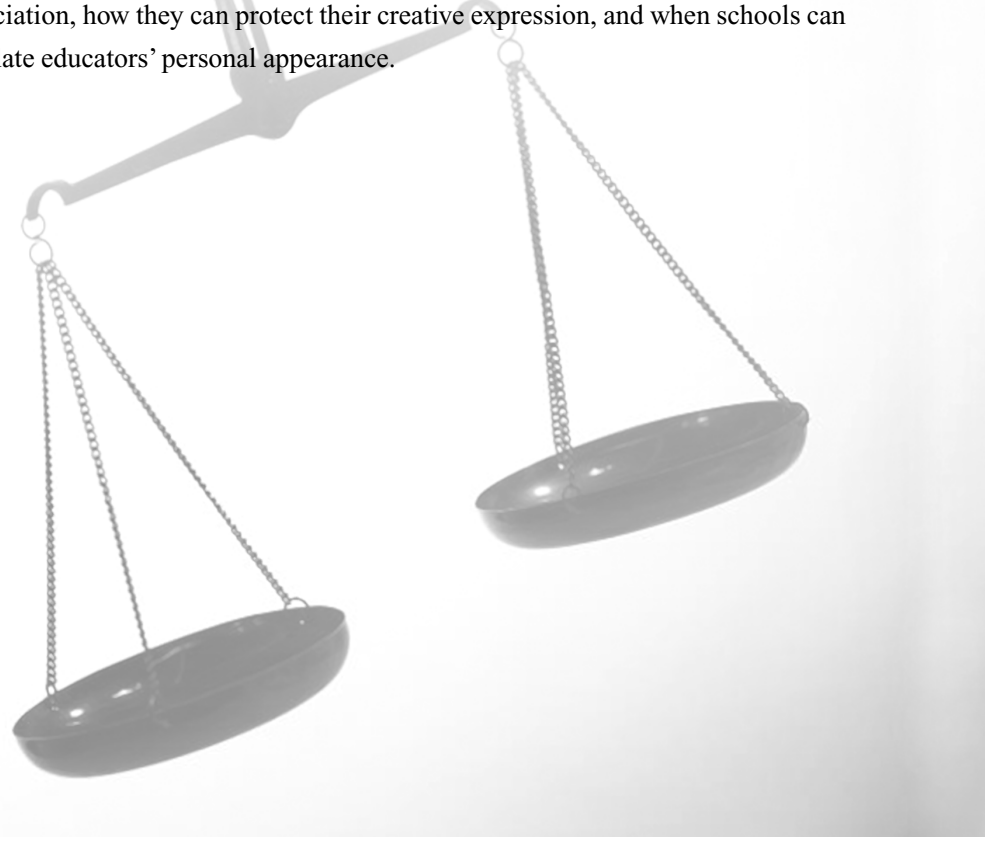
chapter 4

# Teacher Freedom of Expression

## Academic Freedom, Association, Appearance, and Copyright

The U.S. Supreme Court has ruled that public school teachers have a right to freedom of expression. However, no right is absolute. Therefore, this chapter examines the scope and limits of teachers' freedom of speech in and out of school, freedom of association, how they can protect their creative expression, and when schools can regulate educators' personal appearance.



# *Controversial Expression Out of Class*

## Can Teachers Criticize School Policy? The Pickering Case

Marvin Pickering was an Illinois high school teacher who published a sarcastic letter in the local newspaper criticizing the way his superintendent and school board raised and spent school funds and the "totalitarianism teachers live in." Angered by the letter, the board fired Pickering because the letter contained false statements, "damaged the professional reputations" of administrators, and was "detrimental to the . . . administration of the schools." Pickering argued that his letter should be protected by his right to free speech, and the U.S. Supreme Court agreed.

The Court found that Pickering's criticism of the way administrators raised and allocated funds was not directed toward people Pickering normally worked with and raised no question of student discipline or harmony with coworkers. Therefore, the Court "unequivocally" rejected the board's position that critical public comments by a teacher on matters of public concern may be grounds for dismissal. On the contrary, because teachers are likely to have informed opinions about how school funds should be spent, "it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."[1]

## Could Pickering Be Fired If His Statements Were Not Accurate?

Not in this case, because his incorrect statements were not intentional and did not impede his teaching or interfere with the operation of the school. Therefore, the Court concluded that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal."

