suit failed for other reasons, technical, you know, reasons, I think the copyright had expired or something, and fallen into public domain in some way. But the court went out of its way to say, "Even still, that's not a fair use."

So, you know, you playwrights have an interest in both using copyrights and owning copyrights, so you're on both sides of this issue. And my work with the Dramatists Legal Defense Fund is often involved writing amicus briefs and fair use cases, and sometimes we're claiming transformative use, and in other cases we're saying, "What the hell is this transformative use?" So, but we always try to do it in an evenhanded way based on the facts, because that's the way the court's gonna look at it, based on those facts. Sometimes it is and sometimes it isn't. But the thing about fair use is that it is a legal defense to a claim of infringement.

It is not some right in the ether. It is not a license. It is a defense. That means you've already been sued. If you're claiming fair use, that means somebody has sued you. The way to avoid the suit is to go to Billie and license the work in the first place.

Questions?

Amy VonMacek:

Yeah, so we have a question from Matthew, who I'm going to assume is a writer or playwright, but: "Suppose I wanna share on the Internet a work without expectation of remuneration. What restrictions should I consider, and how to make them?" So somebody wants to share a play, they're giving it out for free, but how should they put that out there?

Ralph Sevush:

Well, as long as it's their play and not somebody else's play [*crosstalk*] I assume they can share it. There's a commons, a copyright commons license, where you're allowing anybody to use

it as long as you don't change the work, as long as there's attribution credit. So, you can look online, there's actual – you can download those forms for free, and you can use the parameters that they present. It's a very good structure.

Amy VonMacek: Jordana, this question is for you: "You mentioned one aspect of fair use doctrine being the nature of the work, whether it's creative or factual. Can you talk a little bit more about fair use of factual works, for example, newspapers and photographs?"

Jordana Rubel: Sure. The idea, here, is that the less and the sort of "core" of copyright a work is, the more likely the public might generally have an interest in being able to use it. So, things that are more factual – facts in general are not copyrightable I think is an important thing to explain. You know, if somebody writes down – I don't know, I'm just trying to think of a fact – like, "It was raining on Monday, May 24th," that is not copyrightable. That's just a fact. Now, if you wrote it in language that was expressive enough to be considered original and creative, then you get into the territory that you can copyright the language, but not the underlying fact. And hopefully that distinction is clear.

It is a really tricky distinction that is litigated frequently. But if the work qualifies for copyright protection, so, you know, if something's not copyrightable, if it's just a fact, then it's not protectable by copyright at all. So you don't need to get to fair use, because you can't infringe the copyright of something that's not protectable by copyright. But if there's something in there that makes it protectable by copyright – maybe it's a compilation of facts, like, so you've selected a number of facts that all relate to a certain topic, and you've organized it in a way that is sufficiently original so that the whole compilation is considered copyrightable. If somebody were to copy that without your authorization, and use it in some way, that factor, too, the nature of the work, that would be considered factual and further away from the core of copyright, and just for that factor alone, that would weigh in favor of fair use.

Now, remember, there's all the other factors that you have to keep in mind, as well, like the nature of the use, and how much of it was used, and how you might be affecting the market for the original. Hopefully that answers your question.

Amy VonMacek: Great. Karen, I have a question for you – I mean, this is a question for everybody, but: "How do playwrights and publishers find out that schools or other organizations are breaking copyright laws?" Like, Karen, do you have anything set up? How do you find out if somebody's using your work without permission?

Karen Hartman: Well, I'd say a lot of writers have a Google alert just set up to their name and the titles of their plays. I don't, 'cause I just don't wanna come across a bad review by mistake [*laughs*], so I don't. But the Internet is really how writers do it. And actually, I have, once or twice, reported something to the publisher, and, man, those publishers are real swift. It's really – I don't know that any punishment happens, 'cause I don't think there's a great interest in publishing the kind of tiny nonprofit theaters or institutions, but payment does happen or a closing of the thing happens, and it happens swiftly. And I think that repeat offenders do – I think there was a case – I think repeat offenders do get some kind of punishment, I don't know, maybe a blacklisty or a warning or something – maybe Billie could speak to that.

And I think with unpublished works, it's much trickier with works that are used in classrooms, that's something that I find out about a lot. I've run into people who are, like, "Oh, I read your play in my class," and I just have – I'm so happy, but I have no idea how they got the script and – you know, it might be an old version of a manuscript. So, that's a tough one, and in that one, I would say the way to do it is to just contact the writer or their agent. Most writers have websites, and you can contact them if you wanna use their unpublished work that you have acquired through a friend of a friend of a friend, somehow, who has the script.

