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Copyright 101

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Exploring Copyright through Real World Scenarios

(A.K.A. Jonathan's not so pretty "Cliff Notes"-style Review of Copyright by and for the Non-Lawyer)

SIDLIT (July 31) 2009 Session Description: How do you know when and if copyright materials are legal to use in the classroom (online or face-to-face)? This session will explore important copyright issues using several higher education-related scenarios. The scenarios will be presented as a guide for participant consideration of when and if copyright materials may be used. The Copyright Act of 1976, fair use and the four factor analysis, the TEACH ACT, and multimedia guidelines will be discussed.

Slideshow that accompanies these notes, available at:

<http://www.slideshare.net/jbacon/copyright-scenarios>.

When You Can Use Works & Comply with Copyright

1. Is work protected by copyright?
2. Qualify as "Fair Use?"
3. Qualify under TEACH Act?
4. If not, seek permission from copyright holder.
 - a. <http://landmark-project.com/permission1.php>
 - b. http://landmark-project.com/permission_student.php
 - c. <http://www.universityofcalifornia.edu/copyright/permission.html>
 - d. http://en.wikipedia.org/wiki/Wikipedia:Example_requests_for_permission

The Fine Print of Copyright

1. Copyright balances incentives for authors to create "by granting them exclusive monopolies in the right to copy and sell their works" with Western civilization's belief in "the free transmission of ideas." (*Fair Use Ain't What You Think It Is: Copyright and Fair Use in the Digital Classroom* by Mark J. Davis, Esq. B.A. J.D., Tulane University, Loyola University New Orleans, page 1)
2. Based on the US Constitution Article 1, Section 8: *Congress shall have the 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.*
3. "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 This protection is available to both published and unpublished works." (U.S. Copyright Office)
4. Copyright includes right:
 - a. To Reproduce Works
 - b. To Prepare Derivative Works (Adaption)
 - c. To Distribute Works (*Sale, transfer of ownership, rental, leasing, lending*)
 - d. To Perform Work Publically (*Literary, musical, dramatic, dance, pantomimes, movies, audiovisual work*)
 - e. To Display Work Publically (*Literary, musical, dramatic, dance, mimes, and pictorial, graphic or sculptural works including individual images from movies & audiovisual work*)
 - f. Public Performance of Digital Sound Recordings
5. Considered Personal Property (can be sold, transferred, inherited)
6. Covers Original Works of Authorship § 102(a)

7. Automatic Protection when Work is Created
8. Doesn't Cover Facts or Ideas except as in fixed creative form
9. Registration (Not required after March 1, 1989) & Copyright Notice Not Required. If Used Must Follow Standard Format
10. Owning Object does not equal access to Copyright holder's rights
11. Creator of Work Considered Author
12. However, Created Works May Not Be Owned by Creator (Work for Hire § 101, Transfer or Sale of Copyrights)
13. **Protectable Works** ~ § 102(a) include: Literary Works, Musical Works, Dramatic Works, Pantomimes & Choreographic Works, Pictorial, Graphic & Sculptural Works, Motion Pictures & Other Audiovisual Works, Sound Recordings, Architectural Works

When Works Enter the Public Domain

Digital Copyright Slider <http://librarycopyright.net/digitalslider/>

1. In Public Domain:
 - a. When copyright has expired* (see next item)
 - b. When dedicated by Author to Public or Author has abandoned his copyright (computer freeware)
 - c. If publication in the US before 1923
 - d. If publication in the US before March 1, 1989 without copyright notice
 - e. If publication in the US before 1964 without copyright renewal
 - f. Note: "Determination of whether or not a work is in the public domain is tricky and best left to copyright attorneys." (Davis, page 2)
2. Term of Copyright
 - g. First General Revision of Copyright Law, 1831
28 + 14 Years with Renewal
 - h. Third General Revision of Copyright Law, 1909
28 + 28 Years with Renewal
 - i. Title 17, § 302, 1976
Life + 50 Years
 - j. The Sonny Bono Copyright Term Extension Act, 1998
Life + 70 Years
 - k. What Really Matters
<http://www.lib.umn.edu/copyright/PDchart.phtml>

The Balancing Act

1. Section 106 grants exclusive rights to copyright holders
2. Copyright law places limitations "in order to promote the free exchange of information."
3. For educators five important factors include:
 - a. Fair Use (Section 107)
 - b. Reproduction by libraries & archives (Section 108) see Section 108 spinner at <http://librarycopyright.net/108spinner/>
 - c. The TEACH ACT (Section 110)
 - d. Public Domain (Section 300)
 - e. Infringement (Section 501 et seq.)