## Can Teachers Ever Be Disciplined for Publicizing Their Views or Criticizing Immediate Superiors?

Yes. According to the Pickering decision, there are some positions in education "in which the need for confidentiality is so great that even completely correct public statements" might be grounds for dismissal. For example, a judge upheld the punishment of a guidance counselor for unprofessional disclosures of confidential information about a student's sexual orientation. In addition, some public criticism of an immediate superior by a teacher that seriously undermined their working relationship might justify appropriate discipline. On the other hand, a court protected a Texas teacher who testified before the Dallas School Board about the inability of his principal and coworkers to deal with "multiracial student

bodies." The judge ruled that, in this case, "society's interest in information concerning the operation of its schools outweighs any strain on the teacher-principal relationship."[2] Furthermore, teachers cannot be punished for communicating directly with their school board about matters of public concern rather than going through the chain of command.

## Is Private Criticism Protected?

It depends on the circumstances. The Supreme Court has extended the *Pickering* ruling to apply to private as well as public criticism, and it protected a teacher who complained to her principal about her school's racially discriminatory practices. However, a court upheld the dismissal of a teacher who told her black principal, "I hate all black folks." In this case, the school's interest in employing effective educators outweighed the teacher's free speech interests.[3] Concerning confrontations between teachers and immediate superiors, judges consider the time, place, and manner of the confrontation when balancing the rights in conflict.

## Are Teachers' Personal Complaints Protected by the First Amendment?

No. According to the Supreme Court, "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest" courts will not review the public agency's disciplinary decision.[4] In Illinois, for example, a court wrote that a series of "unprofessional and insulting" memoranda to school officials were not protected because the teacher was not speaking as a citizen concerned with educational problems but was expressing "his own private disagreement" about policies he refused to follow.[5] Similarly, a court did not protect a teacher's letters that complained about overcrowding in her classroom which she claimed was a safety hazard. The court explained that, if the reason for the letters were a personal grievance, a passing reference to safety will not transform a personal problem into a matter of public concern.[6]

## When Are Teachers' Statements Protected as Matters of Public Concern?

According to the Supreme Court, when they relate to "any matter of political, social, or other concern to the community."[7] It also may depend on the statement's content, form, and context. For example, a judge protected a Chicago teacher who was disciplined for criticizing her school's kindergarten program, which she claimed violated state standards. Since she presented her concerns and an

alternative plan to parents and the school council as well as her principal, the judge ruled that her discussion of the program "was truly a protected matter of public concern, not simply an unprotected complaint about her employment."[8]

## If a Teacher's Statements Are about Public Concerns, Are They Always Protected?

No. If a teacher's controversial statements are a matter of public concern, then judges will balance the teacher's right to discuss issues of public interest against the school's interest in efficiency. In a Rhode Island case, for example, the court ruled that the right of a teacher to videotape health and safety hazards in her high school outweighed the administration's concern that the videotape would have a negative effect on the school's reputation. According to the judge, First Amendment rights cannot be conditioned on whether the image of the school is adversely affected. Otherwise, wrote the court, a teacher's free speech rights would almost always be denied since a school administrator "rarely challenges an employee's right to speak where the speech is complimentary."[9]

On the other hand, teachers' public comments are not protected when judges consider the manner, content, and consequences of the expression and conclude that the school's interest outweighs the teacher's. This occurred when a Chicago teacher was fired for publishing several standardized, copyrighted tests to stir debate about the testing. According to the judge, the admirable goal of increasing discussion about standardized tests "fails to convert [the teacher's] copyright violations to conduct protected by the First Amendment." Thus, the school's interest in promoting its educational mission outweighed the teacher's interest in criticizing the tests by publishing them.[10]

## Do Whistle-Blower Laws Protect Teachers?

Yes. All 50 states have whistle-blower protection statutes. Generally they supplement the First Amendment by protecting public employees who in good faith report a violation of law. Many also cover gross waste of public funds or specific dangers to health or safety. The laws also include remedies for whistle-blowers who suffer reprisals.

## Are Teachers at Private Schools That Receive State Funds Protected by the First Amendment?

No. The First Amendment only protects teachers at public schools. For example, even if a private school for special education students receives most or even all of

its funds from public school districts, teachers at those schools can be dismissed for publicly opposing their school's policies.

## *Academic Freedom*

### What Is Academic Freedom?

Academic freedom includes the right of teachers to speak freely about their subject, to raise questions about traditional values and beliefs, and to select appropriate teaching materials and methods. While judges have protected academic freedom among public university professors, recent decisions have limited academic freedom among elementary and secondary teachers and have balanced it against competing educational values.

