

Fair use, work for hire, and sample contracts

The Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions is not law, and courts have stressed that this document is to be taken as a guideline only.

The Copyright Act sets out the four factors for determining

whether a given use of a copyrightable work is a fair use:

1. The nature of the use, whether educational, personal, or commercial;
2. The amount and substantiality of the portion used in relation to the entire work;
3. The character of the work, whether published or unpublished; and
4. The effect of the use on the market for the work; that is, whether the use displaces a sale or avoids payment of a license fee in an established licensing market.

WORK FOR HIRE

The definition of "work made for hire" also includes certain types of works one party creates for another on commission, such as sound tracks, motion pictures, atlases, and compilations. Those works are not considered "works made for hire" unless the parties have agreed in writing that they are to be considered such. As long as the parties have made such an

agreement and the work is included in this list, the hiring party is the author and owner of all rights in the work.

For that reason, many commission agreements, including software development agreements, contain language stating that any works created pursuant to the agreement are "works made for hire." If the works created under the agreement are not, however, included in the list outlined in the Copyright Act's definition of "work made for hire," that language does not convey title in the work to the commissioning party.

SAMPLE CONTRACT LANGUAGE

To help school districts retain or obtain ownership in the intellectual property they create or commission and protect them from infringement claims, I have developed sample language for contracts and other materials. Visit www.asbj.com for:

- Sample language for an employment/labor contract
- Sample language for a software/website development contract
- Sample language for photography/graphic design/motion picture contracts
- Sample letter for unauthorized use of school name or mascot.