

# LEGAL WATCH

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## Copyright Fair Use for Educators

### General Principles

Copyright fair use is one of those areas where everyone has an opinion about it but nobody is really sure what it is! The purpose of this outline is to provide educators with some general background about the fair use exception to copyright infringement.

Copyright is now a matter almost exclusively of federal law. It has its basis in the United States Constitution by providing that Congress has the power to provide for "authors" to have the "exclusive right" to their "writings." U.S. Const., art. I, § 8, cl. 8.

Copyright protection now exists, from creation, in original Works of authorship that are fixed in any tangible medium of expression including: literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. 17 U.S.C. § 102.

Formal notice of copyright, i.e. (© Rick Johnson 1998) is no longer required nor is federal registration. A lack of these formalities, however, affects remedies and damages. For Works created after January 1, 1978, the term of copyright is normally for the life of the author plus fifty years or, in the case of Works for hire, seventy-five years from publication or one hundred years from creation, whichever expires first. 17 U.S.C. § 302.

Ownership of copyright vests initially in the author unless the Work is a Work for hire, in which case the law provides that the employer is the author. 17 U.S.C. § 201.

A Work made for hire is either one prepared by an employee within the scope of employment unless the parties agree otherwise or a Work

that is specially prepared pursuant to a written agreement providing that the Work is a Work for hire. 17 U.S.C. § 101. The issue of ownership of Works by employees can become complicated, particularly with university faculty, as some courts have recognized common law exceptions to the Work for hire doctrine for faculty, at least as to academic or scholarly articles. See *Weinstein v. University of Illinois*, 811 F. 2d 1091 (7th Cir. 1987). "When Saul Bellow, a professor at the University of Chicago, writes a novel, he may keep the royalties." *Id.* at 1094. Thus, education institutions should have a clear policy in this area on ownership of Works created by employees.

A copyright is divided into a bundle of rights, called exclusive rights, and these rights can all have different owners. The copyright exclusive rights are: to reproduce (copy); to prepare derivative Works; to distribute copies to the public; to perform certain Works publicly; and in certain Works to display the Works publicly. 17 U.S.C. § 106. Rights can be further divided by time, location and field of use.

When one isn't the owner, the safest course of action is to obtain specific, written permission from the owner. This can be obtained directly from the owner or is often obtained from certain services such as the Copyright Clearance Center which has authority to contract permissions for various Works, including obtaining permission for coursepacks (<http://www.copyright.com>). Musical works for performances are often licensed by educational organizations from performing rights societies such as ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music, Inc.) or SESAC (f/k/a Society of European Stage Authors and Composers).

Copyright owners often license their products, for example, computer software. A license is basically a contract which includes a promise

not to sue the licensee for copyright infringement. Licenses are usually express licenses, that is, there is a written agreement. There are also, in certain limited situations, such things as implied licenses where, even though there is not a specific written contract, the actions of the copyright owner are such that it is implied by the circumstances that the other party had permission to use or reproduce the Work. An example of an implied license is quite typical in online situations where the circumstances may be such that permission to download or otherwise reproduce can be implied from the circumstances.

There are also certain compulsory licenses, e.g., making arrangements of musical Works for performances. 17 U.S.C. § 115(a)(2).

### **Exceptions to Copyright Infringement**

If one violates any of the owner's exclusive rights, then one is an infringer. The copyright law, however, has many exceptions to what would otherwise be an infringement of the rights of the copyright owner.

A common example that most everyone has experience with is the right to make a backup copy of software. 17 U.S.C. § 117. A special provision in the copyright law, 17 U.S.C. § 108, provides rights to libraries to copy or distribute Works for research purposes. There is also express authority to perform or display various Works in the course of face-to-face teaching in the classroom, 17 U.S.C. § 110(1), in distance learning, such as over interactive video networks in the course of teaching activities, 17 U.S.C. § 110(2), and for nonprofit educational institutions to loan to employees and students phonorecords (including discs and CD's) or computer software if lawfully acquired and for an educational purpose. 17 U.S.C. § 109(b)(1)(A).

### **Fair Use**

The most widespread exception to copyright infringement is the law of fair use which advances the public policy of spreading knowledge, particularly in the areas of teaching, scholarship and research. The law lists four specific factors in 17 U.S.C. § 107 on what courts will look to in determining whether a specific use of a Work is fair use. These provisions are balanced and analyzed on a

case by case basis, so it is not possible to predict with any mathematical certainty whether a court will find a specific use in a specific circumstance as fair use, and hence the uncertainty of the law in this area.

These principles should be considered in any analysis of fair use: (1) The purpose and character of the use including whether the use is commercial in nature or is for nonprofit, educational purposes; (2) The nature of the copyrighted Work, for example, whether it is fact or fiction, published or unpublished; (3) The amount and substantiality of the portion of the copyrighted Work used in relation to the copyright Work as a whole, in other words, how much was used and was the heart or essence of the Work taken vs. inconsequential portions; and (4) the effect of the use upon the potential market for or value of the copyrighted Work. This latter provision is often given great weight by a court because one of the main purposes of copyright is to provide an economic incentive to authors to create Works so that the public knowledge is enhanced.

