

Lesson 3: What is fair use?

🕒 This lesson will take two 45-minute class sessions

Preparing to Teach

- ☑ Post lesson outcomes.
- ☑ Reproduce 1 copy of **Handout 1** for each student.
- ☑ Reproduce enough copies of **Handout 2** — for half of the students.
- ☑ Reproduce enough copies of **Handout 3** — for half of the students.
- ☑ Reproduce 1 copy of **Handout 4** for each student.
- ☑ Reproduce copies of **Handouts 4, 5, & 6** based on the number of students in the small groups.

Lesson overview

In this lesson, students will learn about copyright law. Students will work with the subjects of copyright infringement and the defense called fair use, read a part of the statute and apply the statute to some scenarios. On the second day of the lesson they will participate in a mini-mock trial.

Outcomes

As a result of this lesson, students will be able to:

- Describe copyright infringement.
- Define and provide examples of fair use under the copyright statute.
- Apply the fair use statute to scenarios to determine whether or not the defense is available.
- Describe the public policy reasons for the fair use exemption.
- Participate in a mini-mock trial in a case involving the issue of fair use.

Handouts

Day 1

- **Handout 1: The Fair Use Clause diagram**—one copy for each student
- **Handout 2: Case Study—*Bill Graham Archives v. Dorling Kindersley Ltd.* (2006)**—one copy for half the students
- **Handout 3: Case Study—*Rogers v. Koons* (1992)**—one copy for half the students

Day 2

- **Handout 4: Case Study—*Monster Communications, Inc. v. Turner Broadcasting* (1996)**—one copy for all students
- **Handout 5: Information for the Judges**
- **Handout 6: Attorneys for the Plaintiff Monster Communications, Inc.**
- **Handout 7: Attorneys for the Defendant Turner Broadcasting, Inc.**

Community resource people

You might want to invite a lawyer specializing in Intellectual Property law or someone from your county prosecutor or state Attorney General’s Office as a resource person for this lesson. Send a copy of the lesson when confirming the date and location of the class.

Web resources

- <http://fairuse.stanford.edu/>
- <http://library.albany.edu/digital/copyright.html>

National standards (cont.)

	U.S. History	Language Arts	Technology	Visual Arts	Science	Music
ePIP lesson	8th grade	K–12	K–12	5–8	5–8	5–8
Lesson 3 What is fair use?			Students practice responsible use of technology systems, information, and software.	Students analyze contemporary and historic meanings in specific artworks through cultural and aesthetic inquiry	Understandings about science and technology	

Day 1 Overview

- Overview of the lesson
 - Introduction
 - Background discussion/handout with copyright information and diagram
 - Go through **Handouts 1A** and **1B** with case study example
 - Break into small groups with each small group using the diagram and the case study to decide if the situation is legal
 - Summarize criteria for fair use
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Review and Preview

At the start of the class ask students to review the definitions of patent and copyright from the first lesson. Then ask students to give some examples of patents and copyrights. This lesson will focus on copyright law, in particular the fair use defense to copyright infringement.

Ask students to review the definition of fair use. Ask the class for an example of something they consider fair use. This reviews information from Lesson 1.

Fair use—refers to an exception to the exclusive rights granted under copyright law that allows a reasonable and limited use of a copyrighted work, or a portion of it, without permission from the right holder. Examples include news reporting, teaching, scholarship, and research.

Ask students to review the definition of derivative work.

Derivative Work—Copyrightable work that is based on a preexisting work. Examples include sequels, prequels, conversion into movie script, and abridgements. The holder of the copyright in the original, preexisting work has the exclusive right to produce or authorize a derivative work.

Ask the class to consider the public policy reasons for a fair use exception to copyright laws. What are some other reasons for the fair use exception?

Class discussion should focus on why copyright law includes this exception. Some reasons might include the following:

- desire to make created materials readily accessible for educational purposes
- desire to make created materials readily accessible for research
- desire to make created materials readily accessible for news reporting and criticism

It is important to emphasize that there are limits on what can be considered fair use and those limits are the main focus of this lesson.

Remind students that two major goals of intellectual property law are to protect the rights of inventors and creators; and to encourage the development of more creative inventions and works for the benefit of the public.

What is fair use?

1

Give each student a copy of **Handout 1: The Fair Use Clause** (including parts A and B). Have the students read the introduction and look over the diagrams.

Use the case study as an example. Have the students work through the case study as a class discussing the questions and moving through the diagram to make a decision about the case.