Fair Use: What You Need to Know

<http://librarycopyright.net/fairuse/>

- Statutory Basis in § 107, Title 17 (1976 Copyright Act)
 - "...the fair use of a copyright work, including such use by reproduction in copies...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright."
 - "Equitable rule of reason"
1. Fair use is not a right, it's an excuse (or defense)
 2. Fair use excuses
 - a. Purpose and character of use (nonprofit, educational, and personal uses are generally favored fair uses while commercial uses are less likely to be deemed fair use)
 - b. Nature of the original work (factual works, published works and scientific articles--factual in nature--more likely considered fair use than creative, imaginative, artistic, or unpublished works) – sometimes given less weight by courts than other 3 factors.
 - c. Amount taken from the original (excerpt, extract, clip or small portion--e.g. only part needed for educational purposes-- more likely qualifies as fair use. Entire work or "heart of work" would not qualify.)
 - d. Effect on potential market for original (economic harm or diminished market for owner of copyright weighs against fair use)
 3. Determination of fair use must be made each time work is used; conditions change and each use must be re-evaluated
 4. Fair use is not absolute; look for the tipping point
 5. Conduct four factor analysis (see <http://www.lib.ncsu.edu/dspc/tutorial/copyuse/worksheet.pdf> and Davis, page 4)
 6. Sampling of a few major fair use cases
http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-c.html#2

Four Factor Analysis (Looking for the Tipping Point)

Favors Fair Use	Neutral/Slightly Toward Fair Use	Opposes Fair Use
Purpose and Character of Use		
Teaching		Commercial Activity/Profit-based
Scholarship, Research		Entertainment
Non-profit Institution		For-profit Activity
Criticism, News Reporting, Commentary		Verbatim Replay Only
Original Transformed for New Use (Transformative)		Reiteration of Original
Access Restricted to Students		Wide Audience/Public Distribution
Parody of Original		Broad Parody Beyond Original
Personal Use		No Attribution to Original Authors/Copyright Owners
		Bad Faith Behavior (e.g., Illegal Copy)
Nature of the Original Work		
Non-fiction, Factual	Mixture of Factual and Imaginative	Fiction, Creative
Published		Unpublished (Right of 1 st Publication)
		Entertainment
		Consumable Materials (Workbooks, Answer Sheets)
Amount of Copyright Work Used (Quantitatively & Qualitatively)		
Small Amount (Excerpt, Extract or Clip) Used		Substantial Portion Used
Non-essential Parts Used		Unique Elements Used, Portion Used is Qualitatively Substantial ("Heart of the Work")
Only Portion Used for Favored (Instructional) Purpose		
Effect on Market or Potential Market for Original Work		
No Lost Sales	Work Out-of-print	Substitute for Purchase (e.g., Replaces Sale of Work)
No Effect on Value of Original or Work Stimulates Market for Original Work	No Ready Permission Market Available	Destroys Value of Original or Impairs Market for Original
Limited Copies Made (1 or Few)	Copyright Owner Not Identifiable after Extensive Search	Multiple Copies Made
One Time Use		Repeated Use
No Licensing/Permissions Mechanism in Place		Publicly Available on Web
		Avoids Payment of Fees

Similar (not identical) online version available at <http://www.lib.umn.edu/copyright/checklist.phtml>

The TEACH ACT

<http://librarycopyright.net/etool/>

The Technology, Education, and Copyright Harmonization Act of 2002 (Section 110) addresses ambiguities copyright law as applied to fair use in an educational context or setting.

Provides limitations on author rights only if:

1. Source material is a legally obtained copy
2. Access to source materials does not circumvent a digital rights management system.

Additionally

3. Expands fair use (§ 110) to cover the digital classroom; e.g., provides for transmission of digital materials and media § 110(2)

In Live Classroom

1. **Live Instruction** covered specifically: “Notwithstanding the provisions of section 106, the following are not infringements of copyright: (1) 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, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;
2. So, fair use only applies if all of the following criteria are met:
 - a. Performance or display of work (can screen legally obtained copies)
 - b. Non-profit educational institution (unaccredited non-profits and for-profit companies/schools not covered)
 - c. By instructor or pupils (“Teachers and students are free to perform for each other in class, but this permission does not extend to third parties.” (Davis, page 5)
 - d. Face-to-face teaching (in same room, another section deals with distance education)
 - e. In a classroom setting (on campus, in lecture halls, in places where classes are regularly held)

In the Digital Classroom

“The legal requirements for online classes and video are complex and not equivalent to what is permitted in a face-to-face classroom setting.” (Davis, page 6)

1. Defines fair use in the digital/online classroom.
2. Traditional notions of fair use do not apply in the digital classroom.
3. What may be fair use in the classroom may be an infringement in the distance learning environment, if guidelines are not followed.
4. Digital transmission includes uploads to the Internet, television broadcasts, radio broadcasts, distance learning programs, podcasts, webcasts, and videocasts.
5. Textbooks and other digital materials “typically purchased or acquired by students” (Davis, page 7) and/or made specifically to be sold/licensed for online instruction are excluded (may not be used under Fair Use), e.g., digital classroom materials.

