

Copyright Law and the Leadership Classroom: A Primer

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Abstract

For many educators the fair use provision of the Copyright Act of 1976 and the subsequent Technology, Education, and Copyright Harmonization (TEACH) Act offer *carte blanche* use of various forms of media in the classroom. As Siva Vaidyanathan (2001) notes, “Copyright myths have had as much power as copyright laws” (p. 5). The copyright *carte blanche* idea is undoubtedly not so. Copyright laws are filled with nuances that educators should respect in order to maintain both the scholarly and academic integrity of their classrooms. It is the responsibility of the educator to know and understand copyright laws as they apply to educational settings. “Lack of intent to infringe [on copyright law] is not a defense to copyright infringement – nor is ignorance of the copyright law” (Brigham Young University, 2005).

Introduction

Copyright laws were invented to give legal rights to authors for their works. These rights are provided to those who create an original work to protect them so that they receive compensation for their intellectual efforts. Penalties for the willful act of violating the copyright law can include fines of up to \$150,000 for each act. The copyright law is used to protect the use and dissemination of original works. Copyright laws help to secure the rights of the creative efforts to who can use and reproduce original works. The copyright law protects an author by allowing him to control who can make copies, how many copies can be made, as well as ask for payment, or compensation for the use of the material.

Many questions surround the copyright issue. Issues related to copyright use and infringement include: Public domain material, quoting/referencing other sources, using someone else’s idea, using another’s materials, using another’s logo, or the use of another’s intellectual property. This raises several questions including, what is intellectual property, where does copyright infringement begin as well as what is “fair use”? The interpretation of the copyright law and its applicability is debated daily.

The historical purpose of the United States copyright law is well grounded in education and democracy; however, the historical events have not always followed suit. Copyright laws and court decisions have failed to strike a balance for the benefit of both the consumer and producer while still fulfilling the historical purpose of the law. Over the last century, laws and court decisions have swung from favoring consumers to favoring producers (Vaidhyanathan, 2001). Technological advancements from the printing press to the Internet have further complicated copyright issues, and educators frequently find themselves caught in the middle of the web of copyright laws and provisions. The Copyright Act of 1976 attempted to address the use of copyrighted materials for educational purposes through the fair use provision; however, the factors used to determine fair use are complicated in and of themselves. In 2002 the TEACH Act was signed into law in an effort to clarify points about copyright in an educational setting, and in particular teaching via distance education.

Copyright Law – A brief and simple history

Struggling with copyright law in an educational setting is not a new dilemma brought about by the proliferation of the Internet, as many believe, but rather has been an ongoing issue for centuries dating back to the advent of the printing press. Seventeenth century English law permitted only stationers, or printers, who held a license decreed by the Crown and enforced by the Stationers' Company to publish and print intellectual works (Russell, 2004). The Licensing Act, as it was known, was an early form of copyright law; however, it was also a form of censorship because the Crown believed that "uncontrolled dissemination of literary works and political treatises could invite sedition" (Goldstein, 2003, p. 31). For those printers who held a license, the rules for what could and could not be printed were quite clear and well abided. Their licenses were also quite lucrative due to the monopoly that licensed printers had on printing and publishing (Goldstein, 2003).

The printers and publishers who were part of or licensed by the Stationers' Company fought for many years beyond the 1694 expiration of the Licensing Act to control their printing monopoly. Because the Crown was now labeling seditious libel as a criminal offense, there was no longer a need for the oversight provided by the licensed printers and publishers (Goldstein, 2003). Finally, in 1710, a copyright law titled the *Statute of Anne* "A Bill for the Encouragement of Learning and for Securing the Property of Copies of Books to the Rightful Owners Thereof" was enacted by Parliament (Russell, 2004). While the new statute destroyed the monopoly enjoyed by the members of the Stationers' Company, it did allow printers and publishers to argue that, by printing and publishing works, the stationers owned rights to the works. The stationers argued, "When an author sells a manuscript to a publisher, he is selling not just the tangible manuscript but also a separate and perpetual right to publish the manuscript's contents" (Goldstein, 2003, p. 35).