Use **Handout 1A** to determine whether there has been a copyright infringement. If there has been no infringement then there is no need to use **Handout 1B**. If the students determine that there is an infringement then use **Handout 1B** to decide if the defendant can use the fair use defense.

Emphasize the factors that are considered by a court in a fair use case. You might want to put these factors on a flipchart or board so they are easy for students to see. These factors include:

- the nature and character of the use (for example - was it performed/displayed publicly before a class?)
- nature of the copyrighted work (for example - was it a song or a book?)
- amount of portion of copyrighted work that was used (for example-was it the whole work or was it a sentence out of an entire book?)
- effect on market for the copyrighted work (for example-did customers cease buying the copyrighted work because of the work that used it?)

Remind the students that copyright law seeks to balance the creator's interests with the legitimate public interest in access to the copyrighted work.

Once the class has finished discussing the case study and arrived at a decision, share information about the real case with them.

The case study is based on the real case of *BMG Music, et al. v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005). In this case the court rejected the defendant's argument that she was merely "sampling" the music and not committing copyright infringement. The court held that numerous sites, such as iTunes, permit listeners to sample and examine portions of songs without downloading them onto their computers. In the court's view, downloading full copies of copyrighted material without compensation to authors cannot be deemed fair use.

2

Move the students into small groups of about 3-5. Give half the small groups **Handout 2** and half the groups **Handout 3**. The small groups should work together using the following process:

- choose one member of the group to be the reporter
- read the case study
- use the diagram to analyze the case

- make a decision on the case
- report their decision back to the rest of the class

The groups should use the information they have learned and the diagrams (**Handouts 1A** and **1B**) to figure out how they think a court would rule in the case study. Give students about 12 minutes to work together and make a decision.

Reconvene the class and ask the reporters from each group to summarize the case, describe the discussion, and present the decision of the group.

Once all the groups have reported back you can tell them whether their analysis matched that of the court's decision in the two cases.

Summary

Remind students that Day 2 of this lesson will involve a hearing on a fair use copyright case. Ask students to summarize the factors that would be considered by a court in a fair use case. These factors will form the basis for the arguments by the plaintiff and defendant in the mini-mock trial for the second part of the lesson. Refer back to the factors, posted for students earlier in the lesson.

Day 2

- Overview of the lesson
 - Review and preview
 - Introduce the case study and frame the issue for the case
 - Brainstorm arguments for both sides of the case (use flipchart to outline arguments for both sides)
 - Move students into three “expert” groups (each group will have a handout to help with the discussion), where they will brainstorm the arguments for their side of the case
 - Wrap-up—how did the court decide the case?
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Today’s lesson involves students in role playing a court hearing. You can use this *pro se* (do it yourself) court strategy to introduce students to the judicial system.

Review and Preview (3 minutes)

At the start of the class ask students to review the definitions of fair use and derivative work

Fair use—refers to an exception to the exclusive rights granted under copyright law that allows a reasonable and limited use of a copyrighted work, or a portion of it, without permission from the right holder. Examples often include news reporting, teaching, scholarship, and research.

Ask students to review the definition of derivative work.

Derivative Work—Copyrightable work that is based on a preexisting work. Examples include sequels, prequels, conversion into movie script, and abridgements. The holder of the copyright in the original, preexisting work has the exclusive right to produce or authorize a derivative work.

Trial Preparation (10-12 minutes)

1

The mini trial will allow students to role play a case in groups of three or six depending on the number of students in the class. If you choose to place three students in each group, one student is a plaintiff’s attorney and one a defendant’s attorney, and the third is a judge, who will hear the two sides and make the decision. If you place six students in each group, then there will be two judges, two plaintiff’s counsel, and two defendant’s counsel.

1. Each student will need a copy of the fair use diagrams in **Handouts 1A** and **1B** and **Handout 4: *Monster Communications, Inc. v. Turner Broadcasting***, 935 F. Supp. 490 (SDNY 1996) for this part of the lesson.
2. Ask students to read the facts of the case on **Handout 4** (3-4 minutes). Ask students to describe the facts of the case. What happened? Ask the students to frame the issue in this case. What does the court need to decide?

Issue—Can Turner Broadcasting use the fair use exemption to defend itself against a claim of copyright infringement when they used film clips (approximately 1 minute) of a heavyweight title fight between Muhammad Ali and George Foreman owned by Monster Communications, Inc. for informational reasons in a television documentary about Ali?

