Education Policy Analysis Archives

Volume 10 Number 4 **January 12, 2002** **ISSN 1068-2341**

A peer-reviewed scholarly journal
Editor: Gene V Glass
College of Education
Arizona State University

Articles appearing in **EPAA** are abstracted in the *Current Index to Journals in Education* by the ERIC Clearinghouse on Assessment and Evaluation and are permanently archived in *Resources in Education*.

Technology is Changing What's "Fair Use" in Teaching—Again

Linda Howe-Steiger
University of California, Berkeley

Brian C. Donohue
University of California, Berkeley

Citation: Howe-Steiger, L. & Donohue, B.C. (2002, January 12). Technology is changing what's "fair use" in teaching—again, *Education Policy Analysis Archives*, *10*(4). Retrieved [date] from http://epaa.asu.edu/epaa/v10n4.html.

Abstract

The Doctrine of Fair Use was established by the courts to exempt certain activities such as teaching and research from the legal requirements of the copyright law. Before the 1976 Revision of the Copyright Act, only two cases were brought against teachers for copyright infringements. In both cases the teachers lost because their extensive copying was found to impact the copyright owner's market for legally published copies. Although the 1976 Act explicitly recognizes the existence of potentially Fair Uses, the act makes application of the principle highly situational. Classroom Guidelines attached to the Act make application even more murky and constrained. After 1976 photocopy technology and the advent of the coursepack began a trend towards circumscribing situations in

which Fair Use may be applied. Potential impact on a new, lucrative market for sale of rights to copy portions of books and journals appears to dominate contemporary case law. Desktop publishing and Internet and web-based teaching, the authors believe, will further erode traditional applications of Fair Use for educational purposes. They argue that instructors and researchers should assume that there is no Fair Use on the Internet. Guidelines are provided for faculty and others considering dissemination of potentially copyrighted materials to students via digital technologies.

Ask any teacher in the United Stated whether or not it's "fair" to make free use of copyrighted materials in the classroom and his or her answer will most likely be, "Of course it is." Ask that same teacher why it is so obviously "fair" and you will probably get a blank look. Teachers just "know" that education has important social benefit and that they as teachers are exempt from usual legal obligations surrounding use of copyrighted materials. Or are they?

Introduction

Historical Perspective The Doctrine of Fair Use was conceived by the courts. It exempts certain categories of activity in some instances from the legal obligation to obtain permission from the author of a work before copying, performing, or displaying that work. Potentially exempt activities include teaching, research, scholarship, reporting, commentary, and even parody. The justification for the Fair Use exemption derives from the court's view that sometimes free and open discourse about ideas can be more of a stimulant to creation of new knowledge and new creative works than protection of the author's ability to reap financial reward from his work.. Traditionally the use of excerpts from copyrighted materials for classroom teaching has been conceived as a Fair Use. In 1976 the U.S. Congress formally adopted the Doctrine of Fair Use into its revision of the Copyright Act.

That was twenty-five years ago. Since then technologies for reproducing, copying and displaying copyrighted materials have changed dramatically, and the locus for teaching activities has expanded beyond the classroom to include the airwaves (as in educational TV) and now the Internet. These changes have affected authors', teachers', and publishers' perspectives about is "fair" and what is not "fair." Today as the educational community moves rapidly towards web-based education and a growing emphasis on distance learning, we believe it is important to take a another look at Fair Use and its relationship to evolving instructional technologies, if only to protect schools, teachers, and course developers from unexpected legal challenges.

First, however, to understand Fair Use and its application to education, one must give up any idea that "fair use" was ever really about equity. It's not. Like copyright itself, the doctrine derives ultimately from Western concepts of individualism and principles of market- based capitalism. The identification of what is "fair" or "not fair" is deeply entwined with the nature and ownership of the technologies used to reproduce or distribute the works in question as well as to who stands to gain or loose from a particular type of use.