With an understanding of the complex issues the printing press created in England, the framers of the United States Constitution addressed the issue of copyright in the Constitution to offer Congressional control and promote democracy. “James Madison and others insisted that the United States of America copyright clearly protect distinct expressions of ideas for a limited time, while allowing others to freely use, criticize, and refer to the ideas that lay beneath the text. Copyright was to be a balance between the interests of the producer and the interests of the society of consumers, voters, and readers” (Vaidhyanathan, 2001, p. 28). Drawing from the more democratic elements in the *Statute of Anne*, Article 1, Section 8, of the US Constitution 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” (United States Constitution). The framers of the Constitution believed “the new democracy required a well-informed citizenry, so access to knowledge was paramount” (Russell, 2004, p. 1). Of course, over time Constitutional oversight proved not to be enough. On May 31, 1790, President George Washington signed into law a bill entitled “An Act for the Encouragement of Learning” which gave a 14-year copyright to books, maps, and charts (Goldstein, 2003). With the rapid expansion of copyright works, Congress revised the copyright revision in 1870 by moving registration of copyright works from the federal district courts to the Library of Congress. In addition, two copies were required with the revisions, thus allowing the Library of Congress to rapidly grow (Goldstein, 2003).

Since 1790 copyright law has been amended and revised numerous times, with each revision generally serving as a reaction to new technological advancements. For example, musical compositions have had copyright protection since 1831 and “in 1865, [Congress] amended the Copyright Act expressly to add photographic prints and negatives to the classes of copyrightable works” (Goldstein, 2003, p. 46). In 1909 the Copyright Act was once again revised, but as with preceding acts, it was almost immediately challenged by advancing technology such as motion pictures. Another challenge to copyright law came in 1970 when an assistant professor from Harvard Law School, Stephen Breyer, published, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*. Breyer (1970) noted that “one suspects that many authors dislike copying because of the injury to their purse, not their pride” (p. 290). His article explores “the assumptions and the principles underlying copyright protection” (Breyer, 1970, p. 283) and “what would happen to book publishing if copyright were abolished” (Breyer, 1970, p. 283). Breyer also argues that the case for extending copyright laws had not “been adequately made” (p. 284). “Professor Breyer’s article came at a critical moment, for Congress and the courts were just beginning to address a new copyright battleground: whether copyright should encompass copying by such new technologies as the photocopier, home audiocassette and videotape machines, and computers” (Goldstein, 2003, p. 17).

Copyright in the Classroom

As previously mentioned, the founding fathers of the United States included general copyright provisions in the Constitution to promote democracy and a well-informed and educated society. However, through centuries of technological advancements and attempts for laws to keep pace with those advancements, copyright laws have become complex and convoluted. “Gradually the law has lost sight of its original charge: to encourage creativity, science, and democracy” (Vaidhyanathan, 2001, p. 4). Many educators have also lost sight of the importance of understanding and respecting copyright laws in the classroom. The complexity of the laws does not preclude educators from abiding by the laws. Two major acts have made significant contributions and placed significant restrictions on using copyrighted works for educational purposes: the fair use provision and the Technology, Education and Copyright Harmonization (TEACH) Act.

What is Copyright?

Current copyright laws fall under the Copyright Act of 1976. According to the U.S. Copyright Office Web site, copyright “is a form of protection provided by the laws of the United States ([title 17](#), U. S. Code) to the authors of ‘original works of authorship,’ including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works” (<http://www.copyright.gov/circs/circ1.html#wci>). It is important to also note, as Section 102 of the statute does, that “in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work” (<http://www.copyright.gov/circs/circ1.html#wci>). In other words, not everything can be copyrighted. With the passage of The Berne Convention Implementation Act of 1988, the United States began to conform its copyright laws to the international copyright oversight entity, the Berne Convention, allowing for copyright protection even if the work is not registered with the U.S. Copyright Office. In addition, in an effort to align with the Berne Convention, copyright expirations were extended to 70 years beyond the death of the author.