3. Then ask students to brainstorm two arguments that the plaintiff, Monster Communications, Inc. might make in support of the claim that Turner Broadcasting violated their copyright by using the film clips. Use a flipchart to write down students' ideas.
4. Then ask students to brainstorm two arguments that Turner Broadcasting might make in arguing that their use of the film clips is allowed under the fair use exception. Write these on the flipchart as well.
5. The chart below gives some of the arguments that could appear on the brainstormed list.

Plaintiff's arguments: Monster Communications, Inc.	Defendant's arguments: Turner Broadcasting
<ul style="list-style-type: none"> • The copyright for these clips is registered • We own the copyright to the clips that are being used by Turner • Turner violated our copyright by using the clips in a film • This is not covered under the fair use clause • Turner is publicly releasing the documentary film with the copyrighted clips without paying • Turner has used 10 clips of copyrighted material • Turner's action impacts our market for the copyrighted materials • We have been substantially damaged by the actions of Turner 	<ul style="list-style-type: none"> • We admit that we have used this material in our documentary film • We have no liability for damages because our use is covered under the fair use clause. • The amount of copyrighted material—ten short film clips--is a very small portion of the plaintiff's film—the length of the clips ranges from 41 seconds to two minutes • The plaintiff is not damaged by our use of these film clips in an informational documentary. • There is no negative impact on the market as a result of our fair use of these materials.

3

1. Now have the students count off 1 to 3.
 - All the #1 students will move into an “expert” group to prepare to represent the plaintiff—Monster Communications, Inc.
 - All the #2 students will move into an “expert” group to prepare to represent the defendant—Turner Broadcasting.
 - All the #3 students will move into an “expert” group to prepare to be the judges hearing the case.

If you have more than 15 students (i.e., more than 5 students per expert group), you may want to create two expert groups for each role. These “expert” groups should work together for about 10 minutes.
2. Distribute **Handout 5** to Group 1 – they will be judges. Distribute **Handout 6** to Group 2 – they will be attorneys for the plaintiff, Monster Communications. Distribute **Handout 7** to Group 3 – they will be attorneys for the defendant, Turner.
3. When you move students into their “expert” groups describe the hearing process so that they realize what is expected of them—
 - Plaintiff’s counsel makes arguments (2 minutes)
 - Judge may ask questions (1 minute)
 - Defense counsel makes arguments (2 minutes)
 - Judge may ask questions (1 minute)
 - Plaintiff’s counsel (rebutts) answers arguments (30 seconds)
 - Defense attorney rebuts (30 seconds)
 - Judge makes decision (2 minutes)
4. The plaintiff and defense groups should spend 10-15 minutes outlining their strongest arguments and writing an opening sentence. The judges should spend their preparation time writing three questions for each side.

Trials (10-12 minutes)

After the students have prepared, place them into mini court groups. Take one student from each expert group (for courts of three) and put them together. If you want to use groups of six, take two students from each expert group. Continue until all mini court groups have been formed. Each group should have 1-2 plaintiffs, 1-2 defendants, and 1-2 judges.

Tell the students to begin their hearings. Judges are in charge and should direct the procedures and keep time. The hearing should take about 10-12 minutes. Give the judges a few minutes to consult and to formulate their opinions. Then have the judges from each group announce their opinions with supporting rationale to the whole class. Track each court’s decision on a flip chart.

Debriefing (7 minutes)

1. Take a quick poll of the group to see how all the students think the case should be decided (regardless of their assigned position). Tell the class this was a real case and describe how the case was decided.

Court’s Decision in *Monster Communications, Inc. v. Turner Broadcasting*, 935 F. Supp. 490 (SDNY 1996)

The court held that the use of the film clips was fair use. Overall the court focused on the fact that only a very small portion of the plaintiff’s movie was taken and the purpose of doing so was largely informational.

Here’s how the Court looked at the four criteria:

1. The purpose and character of the use—the allegedly infringing work is a biography, “undeniably...a combination of comment, criticism, scholarship, and research, all of which enjoy favored status...” under the law.
2. Nature of the copyrighted work— the Court looks at the degree of creativity in the copyrighted work. The higher the degree of creativity the more protection is available. In this case the Court found that the level of creativity was not substantial so this factor was essentially neutral.
3. The amount/portion used—the Court found that the alleged infringing use was small and is not the focus of the story---therefore finding for defendants (Turner).
4. Effect on the market for the copyrighted work—Here the Court asks whether the impact of between 41 seconds and 2 minutes will undercut the market for the *Monster* production, *Kings*. The Court finds that the segments used by Turner are not likely to impact the market because they are too small a part in relation to the whole production.