Constitutional Perspective

The basis for copyright is established by Article 1, Section 8.h of the United States Constitution, which states: "The Congress shall have power to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Copyright (along with patent, trade secret, and trademark) is the tool that implements the Constitutional purpose.Copyright is a legally enforceable intellectual property right that protects a financial incentive designed to encourage individuals to take the risk of creating new works or improving on previous ones. The productivity and innovation that lie at the heart of US economic success seems to provide clear testimony for the wisdom of the framers of the Constitution..

Educational Case Precedents

Before the Copyright Revision Act of 1976, the record of cases involving Fair Use of copyrighted material in the classroom is sparse. What exists draws on the general principle that copying for classroom use without obtaining permission from the author was not an infringement of copyright as long as there was no impact on the sale of published books or sheet music. There were only two cases concerning classroom copying by instructors before 1976. Both addressed the question of what portion of a copyrighted work could be freely copied and distributed to students under the Doctrine of Fair Use.

The earliest of these, Macmillan Co. v. King 223 Fed. 862 (D.C. Mass. 1914), was brought against a Harvard tutor who produced for his students very detailed outlines and summaries of an economics textbook published by Macmillan. Macmillan argued this was an infringement of copyright and negatively impacted their market. Although most students did purchase the classroom text, some did not, apparently relying solely on their tutor's materials. The court ruled against the tutor.

In the next case, Withol v. Crow 309 F.2d. 778th Cir. 1962, fifty years later, the court similarly ruled against a music teacher, who, short by forty-eight copies of a musical score for his students, decided to make copies rather than purchase additional scores from the publisher. These two cases represent essentially all of the case law defining the application of Fair Use to teaching activities until the 1976 Copyright Revision Act. Clearly it did seem at that point that if a teacher stayed safely below some upper limit of copying an entire work, then the teacher would not risk a complaint that her activity was not Fair Use.

The 1976 Copyright Law Revision

After 1976, however, Fair Use became more complicated for teachers. Even as the Congressional revision generally identified copying for educational purposes a potentially Fair Use, it laid a foundation for confusion by setting forth criteria to use in the determination of whether or not a specific instance of copying was actually a Fair Use. The analysis of Fair Use thus became highly situational. Two sections of the Act are directly relevant for this discussion.

Section 107 specifically states that making multiple copies of copyrighted materials for use in a classroom is not in itself an infringement of copyright. It then defines four factors that are to be used to analyze any specific situation—and so enters uncertainty:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:
>
> 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education purposes;
> 2. the nature of the copyrighted work;
> 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> 4. the effect of the use upon the potential market for or value of the copyrighted work.

In interpreting this section, the courts thus far have generally viewed the forth factor, potential market impact, as the most important factor, given that the commercial and financial monopoly is at the heart of the concept of copyright. However, the use of the word "includes" rather than "are" in this section opens the door to a suggestion that there could be other factors, perhaps more important, influencing the interpretation of a particular situation.

The second relevant portion of the Act is Section 110, paragraphs 1 and 2. This section establishes that Fair Use may apply to performance or display of copyrighted works during "face-to-face teaching activities" that are "a regular part of the systematic instructional activities of a government body or a nonprofit educational institution." The language here seems to focus on making a careful distinction between what might be construed as Fair Use for educational purposes and some other use that might be construed as either "entertainment" or a commercially motivated performance or display. The limitation of non-infringing performances to only those used in "face-to-face teaching activities" and the introduction of the vague concept that the non-infringing performance must be "integrated into a systematic course of instruction" further increase the complexity of applying this doctrine in the contemporary educational environment where digital instructional technologies allow teachers to download audio, video, graphics, text, photography, and radio and TV-like "webcasts" and "display" them to students inside or outside the traditional classroom via a class website.

The Classroom Guidelines

Incorporated by reference into the Act is a set of "Guidelines for Classroom Copying in Not-for-Profit Educational Institutions." This document provides detailed examples of how to implement an appropriate balance of private intellectual property rights of copyright owners (usually the large commercial publishers) and the public benefit that may result from unrestricted educational uses of copyrighted materials by teachers and students. The guidelines were developed by a diverse group of copyright stakeholders. Congress's purpose in incorporating them into the Act, according to the Congressional Record, was to demonstrate wide consensus on the application of "Fair Use" to educational practice.

