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# Using Existing Research Instruments

## Using Existing Research Instruments: Copyright, Permission, and Fair Use

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A challenge many nurse researchers encounter during the course of their scholarly endeavors is how to use, in ethically and legally appropriate ways, instruments, scales, or other measures developed and published by other researchers. There are several considerations researchers must make in the areas of copyright, permission, and the legal doctrine of *fair use*. This article should not be construed as providing legal advice but rather, the purpose is to discuss several practical considerations for nurse researchers and authors who wish to use instruments published by others in their own research and scholarly activities. Readers are encouraged to consult The Center for Media & Social Impact at American University (2019), along with the other sources cited throughout this paper, which provide comprehensive coverage of the topics discussed here.

## COPYRIGHT

The first concept of relevance in this discussion is that of copyright. Though copyright is a legal term referring to the rights that creators of copyrighted works have over the reproduction and distribution of their works, these rights are limited by US law (Stanford Copyright and Fair Use Center, 2019). Authors and creators of works subject to copyright (which includes nearly everything an author publishes) need not register their works with a government entity in order for copyright protections to apply; when a work is created or published, the author or creator is protected by copyright laws (US Copyright Office, 2016). While copyright laws give authors and creators significant control over their works, authors and creators may allow others to use their copyrighted work by granting permission for the use. The other method for using copyrighted works is through the *fair use* exception to copyright law, discussed later in this article.

Nurse researchers wishing to use an existing instrument or measure that has been published should first seek permission from the holder of the copyright for the instrument or measure. Because it is the practice within our field to publish scholarly papers detailing the validity and reliability evidence for a new instrument, the complete instrument may be published in whole in a journal or less frequently, in a book. If so, the publisher of the journal or book (or the equivalent medium) may be the copyright holder as many publishers require authors to transfer some or all of their rights to the publisher upon publication. Large publishers often have an online request form for researchers to easily submit a request for permission to use. If such a form is not available, a simple email request to the publisher can be enough to secure permission to use an instrument.

Rather than publishing the entire scale or measure in a journal or book, authors of scales and instruments often choose instead to describe the instrument in adequate detail, providing a few sample items from the instrument so that readers

can gain a clear picture of how the instrument is constructed. Thus, the instrument remains under the control of the author and requests to use the instrument should go to the author or authors. Some instrument authors may provide a complete listing of the items from their instrument with details about the response scale used alongside the items in a published journal article. In this case, the instrument could be reconstructed by those wishing to use the instrument – but researchers should still seek permission from the author or authors prior to use. The challenge that researchers wishing to make use of a published instrument often face is that instrument author(s) may not be available to grant permission. When instrument authors move to different institutions, change their contact information, retire, or even become deceased, other researchers wishing to use a copyrighted scale or measure have limited options for obtaining permission to use an existing instrument. It should be noted that protections for copyrighted works created after 1978 persist for 70 years after the death of the copyright holder, often leaving others wishing to use a copyrighted work to try and identify a different instrument or to rely on the *fair use* exception in US copyright law.

## **FAIR USE**

US Copyright Law (United States Copyright Office, 2016) provides an exception to the exclusive rights of copyright holders in the principle of *fair use*. Under the exception for fair use, permission to use a copyrighted work is not required if the work is used for “...criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research...” (p. 35). There are four factors to consider when evaluating if the use of a copyrighted works falls under the fair use exception: the purpose of the use (with favor given for educational or non-profit uses), the nature of the copyrighted work, the amount of the work being used, and lastly, the effect of using the copyrighted work would have on the market or value of the work. It should be noted here that the final determination of whether a use case has met the requirements for fair use can

only be decided by a court after a claim of copyright infringement has been brought. While academicians and librarians alike have longed wished for clear guidance on determining exactly when the *fair use* exception applies, much of the guidance available, even from authoritative sources, has been – and continues to be – shaped by federal case law (Stanford Copyright and Fair Use Center, 2019).

One example of how case law has impacted the fair use exception is that *transformative*, rather than *derivative* uses are favored in fair use cases (New York University Libraries, 2019). For example, a previously published instrument that a researcher revises, adds additional items to, and is then tested in new populations for new purposes seems to be a clear example of fair use. Also, courts have tended to give strong consideration to the fourth factor, related to the market and value impact of the use of a copyrighted work (Stanford Copyright and Fair Use Center, 2019). Uses of copyrighted works that have little or no financial impact for the copyright holder are favored under the fair use exception to US copyright law. Most scales and instruments created by authors in the social and clinical sciences produce no measurable financial gain for the authors, a fact that is favorable under a fair use test. There are instruments and scales that authors have commercialized, where there is a charge for use, and sometimes even a per-administration charge. In these cases, using an instrument under the fair use exception to avoid payment is unlikely to be a successful defense should the copyright holders decide to seek damages for copyright infringement.

## CONCLUSION

So, what advice can we provide to authors, students, and other researchers seeking to use an instrument or scale developed and published by others? First, attempt to identify the copyright holder. If it is the publisher of the journal or book where the instrument appears, then seek permission from the publisher. If the instrument was not published in the journal article or book describing its

development and testing, then attempt to contact and obtain permission from the author or authors of the instrument. Author contact information contained in published articles becomes more unreliable as time goes on, so some searching online may be required to locate the author. Some authors may post their instruments on their faculty webpage or on a separate professional site and grant wide permission for use. Others may impose some restrictions on use, such as to not change the formatting or wording of items, in order that permission be granted. If a researcher has exhausted all attempts to reach the likely copyright holder, then they may consider use of the instrument under the fair use exception to US copyright law. Ideally, this decision should be made in collaboration with an authoritative source on copyright, frequently an experienced college or university librarian who provides copyright services to the institution's faculty, staff, and students. Whether permission to use an existing instrument was obtained from the copyright holder or if the instrument is used under a claim of fair use, researchers should document their efforts and decision making, and retain copies of permission letters or emails, should questions arise in the future.

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