Fair Use

Section 107, U.S. Copyright Act of 1976, known as fair use, states that “the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright” (<http://www.copyright.gov/circs/circ1.html#wci>). This is the provision to which most educators refer to be relinquished from copyright laws in teaching. This

adherence, however, is often misguided because the fair use doctrine is limited in its allowance of rights. Although no clear guidelines or standards exist for determining fair use, the best way to protect classroom academic and scholarly integrity is to weigh the four fair use factors provided by the fair use provision. While not all factors have to be met for fair use to apply, according to Russell (2004), fair use “requires that all of the factors be considered, although depending on the situation, some factors may weigh more heavily than others” (p. 19). These factors include:

1. *The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.* This is the factor which, if offered alone, would provide a *carte blanche* for educational use of copyrighted materials. However, it is only one element of the equation and depending on the situation may not be an equally proportionate element. “Additionally, with respect to the reproduction right, this factor is more likely to weigh in favor of fair use if the use is transformative rather than verbatim copying” (Brigham Young University, 2005, p. 8)
2. *The nature of Copyrighted Work.* The nature of the copyrighted work refers to matters such as if the work is published or unpublished and if the work is factual or creative expression. Fair use tends to favor published and factual works over unpublished and works of creative expression. “The case for fair use becomes even stronger when there are only a few ways to express the ideas or facts contained in a factual work. The line between unprotected ‘facts and ideas’ on the one hand and protected ‘expression’ on the other, is often difficult to draw” (Brigham Young University, 2005, p. 8).
3. *The amount and substantiality of the portion used in relation to the copyrighted work as a whole.* There is unfortunately no magical formula to assist in determining the amount of a copyrighted work an educator may use. What must be considered when assessing the amount and substantiality factor is how critical to the educational process using a substantial proportion of the work is (Russell, 2004). In addition, the educator must weigh quality in addition to quantity when considering the amount and substantiality factor. A small amount of copyrighted material that captures the essence of the work may go against fair use (Brigham Young University, 2005). “The more of the original taken, in amount and substantiality, the greater the negative impact on the market for the copyrighted work” (Brigham Young University, 2005, p. 9).
4. *The effect of the use upon the potential market for or value of the copyrighted work.* “Effect is in some ways the most mysterious, and perhaps most irreconcilable, factor of fair use” (Russell, 2004, p. 25). While “widespread” use that would diminish the publisher’s market would not favor fair use, no class size or definition of “widespread” is offered for educators. The effect factor generally relates to loss of sales for the publisher, and if this loss is significant or long-term. While commonly

considered the most heavily weighed factor, the market factor is, like the others, only one element of the equation.

Organizations have compiled guidelines for the use of copyrighted materials in educational settings however these guidelines were never coalesced with the fair use provision. “While there is a ‘semi-official’ quality to these guidelines because they were created at the request of Congress and are published in congressional reports, the guidelines do not have the force and effect of the law” (Russell, 2004, p. 27). In addition to the guidelines, several templates for determining fair use are available online including the Crews/Buttler “Checklist for Fair Use,” University of Portland web site (<http://library.up.edu/default.aspx?cid=2535&pid=59>), and Checklist for Fair Use, a copyright tutorial and the Fair Use Pyramid Chart on the Brigham Young University web site (<http://copyright.byu.edu>), as well as a Checklist for Fair Use from the Indiana University, Purdue University, Indianapolis web site (<http://copyright.iupui.edu/checklist.htm>). Even with such tools, “more often than not, however, fair use is a gray and sloppy concept” (Vaidhyathan, 2001, p. 27).