2. Ask students: Do you think the court made the right decision? Why or why not?

Extension activity

After students have made a decision about how they think the Court should have ruled, have them draft an editorial (opinion piece) supporting their decision.

Handout 1 – The Fair Use Clause

Introduction

Copyright provides legal protection for written/tangible works including art, books, and music. Copyright is a form of protection for intellectual property. When a work is copyrighted the owner has exclusive control over what can be done with the work. This means that it cannot be copied or used by another person without permission.

As with many legal protections there are some exceptions to the rule. One major exception is called **fair use**.

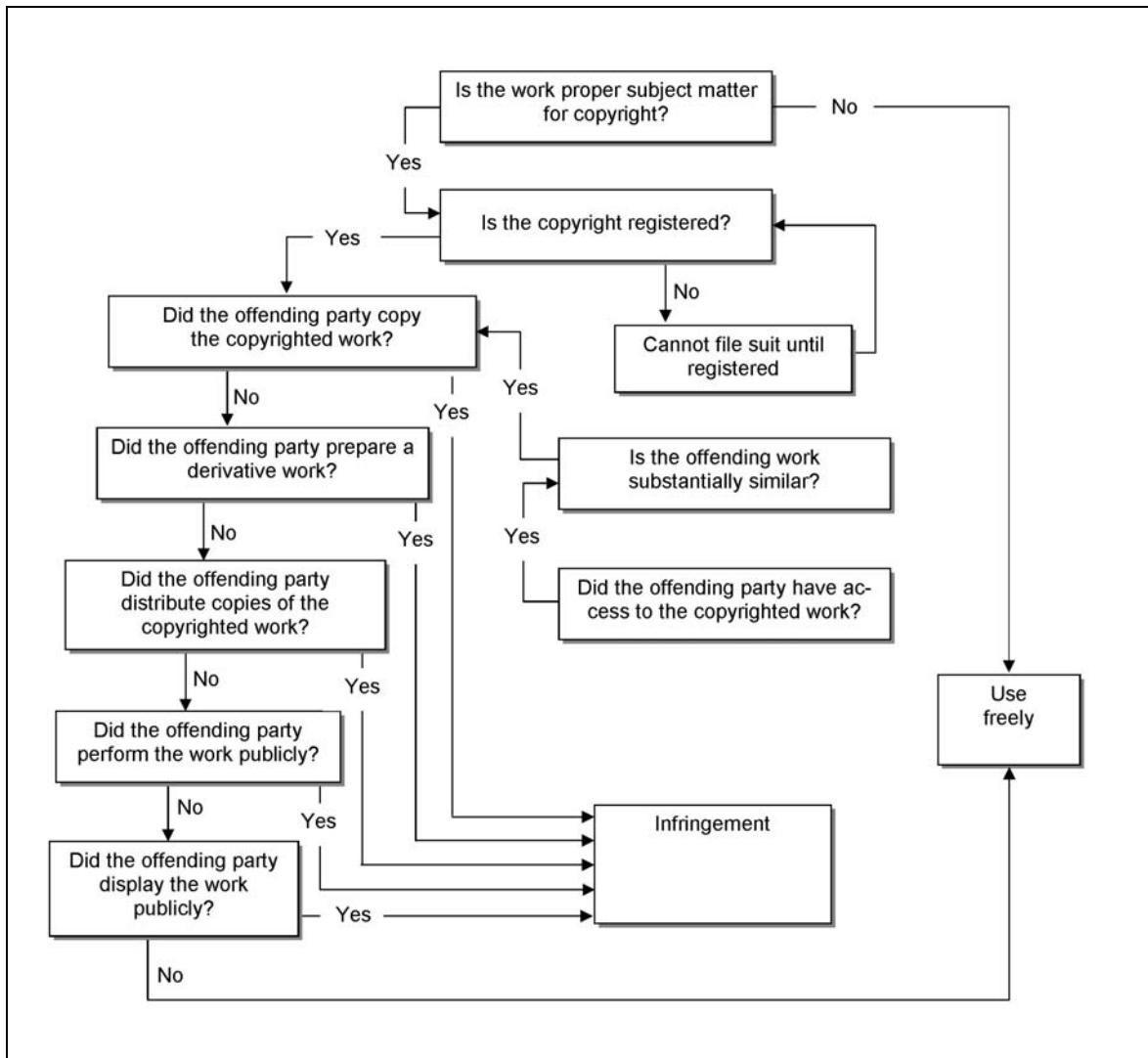
When the owner of a copyright finds that it is being used/copied by someone else that is called infringement. Fair use occurs when the person that is using the copyrighted material admits the use but maintains that it is a reasonable and limited use of a copyrighted work, or a portion of it. Examples include news reporting, teaching, scholarship, or research.