The fourth factor, the effect of the alleged infringing use on the economic value of the Work, is sometimes characterized as the most significant. *Harper and Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985). However, the better and more current view is probably that all four factors in Section 107 are to be considered but that the fourth factor is "primus inter pares," i.e., first among equals. *Princeton University Press v. Michigan Document Services, Inc.*, 99 F. 3d 1381, 1385 (6th Cir. 1996).

In the education setting, the coursepack cases are perhaps the most instructive. See *Princeton University Press, supra*; *Basic Books, Inc. v. Kinko's Graphic Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991). These cases were brought against the owners of copy shops that duplicated coursepacks containing various copyrighted materials for university students and sold them to the students without permission from the publishers and without paying royalties.

In *Kinko's*, the defendant tried to argue that the purpose of the use was educational rather than commercial, but the court didn't buy this argument as *Kinko's* received a substantial profit and was a commercial enterprise. *Kinko's*,

supra at 1530-31. The court also found that the percentage of the amount copied ranged from 5% to 28% and the portions copied were critical portions of the works (one would hope so), so the third factor (amount copied) also weighed against the defendant. *Id.* at 1533. Lastly, the coursepacks greatly reduced the need for the original works and thus had a negative impact on the income of the publishers. *Id.* at 1534.

The defendant in Princeton had decided to ignore the Kinko decision and ended up on the losing end as the court found, again after analyzing the four factors, that the copying by a commercial copier was not fair use. Princeton, supra at 1383. The court did look at the guidelines for classroom copying (see *infra*) as some general guidance on what might amount to fair use, but held that the defendant's copying was light years away from the safe harbor guidelines. *Id.* at 1391.

A consortium of school districts that videotaped programs from public television and sold copies to schools violated the copyrights of the producers of the programs in *Encyclopaedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982). While the purpose was educational, the fact that the entire work was copied, was sold and competed directly with the owner's market was held to be enough to preclude fair use. *Id.* at 1169-70.

The fair use defense was also denied in *Marcus v. Rowley*, 695 F. 2d 1171 (9th Cir. 1983), where a teacher prepared a "learning activity package" for a cake decorating presentation but copied a booklet prepared for the same purpose prepared by another public school teacher. Thus, copying for an educational purpose does not mean that the fair use defense is a slam dunk. All the four factors need to be considered.

Many people may remember the wrestling career of Dan Gable, the 1972 Olympic champion, who went on to have a tremendous coaching career. While at Iowa State University, two students produced a short film of his career called "Champion," which was financed in part by an Iowa State University entity as well as Dan Gable's parents. ABC used portions of this video without permission

as background for some of its 1972 pre-Olympic coverage.

ABC's fair use defense was denied in *Iowa State Univ. Research Found., Inc., v. ABC, Inc.*, 621 F. 2d 57 (2nd Cir. 1980). The profit-making character of the use, along with the negative effect on the market for the copyrighted film (ABC had exclusive rights to broadcast the Olympics which made for few buyers for the film) weighed against a finding of fair use. While facts of Gable's career could be copied, the expression of those facts in the film could not be. Even though the film had material of public importance, fair use was described as not being a "license for corporate theft." *Id.* at 61.

As the above cases demonstrate, fair use is very much a case by case analysis. For example, what if, in the coursepack cases, the educational institution was doing its own copying and not selling to the students for a profit? The educator trying to determine if copying is fair use should look at the four fair use factors in Section 107 and any applicable guidelines and obtain legal advice when in doubt. Fair use is an extremely important defense, but it is very case specific.

One of the advantages educators have is that the copyright law has a specific exception to the award of statutory damages when a nonprofit education institution's employee had a reasonable belief that his or her use was fair use. 17 U.S.C. § 504(c)(2). Statutory damages can run as high as \$100,000 in cases of willful infringement.

Copyright law allows, however, for actual damages to be awarded to an owner as well as equitable remedies, such as an injunction. However, actual damages are often difficult to prove and the infringer may have stopped so that an injunction is of little use. If statutory damages are not to be awarded, there may be little incentive to bring a civil action.

There are, however, serious criminal sanctions for copyright violations. See 17 U.S.C. § 506. Congress has recently upped the ante by passing the No Electronic Theft Act, Pub. Law No. 105-147, 111 Stat. 2678 (1997), which clearly applies criminal sanctions to electronic copying and eliminates the requirement that the infringement had to be for financial gain.

Many students, for example, may know they are violating copyright but may think that it's not a problem because they are not selling anything.

### **Fair Use Guidelines and Safe Harbors?**

There has been considerable debate over the years, and particularly recently as a result of the Conference on Fair Use (CONFU) which was an outgrowth of President Clinton's Information Infrastructure Task Force, on whether parties could agree on what fair use means in particular areas so that guidelines could be created and an educator, then, could be relatively safe if the use stayed within those guidelines. These guidelines can be quite lengthy, but the major areas where various guidelines have been proposed include: books and periodicals in the classroom; educational uses of music; distance learning; educational multimedia; educational use of digital images; and off air recording of broadcast programming.