### Does Academic Freedom Protect the Use of Controversial Materials?

Earlier cases ruled that it does *if* the material is relevant to the subject, appropriate to the age and maturity of the students, and does not cause disruption. Thus, a 1969 decision upheld the right of English teacher Robert Keefe to assign a scholarly article from the *Atlantic Monthly* magazine that contained the word *motherfucker* and offended parents but not the high school seniors. According to the judge, the sensibilities of offended parents "are not the full measure of what is proper in education."[11] But, even this liberal decision did not suggest that teachers have a right to use any language in class. According to the court, whether offensive language is protected would depend on the specific situation—the students, the subject, the word used, the purpose of its use, and whether it has been prohibited. Since there is no Supreme Court decision on academic freedom in public schools, court decisions vary, and the trend of recent cases is to narrow and limit such freedom.

### Can a School Board Require or Prohibit Specific Texts?

Yes. School boards usually have authority to select or eliminate texts, even if teachers disagree. In Colorado, for example, teachers challenged a board decision banning 10 books from an approved list for use in elective literature courses. The court noted that teachers could not be prohibited from mentioning and briefly discussing the books. But the judge explained that state laws give local school boards substantial control over the curriculum, including authority to add or eliminate courses and the books that are assigned.

Similarly, an appeals court upheld the authority of a Florida board to remove Chaucer's *The Miller's Tale* and Aristophanes' *Lysistrata* from the curriculum because of their "sexual explicitness." The case illustrates the difference between what courts and school boards think is lawful and wise. While the judges ruled that the board's decision was not unconstitutional, they emphasized that they did "not endorse the board's decision" and "seriously questioned" how these "masterpieces" could harm high school students.[12]

## Can School Boards Remove Library Books for Any Reasons?

No. A board's discretion to remove books must be used in a constitutional manner, and decisions cannot be based on a desire to promote a particular political or religious view. Although library books can be removed if they are not relevant or appropriate for the age and grade of the students, the Supreme Court has ruled that "boards may not remove books from school library shelves simply because they dislike the ideas contained in those books."[13]

## Can Social Studies Teachers Be Prohibited from Discussing Controversial Issues?

It would probably be unconstitutional for administrators to order teachers of history, civics, or current events not to discuss controversial questions. This was the ruling in a Texas case involving a civics teacher's unit on race relations and his response to a question stating that he didn't oppose interracial marriage. When parents complained, the principal told the teacher to not discuss controversial issues. After the teacher replied that it was impossible to avoid controversy in a current events class, he was fired for insubordination. The judge noted that teachers have a duty to be "objective in presenting [their] personally held opinions" and to ensure that differing views are presented. In this case, however, the court ruled that the teacher acted professionally and did not subject students to indoctrination.[14] On the other hand, teachers have no right to use the classroom to preach about their religious or political views.

## Does Academic Freedom Allow Teachers to Disregard a Text or Curriculum?

No. Thus, a court held that a history teacher had no right to substitute his own reading list for the school's official list. As the judge noted, "The First Amendment has never required school districts to abdicate control over public school curricula."[15] And, in a California case where a biology teacher objected to teach-

ing evolution, a judge wrote: "If every teacher . . . omitted those topics which are different from beliefs they hold, a curriculum . . . would be useless."[16]

### Can Teachers Be Punished for Discussing Topics That Are Not Relevant?

Yes. Academic freedom does not protect materials, discussions, or comments that are not relevant to the assigned subject. Thus, a court upheld the dismissal of three 8th-grade teachers for distributing movie brochures ("to promote rapport") that included positive views on drugs, that had no relation to the curriculum, and that promoted views that were contrary to the requirement that students be taught the "harmful effects of narcotics."[17]

### Can a Teacher Be Punished for Showing an R-Rated Film?

Probably, although it may depend on the students and the movie. An example of how not to do it was provided by Jacqueline Fowler, who showed the R-rated film, *Pink Floyd—The Wall,* at the request of her high school students while she completed her grade cards. She had not seen the film but asked a student to "edit out" any parts that were unsuitable by holding an 8½ × 11-inch file folder in front of the 25-inch screen. Even if the film included valuable messages, the judge ruled that it was not constitutionally protected. By introducing a "sexually explicit movie into a classroom of adolescents without preview, preparation or discussion," the judge wrote, Fowler "abdicated her function as an educator" and demonstrated a "blatant lack of judgment."[18]

### Is a Teacher's Offensive Out-of-Class Language Protected?

It might be if the language does not damage his or her effectiveness as a teacher. On the other hand, a court upheld the dismissal of a teacher for distributing copies of racist "jokes" in school to a coworker that contained "vicious" statements against African Americans and "disregarded standards of behavior the school had a right to expect."[19]

## *Teaching Methods*

### Can a Teacher Be Punished for Using a Controversial Method?

Not usually, unless the teaching method is clearly prohibited. If a teacher does not know that the method is prohibited, it would probably be a violation of due

process to punish a teacher for using that method unless it had no recognized educational purpose.