Technology, Education and Copyright Harmonization (TEACH) Act

Although the Copyright Act of 1976 did address distance education, distance education at the time was generally a synchronous class held at different locations via television (Seadle, 2003). Every student was in a set classroom during a set instructional period which complied with the 1976 copyright language that “(C) the transmission is made primarily for (i) reception in classrooms or similar places normally devoted to instruction” (Seadle, 2003, p. 253). This language was updated for the 2002 Technology, Education, and Copyright Harmonization (TEACH) Act to read, “(C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to (i) students officially enrolled in the course for which the transmission is made” (<http://www.copyright.gov/title17/92chap1.html#110>). The purpose of the TEACH Act was to update section 110 of the Copyright Act of 1976 to make allowances needed in today’s Internet-based, distance education (Seadle, 2003). Despite such good intentions, the complaint has been made that “the 1976 Act’s fair use ‘test’ is a model of clarity when measured against the TEACH Act’s network of interlocking standards and guidelines. The legalese of the act itself is alarmingly incomprehensible” (Logie, 2006, p. 16). The criticism is not without basis given that the language of the section grew more than five times in its attempts for clarification (Seadle, 2003).

Because of the intense legal language, “many of academe’s best copyright lawyers readily admit that they are not completely sure what [the TEACH Act] means” (Seadle, 2003, p. 254). One clear point though is that the TEACH Act requires educational institutions to “develop written copyright policies before they can put more copyrighted material online” (Carnevale, 2003, para 11). While some universities have been aggressive in creating such guidelines and even sharing those guidelines, other universities have been hesitant to do the same.

Official university guidelines could make the university liable in a copyright infringement case, and official guidelines could also have difficulty keeping pace with copyright laws (Seadle, 2006, p. 306). All too often guidelines that are created make the assumption that all instructional activities are occurring on campus (Wallace, 2007), and therefore are missing a key need of university copyright guidelines.

Unlike the fair use factors where a complicated balance is sought, the TEACH Act offers guidelines with specific conditions. However, “as is often the case in copyright law, the [TEACH Act] penalties are clearer than the exceptions” (Seadle, 2006, p. 306). According to the Copyright Clearance Center (2005), the TEACH Act offers three main allowances:

- Instructors may use a wider range of works in distance learning environments.
- Students may participate in distance learning session from virtually any location.
- Participants enjoy greater latitude when it comes to storing, copying and digitizing materials.

(<http://www.copyright.com/media/pdfs/CR-teach-act.pdf>)

Of course, there are also several requirements that must be met in addition to the adoption of written copyright policies as previously discussed. On the most fundamental level, copyrighted materials can be used through the TEACH Act if they are used in supervised instructional activities and limited to the specific students enrolled in a specific class at an accredited, non-profit educational institution (Copyright Clearance Center, 2005; Russell, 2004). On a more complicated level, TEACH requires that an educational institution “institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection” (<http://www.copyright.gov/title17/92chap1.html#110>). In addition, copyrighted materials must be limited in the time they are available online (not to exceed the class session) and reasonable means must be taken to protect against the dissemination of the copyrighted materials beyond the boundaries of the class (Russell, 2004; Carnevale, 2003). Because “reasonable” is not defined by within the TEACH Act, the argument for what is reasonable extends from password protection sufficing to the need for technology that can track where information goes after it is downloaded (Carneval, 2003). Transmission of required class textbook materials and materials created specifically for distance education use is not allowed, and only copyrighted works that were lawfully obtained should be used (Brigham Young University, 2005; Copyright Clearance Center, 2005). With these requirements and restrictions “it is also important to note that the TEACH Act does not supersede fair use or existing digital license agreements” (Copyright Clearance Center, 2005).

Teaching Leadership Using Popular Culture: Specific Elements

Below is general information regarding using specific copyrighted media materials for instructional purposes. This information does not amount to legal advice, and should not be used as such. Note Section 110 states “the performance or display is *directly related and of material assistance* to the teaching content of the transmission” (<http://www.copyright.gov/title17/92chap1.html#107>). The emphasis is added to note that use of copyrighted materials must not only follow fair use provisions and the TEACH Act, they must also adhere to educational and instructional objectives.