Case Study

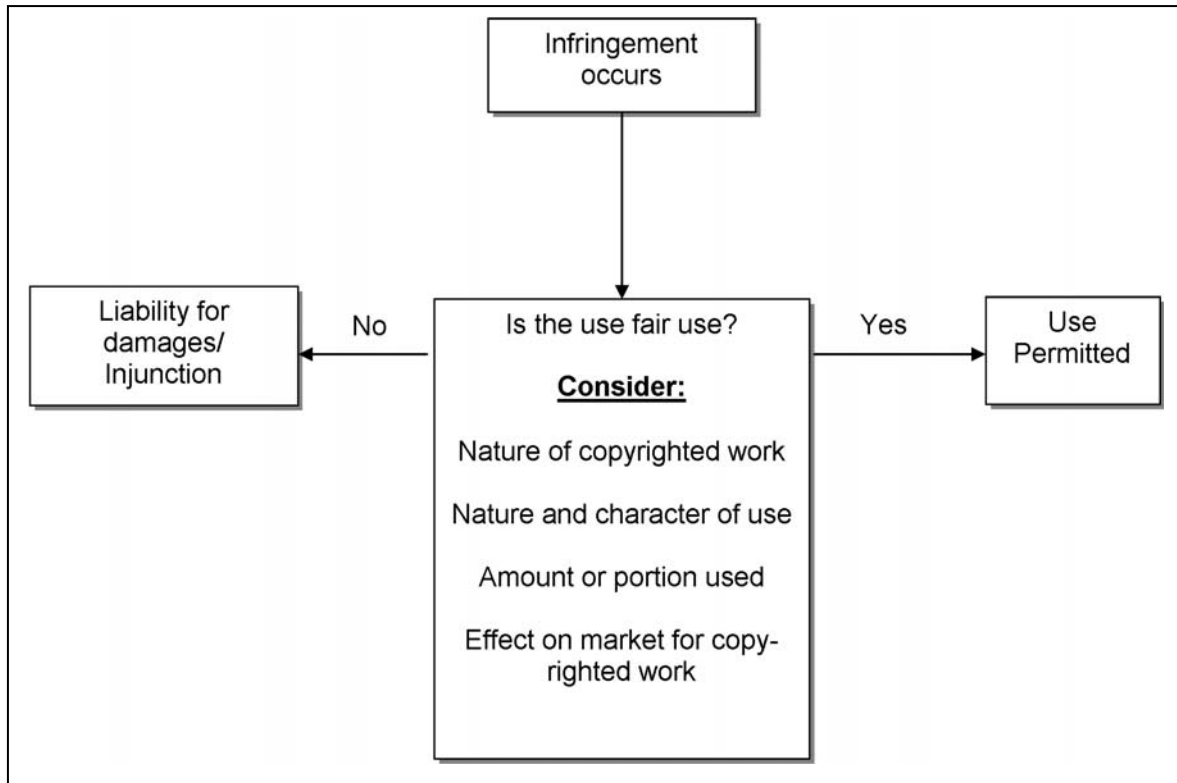
The plaintiff, BMG Music, is the owner of copyrights in musical recordings. The defendant, Ms. Gonzales, downloaded approximately 30 songs onto her computer through an Internet file-sharing network. The defendant argued that she was just sampling the songs to determine which ones she liked enough to buy at retail. The plaintiff sued her for copyright infringement and sought damages against her.

Use the chart on **Handout 1A** to determine if there has been copyright infringement. Then if you feel that there has been an infringement use **Handout 1B** to determine if the defendant can use fair use as a defense. What decision do you think the court should make in this case?

Handout 1A – Copyright Infringement Decision Tree



Handout 1B – Copyright Fair Use Decision Tree



Handout 2 – Case Study

Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2nd Cir. 2006).

The defendant, Dorling Kindersley, published a 480-page coffee table book which tells the story of the Grateful Dead along a timeline running continuously through the book. The book contains over 2000 images presented chronologically and representing dates in the band's history with explanatory text.