Billie Davis: So, when we do get – we do find that a group has done something they're not supposed to do, we embargo them, that's what we do. And so, you know, that way we know that they're an offender and we keep an eye on them. You know, oftentimes, as Karen said, we do have a lot of authors who have their own Google alerts, and they alert us if something comes up, and we get lots of questions from agents and things like that, of, like, "Is this licensed? It's not on my, you know, client dashboard." But we also, with our compliance department, we're regularly running, like, reports in our system, and we're doing some of the research on our side, as well, to try and find anything that might be happening that there's lacking permission for. So, that's what we do on our side.

And there's typically not huge punishment, other than asking them for payment, and then a nice long education. We have documents we provide with them, for them, called "Owning Your Words." We provide that to them, to explain why they have to pay for it, and things like that. So, that's how we handle it on the publishing side.

Amy VonMacek: Great. Billie, I have a question for you – Judy has a question: "I sometimes see musical reviews made up of songs from works that the organization has paid to produce in other years. Is that okay?" So if somebody bought the rights five years ago and they keep producing the same musical review over and over every year, is that okay?

Billie Davis: Well, it depends. So, they could have an ASCAP or a BMI license, which would cover the use of single songs, and those are usually a year license. And so, if they continue to have that license yearly with them, they can do any song that they want, and put it any order that they wish. Which is a little different than, like, a concert version of all of the music in a musical that you would license through us. So, it sort of falls on if it's a single song or if it's multiple songs from one musical, as to who you go to to license that. But as long as they have a license, it's doable.

Ralph Sevush: It's the difference between grand rights and small rights, and that's a whole other seminar [*crosstalk*] we have articles on it.

Amy VonMacek: Yeah, Judy has a follow-up question: "Even if the songs are put into a dramatic context."

Ralph Sevush: No, 'cause then you go from – ASCAP and BMI are licensing small rights, that is, the rights to perform the individual songs as songs. Once you are licensing the dramatic use of the song, in a narrative **construct**, that's a grand rights use and you need the publisher or author's permission.

Amy VonMacek: I have a question similar to that: "So, how does copyright figure into online platforms like TikTok?" They're thinking of situations where museum or other nonprofit organizations are using audio tracks that are presumably protected by copyright, in their created content. If they have a license from ASCAP or BMI, would that maybe fall under that, as a small right?

- Ralph Sevush:* I'm not sure I understand [*crosstalk*].
- Amy VonMacek:* Yeah, so a short video on TikTok, and somebody uses a Stephen Sondheim song as, like, underscoring a video, would that be considered a fair use?
- Ralph Sevush:* It's a fair use analysis, the four-factor test [*crosstalk*] based on the facts: what's the nature of the use, what's the nature of the work, how much was taken, and what's the effect on the market. There was a big deal when ringtones became a commodity that people bought, you know, songs were – you could buy a portion of a song to be your ringtone, so that was a whole new market. And if you started giving, you know, selling or giving those away or taking those and doing it yourself, you'd be potentially damaging that market. And if you're using stuff on TikTok _____ track in a museum or something, it would seem to me to be similar if not identical. But these are fact-specific analyses.
- Amy VonMacek:* So we have a question from Luke, who's currently writing a textbook for playwrights: "If I quote a single sentence or two about the craft of playwrighting, not a line from a play by, say, Arthur Miller, do I need to get permission from the estate?"
- Ralph Sevush:* Four-factor test.
- Amy VonMacek:* Depends on the writer, I think. [*Laughs*]
- Jordana Rubel:* Yeah, I mean, again, it's really hard to draw conclusions or to give advice about whether a specific use would be considered a fair use. You have to walk through the four factors.
- Ralph Sevush:* That's what lawyers do. You can retain lawyers to give you a legal opinion on these things, and they'll look at your manuscript or whatever and give you an assessment.
- Jordana Rubel:* But I will say that, of course, it is a part of academic discourse to cite other people's work that came before you. And if you're doing it with proper attribution, you know, and in good faith, one sentence out of a very long book – again, I'm not giving you specific legal advice, I don't know exactly what sentence you're planning to use, but, you know, that sounds like the type of thing that people do in academia all the time, you know. And it's even more than just a single sentence, you know, you can use a block

quote, a short block quote from a work that – or you can paraphrase somebody's article, especially if you are commenting on it or criticizing what they've said. Those are all things that go towards, like, using it for a different purpose than the original. So, you know, without seeing the specifics, the use of one sentence from a large work, within the context of, like, an academic discussion of playwrighting, that sounds like the kind of thing that is frequently done without a license.

Ralph Sevush: Right. But if you put the Arthur Miller quote on the cover of the book, and you wanna sell the book based on the fact that Arthur Miller is quoted in it, or implying that Arthur Miller had something to do with it, that's a problem. Also, there's something called the heart of the work doctrine, where, you know, you can take only a small portion of something, but if it is the heart of that work, if you've taken the heart, the main ingredient of that work, you could still be found, even if it's a very small amount taken, it could still be an infringement. So that's why we on this call are not gonna tell you whether something is infringing **use** or non-infringing **use**.