We suggest that the Congress may have been deluding itself. In fact, the Congressional

Record also reveals there was some real disagreement between those stakeholders interested in maintaining copyright free from any significant educational entitlements (that is, publishers and authors) and the academic community which views Fair Use for education purposes as an historic privilege. Educators on the committee also argued that teachers should be excused from obtaining permissions because the very process of obtaining and paying royalties to use materials would be an onerous duty and an inhibitor of academic freedom.

Indeed, the guidelines are very conservative and are increasingly difficult to apply in practice. Part of the reason they sound so silly today is that in being so specific they have simply not kept pace with changes in copying technologies (photocopying and computers). The guidelines set a very constrained standard for what may be construed as a "Fair Use" in an educational setting and may appear to contradict a more expansive interpretation of the language in the statute itself. For example, the guidelines define "brevity" as not more than 250 words of poetry, or 2500 words or less from a complete article, short story or essay, or 1000 words or 10 percent (whichever is less) from any prose work.. Copies of these brief excepts are non-infringing only if they are also "spontaneous" (i.e., according to the guidelines, a last-minute inspiration of the teacher) and one-time. According to authors of the guidelines, the basis for an exemption for such spontaneous one-time use of copyrighted works was simply to allow teachers enough time to obtain permission for the next classroom use (a process that in the mid-1970s took from four to eight weeks). Lost is the court's concept in the original doctrine of Fair Use that there was general social benefit in open discourse which itself was an encouragement of new ideas and innovation. Finally, the guidelines make clear that any post-class distributions of teaching materials to an interested but non-registered student could never be construed as Fair Use. (The guidelines may be viewed on-line at www.ucop.edu/ucophome/uwnes/copyrep.html, Appendix I.)

Why did the academic community sign-on to the guidelines if they were not practical? One answer may involve the technology for classroom copying in 1976. The mimeograph machine was cheap but it was also messy and irritating. The danger of teachers seriously impacting revenues from the sale of books and periodicals by making copies on the departmental mimeograph machines probably seemed fairly remote even to the teachers themselves. Indeed, in practice many teachers may have felt the constraints of the guidelines tight but livable given the situation. Anyway, it was standard teaching practice at that time, particularly in colleges and universities, was to send the students to the library reserved reading room.

Still, there were those who were wary. The American Association of University Professors and the Association of Law Schools joined in arguing that the guidelines failed to take into account the reality of how teachers actually used materials for teaching purposes (122 Cong. Rec., H 10, 880-81). They argued, more to the point, To protect themselves, many Universities today still disseminate the 1976 guidelines to their faculties, probably with tongue deeply embedded in cheek..

Emergence of Photocopy Technology

Shortly after 1976 came the photocopy revolution. With it libraries and instructors had a means to quickly, easily, and cheaply reproduce quantities of materials for research and teaching. Instead of gathering books and journals onto the shelves of the reserved book

room where students lined up to read assignments from the one or two available copies, libraries and instructors could just hit the "number of copies" button on a big machine and in minutes have copies for even the largest class. The old departmental mimeograph machine went to salvage and a typical student excuse for not doing the reading disappeared. Instructors also felt themselves freer to pick and choose reading material for their students without being bound by selections in someone else's textbook.. Commercial copy centers sprang up around campuses, reserve reading rooms dimmed their lights, and the "coursepack" was born.

Meanwhile publishers and authors saw the photocopy machine as creating a whole new market for the sale of rights to reprint portions of books and articles from journals. Two cases established the rules for determining Fair Use in this new technical environment. The first was Basic Books v. Kinko's 758 F. Supp. 1522 (S.D.N.Y. 1991). In this case the publisher, Basic Books, challenged Kinko's failure to obtain permission from the copyright holders (usually the publishers) when reproducing coursepacks. Although Kinko's argued that permission was not needed because the coursepacks were for classroom use and hence were exempt under Fair Use, the court agreed with Basic Books. Kinko's had unfortunately attracted the attention of the publishing world by advertising its ability to produce quick turn around of copies because it did not have to take the time to obtain permission from publishers.