6. Digital copies must be legally obtained and may not circumvent digital rights management systems (e.g., access code required for an ebook).
7. TEACH Act exemptions to copyright limitations only apply to uses by accredited non-profit educational institutions.
8. Directly related to subject being taught (does not cover entertainment or “filler” activities, “Does the digital transmission of this copyright work aid the teacher in conveying the lesson?” Davis, page 7)
9. Under direct supervision of class instructor
10. Part of systematic mediated instructional activities (e.g., part of the lesson plan, course outline, course objectives)
11. Equivalent to amount used in a live classroom (e.g., “The TEACH ACT does not permit an instructor to podcast an entire Wagner opera to his class when a ten minute excerpt is sufficient.” Davis, page 7)
12. Access is limited to enrolled students (posting to public sites like YouTube or iTunesU violates this rule. If the iTunes U site is authenticated and currently enrolled students are the only ones allowed access, this rule is not violated).
13. Technological measures must be employed that prevent retention of the copyright works and unauthorized further dissemination to others.
14. Mandatory precondition: a) institutional policies on copyright usage, b) focus on education and c) notification of copyright ownership to learners
15. The “technological measures” that we employ at JCCC to help instructors meet this requirement include:
 - a. The use of the college’s learning management system (LMS) to store and disseminate online materials.
 - b. Placing the copyright works in college supported, password protected (authenticated) sites only available to students currently enrolled in the course (e.g., your college’s LMS or the non-public iTunes U site or a password protected portal).
16. There is no technology currently available that precludes students from downloading and distributing video, audio or text found even in password protected sites. See <http://www.makeuseof.com/tag/18-free-ways-to-download-any-video-off-the-internet/>.
17. We recommend that Blackboard users place a notice on their course pages/materials such as: “The materials on this course web site are only for the use of students enrolled in this course for purposes associated with this course and may not be retained or further disseminated.”
18. Because there are no effective means to avoid downloading and distributing copyright materials, the college has placed a footer on all ANGEL course pages that reads: “The materials on this course web site are only for the use of students enrolled in this course for purposes associated with this course and may not be retained or further disseminated. Further, Johnson County Community College (JCCC) requires its faculty, staff, and students to comply with the United States Copyright Act. Faculty, students and staff shall download, possess, or store only lawfully acquired copyrighted materials and use, adapt, distribute, or perform them only in ways consistent with the Copyright act, associated case law, the Fair Use principle, and the intellectual property rights of others (read JCCC’s Copyright Policy and Guidelines at http://www.jccc.edu/home/depts/003100/site/desk_ref_toc/copyright_toc.)”

Note from Mark Davis: “You’re doing just about all that you can by putting the material behind password protection. There is no bullet proof way of preventing unauthorized downloading by students. The trick is to make it hard for them to do it. Use Flash if you can & only post as little as possible. For example use just a scene from a movie instead of the whole thing. The © notice in the

footer is also good. What an educational institution has to show is that it took all prudent steps to protect the copyright owner.”

JCCC Copyright Policies & Procedures

©JCCC has published copyright information and policies on the web. The important links are:

http://www.jccc.edu/home/depts.php/003100/site/desk_ref_toc/copyright_toc/Index_Copyright

and http://www.jccc.edu/home/depts/003100/site/desk_ref_toc/copyright_toc

Additional Resources

Handouts for Copyright in Academia: Challenges and Opportunities KU Libraries Symposium held on Friday March 7, 2008: <http://www.lib.ku.edu/copyrightsymposium/>.

Teaching copyright (Right) curriculum by Electronic Frontier Foundation (EFF)
<http://www.teachingcopyright.org/>.

Copyright Alliance Education Foundation <http://www.copyrightfoundation.org/curriculum>

Wikipedia on Fair Use http://en.wikipedia.org/wiki/Fair_use

Discussion of Society for Cinema and Media Studies (<http://www.cmstudies.org/>) new set of best-practices guidelines for fair use
<http://www.insidehighered.com/layout/set/print/news/2007/11/16/fairuse>

Delicious tags on Copyright assembled for Spring 2009 C2C Forum <http://tinyurl.com/njgcsj>

Types of Musical Copyright <http://www.bmi.com/licensing/entry/533606>