Amy VonMacek: This is for everyone: "What recommendations do you have for emerging playwrights sharing their work online, like the National Play Network? What should we do to safeguard against the work from unauthorized use?"

Karen Hartman: I can speak to that. One thing we've been talking about a lot, in the Copyright Committee, is just on watermarking your drafts. So if you share it with someone, to just put their name on it. So if I send, you know, to my friend Mike, I put Mike's name as a watermark, which Final Draft allows you to do, if you have Final Draft. I'm not sure about Word.

Amy VonMacek: Yeah, Word will allow you to do that.

Karen Hartman: Yeah, so, and that can help for, you know, for something like, you know, play exchange, you can put, you know, "For reading only," "Don't distribute," you can put the dates, you can put whatever you want on a watermark. I personally don't put full scripts up on the Internet; I put partial scripts up. I know, you know, some, like, playscripts will allow people to read but leave out, like, the last 30 pages, which I think is a great idea. So if you wanna review, then you could put that up on your play exchange, but then you have to be contacted to get the full script. Which even if you're willing to

do for free to a teacher considering, which I think you should, as an emerging writer, then you have a better track of who's got it. I personally never recommend that emerging writers put entire PDFs of full works up on the Internet. It's just, then you lose control. But that's me.

Ralph Sevush: I support that, wholeheartedly.

Amy VonMacek: Yeah, we also have releases, and thank you to Terry for posting the link to the copyright page. We also, for members, we have copies of releases for actors, that when you're in a rehearsal or when you're in auditions, the actor signs a release saying that they promise not to share the work. That's another way of protecting your work. And it's been received well, you know, from agents and from actors, so you should feel free to use it.

Ralph Sevush: And the most primary protection is, once you're ready to send the work out into the world for people to read and look at and assess, you need to have registered it with the copyright office.

Billie Davis: I was just gonna say that. *[Laughs]*

Ralph Sevush: I wanted to give you a freebie. Could you *[crosstalk]* and tell them the benefits of registration?

Billie Davis: Yeah, it is not expensive to register your work, and it is well worth the effort of doing so. You don't need to be a lawyer to file a copyright application. In fact, it might make it easier if you're not a lawyer. *[Laughs]* We have folks in the public education section of the copyright office that can help walk you through the process. When you have your work registered, there's a number of benefits that you get, and number one, that's a tool that you have in case there is a question of somebody else using it without your authorization. Part of your letter to them or your agent's letter to them says that, "This is a work that the copyright is registered with the US copyright office."

It provides the public with notice about how they can contact you if they do wanna get rights or permissions to use it. You have additional remedies that you can get, meaning, additional money that you can get if you did proceed with litigation. There's a whole laundry list of benefits that you can get, so, I really do encourage you to do that, especially if you're new to it, it really is easy. You

can contact me, you can call the copyright office – there's lots of resources to help you through the process.

Ralph Sevush: And the critical thing is to register it before there is an infringement. If you register it afterwards, that's necessary in order to bring an action, a copyright infringement suit, you have to register it, even if it's after the infringement. But you won't get those extra benefits. You won't be able to get statutory damages, or attorneys' fees, which is often the most important part of it. Because if you have to pay for your own attorney, it's probably gonna cost you more to bring a case than you would make in damages, especially if you don't get statutory damages. So, it's really critically important that a work be registered early in its life, as soon as you're feeling like it's finished enough for other people to see and you're sending it out into the world, much less putting it up on NPX.

Amy VonMacek: Great. We have one final question about attributions: "If a song is a part of creative commons, how do you attribute to that?" For example, this person has used a song for a podcast using creative commons song, but have only made attribution within the podcast episode and not anywhere else. So if you're using a song, how should you attribute it, even though you have permission?

Ralph Sevush: The creative commons has, you know, a definition of what attribution means and how it needs to be treated. So, it's a contract, basically. You're using the song under certain terms, and that's a license **under** creative commons, and so that determines the billing.

Amy VonMacek: Great. Okay, all of our questions, I believe, have been answered. If there's anybody who has a last-minute burning question about educational fair use, you can go ahead and ask it now. We, of course, are always here in the business affairs department, to talk to you about any questions that you may have. If you're not a member, we'll still pick up the phone and give you as much information as we can. Also, look at our website; there's a couple of really helpful links in here, including the dramatistsguild.com, our copyright page. I would really love to thank all of our guests today, Ralph, Karen, Billie, and Jordana, thank you all for coming. And have a great rest of your afternoon, everyone. Thank you so much.

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