An analysis of the Kinko's case emphasizes the commercial nature of copyright law and demonstrates how the Doctrine of Fair Use may be modified when a new technology creates opportunities for business. The court held that Kinko's failure to obtain permission had negatively impacted the market in permission or licensing fees. Kinko's had "extinguished" a financial reward to the copyright holder (the publisher), which was precisely the reward that copyright was designed to protect. Today most copy shops rigorously refuse to reproduce coursepacks unless permission to reprint has been granted in writing. Any permission fees charged by the copyright owner are then passed on to the students. The key to understanding the Kinko's case is to see that the court did not really address the Doctrine of Fair Use as it applies to actions by instructors and students. Instead, with typical narrowness, the court focused the discussion entirely on the two businesses in the middle of that educational relationship. Since the copy shop had a commercial interest in the coursepack, the copy shop could not view its own reproduction as "Fair Use," despite the end use of its product for classroom teaching purposes.

The principle laid down in Basic Books v. Kinko's was repeated, clarified, and perhaps strengthened in a second case on the same issue: Princeton University Press v. Michigan Document Services 99F.3d. 1381 (6th Cir. 1996). In this case, Michigan Document was one among several copy shops operating near campus. Its owner deliberately set out to test the ruling in the 1991 Basic Books case. Michigan Document therefore, not only did not obtain permission to reproduce materials for coursepacks, but also advertised this action, passed the savings incurred on to students, and used this reduction in price to undercut competitors. It is not surprising Michigan Document drew the attention of the publishers, and a negative ruling from the court.

Again, however, the key to understanding the court's ruling is the commercial exploitation of copyright. In brief, the court asked: who is making money from the copying and who is losing money? The court reaffirmed that if the copier (Michigan Document) makes money from the copying, then the copying could not be construed to

be Fair Use, even though the reproduction had an ultimate educational purpose. The court amplified that the Fair Use exemption is not a blanket exemption and that when litigants have commercial interests, the burden of proof that a copying situation is "fair" lies with the copier—in this case the copy shop. Since ultimately the copy shop is in the business of commerce, that is in making money not in teaching, the Doctrine of Fair Use does not apply. The court also again noted the existence of a lucrative new market in permissions created by photocopy technology. Teachers who believe they can "get around" the commercial aspect of the copyshop decisions by making their own copies in the library or on their own office copy machines might do well to take another look at the story of the Harvard tutor back in 1914.

The court has never actually tested the legitimacy of the coursepack itself, just of its reproduction by a commercial business. Essentially the coursepack is a unique collection of materials assembled by an instructor for a particular class that may be delivered one or more times. Components of the "pack" are quite long—whole chapters, articles, essays, or stories—far exceeding the so called safe harbor standards presented in the classroom guidelines. Under the 1976 Act such a collection itself is a copyrightable work, referred to as a "collective work..."

Digital Publishing and the Internet

The digital technology for both desk-top publishing and distance learning, including webcasting, class web-sites, e- learning, and in-class real-time Internet access, is here now here. With it has come a quantum leap in the murkiness of applying the Doctrine of Fair Use for education. Not only does the approach suggested by the 1976 Act seem outdated, but also Congress's recent effort to update copyright for the computer age—the 1998 Digital Millennium Copyright Act—deliberately sidesteps many of the toughest issues for educators by declaring them simply "unsettled." (See the "Report on Copyright and Distance Digital Education," May 1999, US Copyright Office available at Error! Bookmark not defined..)

The first "unsettled"—if not "unsettling"—issue concerns the definition "copy" on the Internet. When an on-line instructor assigns a student something to read something and the student "retrieves" that something from a digital file on a server connected to the Internet into her desktop computer, is that a copy? According to the Copyright Act, to be a "copy" the reproduced work needs only to be fixed in a tangible medium of expression. In Advanced Computer Services v. MAI Systems Corp., 845 F. Suppl. 356 (E.D. Va. 1994), the court ruled "the representation created in the RAM ‘is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration'." In other words, "Yes," the student is reading a "copy." But is this copy a legally reproduced copy or a copyright infringement?