News Media Programs, Segments, and Clips

Current events can often capture excellent examples of leadership moments and make a strong connection between theory and practice. While clips of news programs such as the PBS series *Frontline* or CBS’s *60 Minutes* provide a strong connection to educational instruction, such programs may be recorded only for use up to 45 days after the original broadcast (Brigham Young University, 2005). Instructional use of the broadcast must take place within the first 10 consecutive school days after the original broadcast, while any subsequent use during the 45-day period is for teacher evaluation only (Brigham Young University, 2005). Finally, it is important to note that the clip may not be altered or combined with any other media clip, and the broadcast must include the copyright notice if available (Brigham Young University, 2005).

Publications – Books and Magazines

When a book, book section, or magazine offers the key to understanding a vague leadership concept, for instance, the decision whether to copy and distribute the copyrighted material should be carefully weighed against the fair use provision. Considering the elements of the purpose (should be meeting an educational objective), the nature of the original work (with more factual in nature being more fair), amount to be copied (the amount, like the purpose is strongly tied to the educational objective), and the market effect (will the use cause market loss) (Russell, 2004). Also, the connection to the educational objections as cited by the CONFU guidelines is a highly important factor.

Movies and Movie Clips

Copyrights laws allow portions of movies to be used under the fair use law. Generally this has been interpreted to mean that as long as the instructor does not charge admission to see the film, and the instructor is not copying or transcribing any large segments, the film can be used for educational use. Section 110, 1976 Copyright Act states “performance or display of a work by instructors or pupils in the course of face to face teaching activities of a nonprofit educational institution,

in a classroom or similar place devoted to instruction” are not infringements (<http://www.copyright.gov/title17/92chap1.html#107>). It is important to note that movie clips must be used for purposes of education that are “directly related and of material assistance to the teaching content of the transmission” (<http://www.copyright.gov/title17/92chap1.html#107>) and not entertainment. Decisions on how much of the movie can be shown without infringing on copyright law should be measured by fair use factors. The relation to the learning objectives and how much of the movie must be shown to fulfill those objectives is also a key factor to consider.

Internet

It is a common myth that material on the Internet is in the public domain, and therefore not subject to copyright law (Brigham Young University, 2005). Placing material protected by copyright on the Internet may imply intent by the copyright owner to make the material more widely available, but does not mean they have granted permission to further duplicate and/or distribute their material” (Brigham Young University, 2005, p. 28). Because web sites are generally considered original and creative works and they are “fixed in a tangible medium,” they have copyright protection even if no notice of copyright is posted (Russell, 2004). Once again, fair use factors should be weighed to determine if information from web sites can be printed and distributed for educational use.

Conclusion and Future Issues

In June of 2007, *The Chronicle of Higher Education* reported that the Copyright Clearance Center had created a way for universities to pay a blanket fee to use copyrighted materials (Read, 2007). The blanket use fee for those universities who opt to participate is \$8 to \$10 per person on average, however, this does not take care of all copyrighted materials because not all publishers are participating in the Copyright Clearance Center program (Read, 2007). Some do, however, question the need for blanket fees given that many of the copyrighted materials could be legitimately used free of charge under the fair use provision (Reed, 2007). In addition, the Association of American Publishers has started to scrutinize universities that do not appropriate use copyrighted format in digital format. “Through desktop searches, the AAP began investigating college practices and policies with regard to copyright guidelines for digital works” (Jones, 2008). When university policies were not found to allow copyright infringement, the AAP began to work with universities to bring them into compliance with copyright law (Jones, 2008).

As university administrations work to keep students from illegally downloading music, those same administrators, along with faculty, should put as much time and effort into ensuring that academic instruction remains within the boundaries of copyright laws as well. “If academics fail to make persuasive cases for the ethical and reasonable uses of copyrighted materials in their classrooms, they are

contributing to a culture in which copyright law remains both inexplicable and widely disregarded by the general public” (Logie, 2006, p. 19). Complying with copyright laws within the academic setting “to promote the Progress of Science and useful Arts” supports academic and scholarly integrity, and contributes to and promotes what the founding fathers intended.

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Dr. Jones is currently an Assistant Professor at North Carolina State University. Dr. Jones teaches leadership and is involved in researching teaching methods and generational learning. Dr. Jones graduated in May, 2006, from the University of Florida with his Ph.D. in Agricultural Education