In discussing the subject of taboo words, English teacher Roger Mailloux wrote the word *fuck* on the blackboard and asked his 11th-grade class for an explanation. After a student volunteered the word meant sexual intercourse, Mailloux said: "We have two words, sexual intercourse, and this word on the board; one is accepted by society, the other is not accepted. It is a taboo word."[20]

As a result of this incident, Mailloux was fired and took his case to court. The judge found that the word *fuck* was relevant to the topic of taboo words, that Mailloux's method did not disturb the students, and that educational experts were in conflict about whether it was appropriate to use the controversial word in class. Since teachers should not be required to "guess what conduct or utterance may lose him his position" and since Mailloux did not know that his method was prohibited, the judge ruled that it was a violation of due process to fire him.

In a more recent case, a court explained that schools may restrict teaching methods if two conditions are met. First, the restriction must be related to "legitimate educational concerns." Second, schools must have notified the teacher about what conduct was prohibited. However, the court did not require schools to "expressly prohibit every imaginable inappropriate conduct."[21] Rather, the question is: Was it reasonable for the teacher to know his or her conduct was prohibited?

## When Are Controversial Methods Not Protected?

Controversial methods are not protected by academic freedom when they are inappropriate for the age and maturity of the students, not supported by any significant professional opinion, or when they are prohibited by school policy. Thus, a court upheld the punishment of an English teacher who repeatedly used the words *penis* and *clitoris* and refused to de-emphasize the sexual aspects of the literary works he discussed in class.[22]

## May a School Refuse to Rehire a Teacher Because of Disagreements over Teaching Methods or Philosophy?

Yes. When an English teacher was not rehired because she emphasized student choice and failed to cover the material she had been told to teach, she went to court, but lost. The issue, explained the judge, is not which educational approach has greater merit, but whether the school may require conformity to its philosophy and decline to rehire a teacher whose methods are not consistent with its educational goals.[23]

### Is Academic Freedom the Same in Public Schools and Colleges?

No. In explaining why academic freedom is greater in colleges than in secondary schools, a judge wrote that the high school faculty does not have

> the broad discretion as to teaching methods, nor usually the intellectual qualifications of university professors. . . . While secondary schools are not rigid disciplinary institutions, neither are they open forums in which mature adults . . . exchange ideas on a level of parity. Moreover, a secondary school student, unlike most college students, is usually required to attend school classes and may have no choice as to his teachers.[24]

## *Freedom of Association*

### Is Freedom of Association a Constitutional Right?

Yes. Although freedom of association is not explicitly mentioned in the U.S. Constitution, the Supreme Court has held that the right is "implicit" in the freedoms of speech, assembly, and petition. "Among the rights protected by the First Amendment," wrote Justice Powell, "is the right of individuals to associate to further their personal beliefs."[25]

### Can a Teacher Be Fired for Belonging to a Communist, Nazi, or Subversive Organization?

Not merely for being a member of such an organization. According to the Supreme Court, those who join a subversive organization but do not share its unlawful purposes and do not participate in its unlawful activities pose no threat, either as citizens or teachers.

### Can a Teacher Be Dismissed for Being Active in an Organization That Promotes Sexual Relations between Men and Boys?

Yes, but not just because he was a member of the organization. Peter Melzer went to court when he was fired after a widely publicized video disclosed that he was an active member and writer for NAMBLA (the North American Man/Boy Love Association) that advocates legalizing consensual sexual relations between men and boys. Although there was no evidence that Melzer ever engaged in inappropriate conduct with students, the media attention led to intense conflict in the school community. Although the court acknowledged that the First Amendment

protects the "association rights of an individual like Melzer, no matter how different, unpopular, or morally repugnant society may find his activities," it upheld his dismissal. The court explained that, in the context of teaching, "Melzer's activities strike such a sensitive chord that . . . the disruption they cause is great enough" to outweigh his freedom of association rights.[26]

## Can Schools Refuse to Hire Teachers Because Their Children Attend Private School?

No. When an Ohio teacher was refused a teaching position because he did not send his son to a public school, he sued. In this 2004 case, the court ruled that parents have a constitutional right to send their children to private or public schools, and administrators can be held liable when the only reason for denying teachers employment is because they enrolled their children in a private school.[27]

## Can Students Attend Schools Where Their Parents Teach?

Generally, this is permitted, but many school districts prohibit students from being assigned to classes taught by their own parents. Some teacher union contracts, however, include as a fringe benefit the right of teachers to have their children attend their same school even if they live outside that school's geographic boundaries.