Although the focus of Advanced Computer Services was software, the principle laid down by that decision would seem to be applicable to any work, including articles and Power Point presentations, or video clips, viewed or read via the Internet. If that is so, it raises the spectre of every single viewing of copyrighted materials over the Internet involving either a potential copyright infringement or a royalty payment. Will everything be pay-per-view? This interpretation seems overly restrictive, undercutting the balancing of interests that copyright law attempts to achieve between public and private benefits. While authors do need protection of their ability to reap benefits both in dollars and

reputation, the ultimate goal of copyright—the encouragement and advancement of knowledge and creativity—would not be served by skewing everything in the direction of the author's monopoly of copyright.

Indeed, the court in Religious Technology Center v. Netcom On-Line Communications Services. Inc., 907 F. Supp. 1361 (N.D. Cal. 1995) took a more reasonable approach when it characterized what happens when a user browses through materials on the Internet as "the functional equivalent reading"—not copying. Judge Whyte viewed this such reproduction of a file on the computer screen as simply a necessity for humans to perceive the information—rather like stand-up reading in a book store or borrowing a journal from the library. We hope, in the end, that Judge Whyte's reasonable view will prevail. Anti-copying technology certainly exists to disable a reader's ability to print, attach, or email an article over the Internet—activities that may be closer to a traditional understanding of copying. However, such distinctions are by no means without uncertainty in the evolving legal environment.

How, then, will the Fair Use Doctrine be applied to education and teaching in this environment? Unfortunately, current trends appear to be towards protecting commercial interests rather than protecting the public's access to knowledge or learning. We note that the instructor and the learner in any on-line situation are often separated by one or many commercial interests—for example an Internet service providers (ISPs) or an e-business providing course management or courseware to an instructor. One would do well to recall the Kinkos and the Michigan Document decisions.

In addition, technology may help resolve the complaint made in the minority report on the classroom guidelines that the task of obtaining permission to use copyrighted materials is onerous and time consuming. This, at any rate, is one possible implication to be derived from the decision in American Geophysical Union v. Texaco, 802 F. Supp. 1 (S.D.N.Y. 1992). In this case the court ruled against a Texaco researcher who, for his own convenience, regularly made photocopies of articles from journals which he kept in his office for future reference. Though such copying is common practice among both researchers and teachers, whether working in commercial or noncommercial context, the court accepted the copyright owner's argument that permissions were easy to get because of new Internet-based Copyright Clearinghouse technology and then went on to reason that since the ultimate purpose of the researcher's activity was profit for his employer (Texaco) that the private monopoly interest of the authors should prevail.

Somewhere the larger issue that led to the establishment of the Doctrine of Fair Use in the first place seems to have gotten lost in excitement over how easy the new technology can make the payments for copying rights flow. We as a society need to stop a moment and review what earlier courts had to say about the importance of support for the individual teacher or researcher who is exploring ideas and creating knowledge for the next generation and the general benefit of society.

Conclusion

There's No Fair Use on the Internet

The current use of Internet technology to support teaching brings new commercial players into the communications continuum, separating teacher and student in the

so-called distance learning environment. Will this situation permanently eliminate the Fair Use exception for digital teaching? In all of the cases cited above (and there are no cases on the "other" side)—whether it is a commercial copy shop making coursepacks, an instructor copying sheet music for students, or an engineer copying articles for his research files—when there are royalties to be collected and any potential commercial interest in the vicinity that might be viewed as either funneling off or diluting a potential profit for the copyright owner, then Fair Use copying may not apply. Even the possibility of diluting some future profit may be deemed sufficient to establish an market impact.