Some of the guidelines were initially proposed around the time that the current Copyright Law was passed in 1976, such as the guidelines for classroom copying with respect to books and periodicals. Others have been more recently proposed as a result of CONFU and attempts to deal with fair use with respect to the electronic and information age, such as the guidelines for distance learning and educational multimedia.

The policy debate has been lengthy and often acrimonious on the guidelines as educators, including library associations, have felt that they are too restrictive and, since they are not law, do more harm than good by making educators too cautious in using fair use. Others, however, have felt that they can still be used as a general guide and give some direction to educators and researchers. It is useful to know what the guidelines state as a court may look to the guidelines in a general way. The key in any evaluation of any situation is to look at the four statutory criteria in Section 107 as stated above.

There are certain rules of the road, fairly common to the guidelines, to help educators in determining whether use is fair use in addition to the Section 107 provisions. Some of these would be: (1) Provide proper attribution and

reprint the copyright notice when you use a Work; (2) Use as little of the Work as possible to get the job done; (3) Use the Work for as short of time as possible and then get permission. For example, if a teacher is repeating a course semester to semester, year after year, and fails to get permission for coursepack materials, the odds increase of a finding of no fair use; (4) Control who you give the copied Works to and who has access.

This is particularly important in the modern media world with online courses so that the educator can show restriction on the use and only class members can access the copyrighted material; (5) Consider how much effect the use will have on the market for the product. If the use and other uses like it will significantly damage the owner's economic incentive, for example, copying workbooks that accompany text for a class, the likelihood of fair use is much less.

As mentioned above, there are no absolute safe predictions in this area. There have been some attempts to develop certain checklists, one of which was developed by Howard Lurie in a booklet available from the Villanova University Press entitled "Can I Copy...?" (1982) as follows:

#### Checklist

1. Are you using the copyrighted work for a noncommercial, nonprofit educational use such as classroom teaching?
2. Is the copyrighted work that you want to reproduce the kind of work of which limited reproduction is intended, expected, or commonly accepted as unobjectionable?
3. Are you reproducing no more than – a. 10 pages of a work of no more than 100 pages, b. 5 pages of a work between 50-100 pages, or c. 3 pages of a work of less than 50 pages?
4. Are you making not more than one copy for each student in your class?
5. Is any charge being made to the students beyond the actual cost of the photocopying?
6. Is the copyrighted work that you are reproducing one that was intended to be consumable in the course of study or teaching, such as workbooks, exercises or tests?

7. Are reprints of the copyrighted work available from the publisher?
8. Is your use of the copyrighted work likely to result in substantially fewer copies of the work being sold by the copyright owner or publisher?
9. Do you have any concrete reason to believe that permission to reproduce the work would be denied by the publisher or copyright owner if you requested it?
10. Do you have time to seek permission?
11. Are you using the copyrighted work in order to create or replace or serve as a substitute for an anthology or similar work?
12. Is the copyrighted work that you want to reproduce the kind of work which is usually published more than once by the copyright owner?
13. Is the work which you wish to reproduce the kind of work for which the author is usually compensated on the basis of number of copies sold?

If you can answer "yes" to questions 1-4, and "no" to questions 5-13, your reproduction is probably fair use.

If you answer "yes" to any of questions 6-9, your reproduction is probably not fair use.

If you can answer "yes" to questions 1-4 and "no" to questions 5-10, your reproduction may be a fair use so long as you do not reproduce the work again without permission.

Such approaches are interesting, but again are only a general guideline.

### **Institution Policies**

Often, copyright infringement occurs because of a lack of knowledge by students and

employees. Therefore, it is extremely helpful and important for institutions to have policies and provide information regarding copyright. Because of the tremendous ability to transfer information on the Internet, there is unknowing copyright infringement occurring on a massive scale never before thought possible. Often, institutions will provide information and warnings about copyright infringement in computer use policies to help avoid these problems and to provide the basis for their own sanctions for violations, such as eliminating permission to use the host computers.

### **Conclusion**

Fair use is one of those slippery concepts in the law, but by considering the statutory four fair use factors in Section 107 and considering any fair use guidelines that may have some general relevance, the educator can have a better comfort level on what constitutes fair use. There are some additional online sources which the educator can review to obtain a better overall understanding of this complicated area:

University of Texas General Counsel's Office:  
<http://www.utsystem.edu/OGC/intellectualproperty/copypol2.htm>

CETUS: <http://www.cetus.org/fairindex.html>

Copyright Management Center:  
<http://www.iupui.edu/it/copyinfo/>

Stanford University Libraries:  
<http://fairuse.stanford.edu/>

CONFU Guidelines:  
<http://www.uspto.gov/web/offices/dcom/olia/confu/>