## Can a Teacher Be Prohibited from Marrying an Administrator?

Yes. Or an administrator could be transferred or dismissed for marrying a teacher. Schools can justify such actions to avoid conflicts of interest. Thus, a court ruled in favor of a Minnesota board that did not renew a principal's contract when he married the physical education teacher in violation of board policy.[28] Similarly, a New York court upheld the transfer of a teacher who married an assistant principal who supervised her. The court supported the district policy prohibiting any employee supervising a "near relative," to avoid the "perception of favoritism on the part of other members of the teaching faculty."[29]

## Can Spouses Be Prohibited from Teaching in the Same School?

Yes, according to a ruling by a federal appeals court that upheld an antinepotism policy prohibiting spouses from working on the same campus.

### Can Teachers Be Prohibited from Intimate Associations with Students after They Graduate?

Yes, if schools wish to have such a prohibition. For example, a 2004 federal decision upheld the dismissal of a Michigan teacher who had a sexual relationship with a student after her graduation. According to the court, schools can act "prophylactically" by prohibiting such a relationship with former students "within a year or two" of graduation to prevent students from being perceived as "prospects eligible for dating" soon after they graduate.[30]

### Can Teachers Wear Political Buttons or Symbols to Class?

Yes, as long as such symbols do not interfere with a teacher's classroom performance and are not an attempt to proselytize or indoctrinate students. On the other hand, teachers can be prohibited from promoting political candidates in class and can be disciplined for doing so.

### Can a Teacher Be Prohibited from Being a School Board Member?

Yes. To prevent conflicts of interest, teachers can be prohibited from serving on school boards in districts where they work.

### Can a Teacher Be Prohibited from Running for a Political Office?

State laws and district policies differ, and courts are split on this issue. Some hold that it is reasonable to require a teacher to resign before campaigning for public office. On the other hand, an Oregon court ruled that a law prohibiting public employees from running for *any* office is unconstitutional—particularly if the office is part-time or nonpartisan.

While school boards can protect their educational system from undue political activity that substantially interferes with their schools, prohibiting teachers from engaging in any political activity goes too far, violates a teacher's constitutional rights, and deprives the community of the political participation of its teachers.

## *Personal Appearance*

### Do Teachers Have a Constitutional Right to Wear Beards or Long Hair?

Probably not. When an Illinois math teacher's contract was not renewed because of his beard, he went to court. The judge wrote that hairstyle was of "relatively

trivial importance" when judging a teacher's qualifications and that a teacher could "explain the Pythagorean theorem as well in a T-shirt as in a three-piece suit." However, he ruled that grooming choices were not protected by the Constitution and that, if a school board decided a "teacher's style of dress and plumage" had a negative impact on education, the interest of the teacher is subordinate to the interest of the school.[31]

### Do Teachers Have a Right to Dress as They Wish?

No. Therefore, teachers who challenge clothing regulations rarely claim they can dress anyway they wish; rather, they might argue that the dress code is arbitrary, unreasonable, or discriminatory. This was the argument of a tenured Louisiana teacher who was suspended for violating a policy requiring male teachers to wear neckties. Since the purpose of the rule was to enhance the professional image of teachers in the eyes of students and parents, the court did not find the policy arbitrary or unreasonable.[32]

### Can a Teacher Be Punished without Due Process for Violating a School's Grooming Code?

No. This was the ruling in the case of David Lucia, who grew a beard in violation of an unwritten school policy. When he failed to shave his beard after meeting with the superintendent and school committee, he was suspended for "insubordination and improper example," and he was not invited to a meeting at which the committee dismissed him. A court ruled that the committee violated Lucia's due process rights since, prior to his case, there was no announced policy against teachers wearing beards, and the committee did not explain that failure to remove his beard would result in dismissal.[33]

This case indicates that teachers cannot be dismissed for violating a school's dress or grooming policy unless (1) teachers are given adequate notice of the policy and the consequences of not following it; and (2) they have the right to a hearing if facts are in dispute.