In short, it is easy to conclude that there is no Fair Use on the Internet because the Internet per se has become a commercial, for-profit business. To those who would say that information on the Internet is in most cases free and not commercially motivated, we reply that the goal of Internet companies and those who support their development is ultimately to make money—if they don't, they'll go out of business. The collapse of the dot com bubble makes that truth almost self-evident. Therefore, to help educators who are creating courses on the Internet (which are themselves copyrighted works), we have constructed some guidelines:

1. Know what's copyrighted and who holds that copyright. Before 1978 every copyrighted work had to carry a copyright notice. If it didn't, it wasn't copyrighted. So look. After 1978 the explicit copyright notice was no longer required for establishing legal ownership. Any fixed expression is copyrighted under common law from the moment of its creation, whether or not it is formally published or registered with the Copyright Office. This includes student work, institutional reports, neighborhood newsletters, and office memos. If something published since 1978 does not explicitly state that it is in the public domain and may be used and copied freely, it should be considered copyrighted material.
2. Don't assume something is in the "public domain" just because it's a government document. Everything published by a government agency or funded with public dollars is NOT necessarily in the public domain. Seek out a copyright notice or other notice regarding rights to reprint or post on the Internet. If you cannot find one, ask the author or publisher. Many non-profit organizations simply want you to send them some notification that you are using their materials for bragging purposes. Asking for copyright permission does not necessarily mean you will have to pay a fee.
3. Take personal responsibility for obtaining permission before using any copyrighted work. Should a suit be brought for copyright infringement, you personally will be liable. Don't assume that the Fair Use exemption will apply because your use has some educational purpose..
4. Never post copyrighted material (see rules 1-3) on the Internet assuming that you are exempt from obtaining permission by the Fair Use Doctrine because you are posting to a class web site or because you are an instructor or researcher making educational materials to anyone who's interested. There may be a commercial interest somewhere you will tread on. Explicitly seek and receive permission from the copyright owner. An alternative is to provide students with references for the library or the bookstore or point them towards the author's own on-line version or to a legitimate digital library managed by someone else who is presumably posting only legal copies.
5. Do not distribute copyrighted course materials that you formerly distributed via coursepacks over the web (even if you formerly obtained permission for the

coursepack copy) unless you restrict access to materials to just the registered students in your class (i.e. a password protected class site) or have received specific permission from the copyright owner to make copies available on the web.

6. Always give full, standard bibliographic citation on the digital copy itself, including a statement that permission to reprint for use by your on-line students has been granted.
7. Allow yourself plenty of time to identify copyright holders and receive their permission to publish via the Internet. Despite the availability of an evolving digital clearinghouse technology, common sense suggests that everything will not be in the database and you are ultimately responsible.

About the Authors

Linda Howe-Steiger, Ph.D., AICP
Institute of Transportation Studies
Technology Transfer Program
University of California Berkeley
1355 S. 46th Street, Building 452
Richmond, CA 94804
Tel: 510-231-5678
Fax: 510-231-9591
Email: lkhs@uclink.berkeley.edu

Linda Howe-Steiger is Director of the Technology Transfer Program for the Institute of Transportation Studies at the University of California Berkeley. She holds a BA in English from Bryn Mawr College, an MA from the University of Chicago, a Ph.D. from the University of Pennsylvania, and Master of City and Regional Planning (MCRP) from Rutgers University. She has taught graduate and undergraduate courses at Rutgers is developing a series of on-line tutorials for transportation professions as part of the California Learn-Net project. She is a member of the American Institute of Certified Planners.

Brian C. Donohue, J.D., M.B.A.
Business Contracts Administrator
University of California Berkeley
6701 San Pablo Avenue, Suite 218
Berkeley, CA 94720
Tel: 510-642-3128
Fax: 510-642-8604
Email:donohue@uclink4.berkeley.edu

Brian C. Donohue holds a BA from Fordham University, an MBA in Information Technology from George Washington University, and a JD (Juris Doctorate). He received a Certificate of Advanced Trail Advocacy from Hastings College of Law and has taught "Intellectual Property Law and the Internet" for the University of California Berkeley Extension for six years. As Berkeley's Business Contracts Administrator he has executed on behalf of the Regents of the University over 100 Internet agreements.

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General questions about appropriateness of topics or particular articles may be addressed to the Editor, Gene V Glass, glass@asu.edu or reach him at College of Education, Arizona State University, Tempe, AZ 85287-2411. The Commentary Editor is Casey D. Cobb: casey.cobb@unh.edu .

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