The plaintiff, Bill Graham Archives, was the holder of copyright on seven Grateful Dead event posters. Along with many others, the defendant reproduced seven artistic images originally depicted on the posters for inclusion in its book. The images were displayed in significantly reduced form (i.e., they were much smaller than the poster size) and were accompanied by captions describing the concerts they represented. The defendant did not get the plaintiff's permission to use images of its Grateful Dead event posters in its book.

The plaintiff sued the defendant for copyright infringement.

Use Handouts 1A and 1B to discuss and decide what decision you think the court should make in this case.

Handout 3 – Case Study

Rogers v. Koons, 960 F.2d 301 (2nd Cir. 1992).

The plaintiff, Art Rogers, was a photographer who was commissioned to photograph a man, his wife, and their eight new German Shepherd puppies. The plaintiff did so, and then licensed the photograph to a company that produces and sells postcards containing photographs.

The defendant, Jeff Koons, was a sculptor who created a series of porcelain sculptures based upon a man and woman holding puppies. The sculptures copied the plaintiff's photograph in detail. The defendant sold his sculptures for several hundred thousand dollars.

The plaintiff sued the defendant for copyright infringement.

Use Handouts 1A and 1B to discuss and decide what decision you think the court should make in this case.

Handout 4 – *Monster Communications, Inc. v. Turner Broadcasting*

Monster Communications, Inc. v. Turner Broadcasting, 935 F. Supp. 490 (SDNY 1996)

Facts

The plaintiff, Monster Communications, was the producer of a movie about the 1974 heavyweight title fight between Muhammad Ali and George Foreman called “When We Were Kings” (84 minutes). The defendant, Turner Broadcasting, was the maker of a television documentary about Ali’s life called “Muhammad Ali—The Whole Story” (94 minutes). The documentary contained approximately ten short film clips of actual historic events (about 2.1% of the film) that also appear in the plaintiff’s movie. The clips ranged from 41 seconds long to two minutes long. The defendant did not get permission to use the clips from the plaintiff.

The plaintiff sued the defendant for copyright infringement.

Handout 5 – Information for Judges

You are the judge who will hear the case.

The arguments to be presented should be based on the copyright statute and the fair use exemption. In this activity you will be making a decision in the case.

Your job is to:

1. Review the case and think of questions to ask the attorneys.
2. You will be in charge of the hearing and call on the attorneys to present their arguments.
3. Listen carefully to the arguments and ask questions whenever you like.
4. Be sure to consider the impact of your decision on other situations that may arise in the future.
5. Decide how the issue should be handled. If there is more than one judge you do not have to agree. There can be dissenting opinions.
6. Announce your decision and give your reasons.

Here is process for the hearing:

- Plaintiff's counsel makes arguments (2 minutes)
- Judge may ask questions (1 minute)
- Defense counsel makes arguments (2 minutes)
- Judge may ask questions (1 minute)
- Plaintiff's counsel (rebut) answers arguments (30 seconds)
- Defense attorney rebuts (30 seconds)
- Judge makes decision (2 minutes)

Handout 6 – Attorneys for the plaintiff, Monster Communications, Inc.

In this activity you will be preparing and presenting a 2 minute argument before the court representing the plaintiff, Monster Communications, Inc.

The arguments to be presented should be based on the copyright statute and the fair use exemption.

Your job is to:

Describe the facts of the case and develop arguments to persuade the Court to decide for your client based on the law. Be prepared to answer any questions the judge may ask you.

In preparing your 2 minute argument, you should think about the following questions:

- What decision do you want?
- What are the arguments in favor of and against each side? (Anticipating the opposition can strengthen your argument.)
- Which arguments are the most persuasive? Why?
- What might be the consequences of each possible decision? (to society and to the involved parties?)
- Are there any alternatives besides what each side is demanding?

You will also have 1 minute to respond to any arguments raised by the other side during their presentation.

Handout 7 – Attorneys for the defendant, Turner Broadcasting

In this activity you will be preparing and presenting a 2 minute argument before the court representing the defendant, Turner Broadcasting.

The arguments to be presented should be based on the copyright statute and the fair use exemption.

Your job is to:

Describe the facts of the case and develop arguments to persuade the Court to decide for your client based on the law. Be prepared to answer any questions the judge may ask you.

In preparing your 2 minute argument, you should think about the following questions:

- What decision do you want?
- What are the arguments in favor of and against each side? (Anticipating the opposition can strengthen your argument.)
- Which arguments are the most persuasive? Why?
- What might be the consequences of each possible decision? (to society and to the involved parties?)
- Are there any alternatives besides what each side is demanding?

You will also have 1 minute to respond to any arguments raised by the other side during their presentation.