## *Copyright Law: Protecting Creative Expression and Fair Use*

The purpose of copyrights is to protect the creative works of authors and to prevent others from using them without the author's permission. The federal Copy-

right Act of 1976 gives authors control over the reproduction and distribution of their work and enables a copyright owner to sue anyone who reproduces, distributes, or displays the work without the owner's permission.[34]

Under the 1976 act, authors were required to put a copyright notice on their works which included: (1) the symbol © or the words "copyright" or "copr.," (2) the year of publication, and (3) the name of the author. Since a 1989 change in the law, authors are no longer required to place a copyright notice on their works.[35] But it is wise to do so, since such a notice prohibits anyone from claiming that they innocently infringed a copyright. To be more fully protected, authors must register their work with the U.S. Copyright Office within three months after the work is published.[36] Copyright owners who do not register may still sue for damages. But by registering with the Copyright Office, copyright owners may be entitled to substantial "statutory damages" and attorney's fees.[37]

Works created after 1978 have copyrights that last until 50 years after the death of the author. Copyright owners can sell or transfer their ownership and give someone else the right to make and distribute copies. When two authors collaborate on a joint work, they both own a right to the entire work and each can transfer his or her interest without asking permission of the coauthor.

## Do Teachers Own a Copyright on Works They Produce at School?

Not usually. Teachers may create lesson plans, books, and other teaching materials that they wish to copyright. Under a rule known as "work made for hire," however, the employer of the teacher is considered to be the author; the employee who actually created the work does not own the copyright. Thus, the copyright to any materials that teachers produce within the scope of their employment is owned by the school district.

On the other hand, teachers who act as "independent contractors" can obtain a copyright. A reading teacher, for example, might agree to produce materials for the school district. If the district relies on the teacher's expertise, specially compensates the teacher for this project, requests that the teacher use his or her own equipment and resources, and otherwise gives the teacher complete freedom in structuring the materials, the teacher could be considered an independent contractor and not subject to the work-for-hire doctrine. A teacher could also avoid the application of this doctrine by signing a contract with the employer limiting the employer's rights in two ways. First, the contract could specify that certain types of activities, such as any materials presented at national professional meetings, will not be considered within the scope of employment. Second, the contract

could give the teacher rights other than ownership of the copyright. For example, under such terms, the employer, which still owns the copyright, could give the teacher the right to reproduce or distribute curriculum materials.

## Does Copyright Law Apply to the Internet?

Yes. The basic doctrines of copyright law protect works appearing on and distributed via the Internet.

## Fair Use: When Can Copyrighted Works Be Copied without Permission?

The doctrine of fair use is an exception to the general rules of copyright law that allows use of copyrighted material without the user's securing the copyright owner's consent. The doctrine is designed to balance the exclusive rights of the copyright owner against the public's interest in dissemination of information. When determining whether a particular use of copyrighted material is fair use, courts consider the purpose of the fair use doctrine and the following four statutory criteria:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for a nonprofit educational purpose;
2. the nature of the copyrighted work;
3. the amount used in relation to the copyrighted work as a whole; and
4. the effect of the use on the potential market for the copyrighted work.[38]

## Are There Fair Use Exceptions for Teachers?

Yes. Teachers are permitted to make *single* copies of the following copyrighted works for their own use in scholarly research or classroom preparation:[39] (1) a chapter from a book; (2) an article from a periodical or newspaper; (3) a short story, short essay, or short poem; and (4) a chart, graph, diagram, drawing, cartoon, or picture from a book, newspaper, or periodical.

In addition, a teacher can make multiple copies of the following copyrighted works for use in the classroom (with the number of copies not to exceed one copy per student in the class), provided that copying meets certain tests of brevity, spontaneity, and cumulative effect and that each copy includes a notice of copyright. The definition of *brevity* is:

- a complete poem or excerpt, if it is less than 250 words;
- a complete article, story, or essay if it is less than 2,500 words;

- an excerpt from a prose work, if it is less than 1,000 words or 10 percent of the work, whichever is less; or
- one chart, diagram, cartoon, or picture per book or periodical.

The definition of *spontaneity* means that:

- the copying is at the instance and inspiration of the individual teacher, and
- the inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

To meet the test of *cumulative effect* the copying of the material:

- must be for only one course;
- must not involve more than one short poem, article, story, essay; or two excerpts from the same author, or more than three from the same collective work or periodical volume during one class term; and
- must not involve more than nine instances of such multiple copying for one course during one class term.[40]

However, teachers cannot make copies of "consumable" materials, such as workbooks or answer sheets to standardized tests.

In addition to the exceptions for copying, the act also exempts certain public performances. For example, the performance of a copyrighted dramatic work by students and teachers in the classroom is not a copyright violation. If students give a "public performance" of a copyrighted work, however, they will be protected from copyright violation only when there is no admission charge and no compensation paid to any performer or promoter. Even when students perform without pay, if the school charges admission to the performance, the copyright owner has the right to prohibit the performance. Teachers who do not follow these guidelines can be held liable for copyright infringement.

## Is It Fair Use to Copy Computer Software for Educational Purposes?

Not usually. Computer programs are eligible for copyright protection, and therefore making copies of software for students is not fair use. However, the owner of a copyright program does not infringe the copyright by making one copy for

backup purposes only.[41] Because it is so easy to copy computer software, schools should be careful to educate students and teachers about illegal copying.[42]

### Is It Fair Use to Videotape for Educational Purposes?

Although federal law does not include specific rules for educational videotaping, a committee of copyright proprietors and educational organizations developed guidelines that apply to off-air recording by nonprofit educational institutions.[43] These guidelines provide that such institutions may videotape copyrighted television programs, but may keep the tape only for 45 days, after which it must be destroyed. During 10 school days after the taping, teachers may use the tape for instructional purposes and may repeat such use only once for instructional reinforcement. After the 10 days, the tape may only be used to evaluate its educational usefulness.

### Where Can Teachers Get Permission to Photograph or Videotape Where There Is No Fair Use Exception?

In such cases, teachers should get written permission to copy or tape from the copyright owner. In requesting permission, the teacher should specify the exact material to be copied, the number of copies, and the proposed use of the materials.

### What Are the Penalties for Violating a Copyright?

In a suit for copyright infringement, a court may issue an injunction to prevent people from making further copies and may order the destruction of all illegal copies. In addition, the copyright owner can collect lost profits or an amount ranging from $500 to $20,000 for an infringement of one work to as much as $100,000 for intentional violations or as little as $200 for unintentional violations.[44]

## *Guidelines*

### Criticizing School Policy or Personnel

- To determine whether a teacher's out-of-class speech is protected by the First Amendment, courts first determine whether the speech is about a personal grievance or a matter of public concern. If it is about a personal matter, it is not protected.
- If the speech is about issues of public concern, courts will use a "balancing test." They will balance the interest of a teacher as a citizen in commenting

on matters of public interest against the interest of the government in promoting the efficient operation of the schools.

- The balance will likely favor teachers who publicly criticize how schools raise funds, whose criticism relates to violations of students' rights or dangers to their health or safety, or to illegal practices.
- The balance will likely favor the school when teachers' public statements involve disclosures of confidential information, false or misleading accusations about superiors or colleagues, or complaints about classroom assignments or personal evaluations.

## Academic Freedom

- School boards have broad discretion to determine the curriculum and to require or prohibit specific texts.
- Administrators may require approval of supplementary material. However, teachers should not be disciplined for using controversial materials or methods unless they know (or should know) that the materials or methods are prohibited.

## Freedom of Association

- Teachers cannot be fired for mere membership in a subversive or controversial organization unless they support the organization's unlawful aims or activities.
- Teachers have a right to send their children to private or public schools.
- Teachers can be prohibited from marrying administrators.
- Teachers can be punished for having sexual relations with former students within one or two years of graduation if it is against school district policy.
- Laws differ about whether teachers can run for partisan political office. Teachers are usually prohibited from running for the school board where they teach to avoid conflicts of interest. But, most districts allow teachers to run for part-time, nonpartisan positions that do not interfere with their teaching.

## Dress and Grooming

- Schools have broad discretion to regulate teachers' dress and grooming.
- Teachers cannot be punished for violating such regulations without adequate due process.

## Copyright

- The federal Copyright Act protects not only creative written work but other pictorial or graphic expressions on videotape or computer disk.
- To establish a copyright, authors place a copyright notice on all copies of their work. Additional protections are available to copyright owners who register their work with the federal Copyright Office.
- When teachers create material within the scope of their employment, the copyright is owned by the school district. However, teachers who work as independent contractors can obtain their own copyright.
- Fair use is an exception to copyright law that allows teachers to use a limited amount of copyrighted materials for educational purposes without the owner's consent.

## *Notes*

1. *Pickering v. Bd. of Educ.,* 391 U.S. 563 (1968).
2. *Lusk v. Estes,* 361 F. Supp. 653 (N.D. Tex. 1973).
3. *Anderson v. Evans,* 660 F.2d 153 (6th Cir. 1981).
4. *Connick v. Myers,* 462 U.S. 138 (1983).
5. *Hesse v. Bd. of Educ. of Township High Sch. Dist. No. 211,* 848 F.2d 748 (7th Cir. 1988).
6. *Ifill v. Dist. of Columbia,* 665 A.2d 185 (D.C. 1995).
7. *Connick v. Myers,* 462 U.S. 138 (1983)
8. *Lifton v. Bd. of Educ. of Chicago,* 290 F. Supp. 2d 940 (N.D. Ill. 2003).
9. *Cirelli v. Johnston Sch. Dist.,* 897 F. Supp. 663 (D. R.I. 1995).
10. *Chicago Sch. Reform Bd. of Tr. v. Substance, Inc.,* 79 F. Supp. 2d 919 (N.D. Ill. 2000).
11. *Keefe v. Geanakos,* 418 F.2d 359 (1st Cir. 1969).
12. *Virgil v. Sch. Bd. of Columbia Cnty., Fla.,* 862 F.2d 1517 (11th Cir. 1989).
13. *Bd. of Ed., Island Trees Union Free Sch. Dist. No. 26 v. Pico,* 457 U.S. 853 (1982).
14. *Sterzing v. Fort Bend Indep. Sch. Dist.,* 376 F. Supp. 657 (S.D. Tex. 1972).
15. *Kirkland v. Northside Indep. Sch. Dist.,* 890 F.2d 794 (5th Cir. 1989).
16. *Peloza v. Capistrano Unified Sch. Dist.,* 782 F. Supp. 1412 (C.D. Cal. 1992).
17. *Brubaker v. Bd. of Educ. Sch. Dist. No. 149, Cook Cnty., Ill,* 502 F.2d 973 (7th Cir. 1974).
18. *Fowler v. Bd. of Educ.,* 819 F.2d 657 (6th Cir. 1987).
19. *Reitmeyer v. Unemployment Cmpensation Bd. of Review,* 602 A.2d 505 (Pa. Commw. 1992).
20. *Mailloux v. Kiley,* 323 F. Supp. 1387 (D. Mass. 1971).
21. *Ward v. Hickey,* 996 F.2d 448 (1st Cir. 1993).

22. *Bernstein v. Norwich City Sch. Dist.,* 726 N.Y.S.2d 474 (A.D. 3 Dept. 2001).
23. *Hetrick v. Martin,* 480 F.2d 705 (6th Cir. 1973).
24. *Mailloux* at 1392.
25. *Healy v. James,* 408 U.S. 169 (1972).
26. *Melzer v. Bd. of Educ. of the City of New York,* 336 F.3d 185 (2nd Cir. 2003).
27. *Barrett v. Steubenville City Sch.,* 388 F.3d 967 (6th Cir. 2004).
28. *Keckeisen v. Indep. Sch. Dist. No. 612,* 509 F.2d 1062 (8th Cir. 1975).
29. *Solomon v. Quinones,* 531 N.Y.S.2d 349 (N.Y. App. Div. 1988).
30. *Flashkamp v. Dearborn Public Schools,* 385 F.3d 935 (6th Cir. 2004).
31. *Miller v. Sch. Dist. No. 167,* 495 F.2d 658 (7th Cir. 1974).
32. *Blanchet v. Vermilion Parish Sch. Bd.,* 220 So.2d 534 (La. 1969).
33. *Lucia v. Duggan,* 303 F. Supp. 112 (D. Mass. 1969).
34. Copyright Act of 1876, 17 U.S. C. §§ 101-1010.
35. 17 U.S.C. § 401 (d).
36. For information on how to register, see the U.S. Copyright Office Website at www.loc.gov/copyright.
37. Kenneth Crews, *Copyright Law for Librarians & Educators* (2nd ed., American Library Association 2006), p. 80.
38. 17 U.S.C. § 107.
39. Notes of Committee on the Judiciary, H.R. No. 94-1476, 94th Cong. (1976).
40. Numbers 2 and 3 of the cumulative effect test do not apply to current news periodicals and newspapers.
41. 17 U.S.C. § 117.
42. For a model school district software policy, see John Soma & Dwight Pringle, *"Computer Software in the Public Schools,"* 28 *Education Law Reporter,* 315, 323–24 (1985).
43. Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes, 97 *Cong. Rec.* E4751 daily ed. (Oct. 14, 1981).
44. 17 U.S.C. § 501(b).