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A Primer on Copyright and Fair Use

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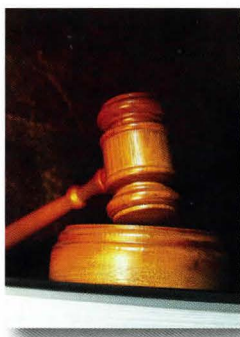
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A Primer on Copyright and Fair Use

By Ann E. Biswas, M.A., and Charles J. Russo, J.D., Ed.D.

The complex, evolving laws governing copyright and fair use are muddled by the rapid growth and use of technology in schools.

One student creates a video for class using a Lady Gaga song. Another puts together a PowerPoint presentation about the Vietnam War using images she found online. A third student adds a link to a YouTube video in a blog post for an English class.

One teacher photocopies and distributes articles from a national newspaper. Another teacher records a television documentary at home and shows it to her class.

Did those students and teachers violate copyright law?

The complex, evolving laws governing copyright and fair use are muddled by the rapid growth and use of technology in schools, yet it's an area about which school business officials and other education leaders should have some basic knowledge.

Copyright Basics

U.S. copyright law is designed to address two competing interests: the creators' rights to protect their creative works and the public's need to access and use creative works. It applies to published and unpublished original works that are fixed in a tangible medium of expression. These works include the following (17 U.S.C. § 102[a]):

- Literary works
- Musical works, including accompanying words
- Dramatic works, including accompanying music
- Pantomimes and choreographic works
- Pictorial, graphic, and sculptural works
- Motion pictures and other audiovisual works
- Sound recordings

Copyright protection does not extend to "any idea[s]" (17 U.S.C. § 102[b]) or facts.

Over time, the courts have differed over the meaning of what constitutes original

works and when works are fixed in tangible form. In *Feist Publications v. Rural Telephone Service Company* (1991), the Supreme Court weighed competing concepts of originality and ruled that protected works must be original to authors and must possess "at least some minimal degree of creativity" (p. 345). The Court explained that no one can claim originality of facts, which are discovered as opposed to created, specifying that "facts are not copyrightable" (p. 344). The Court added that compilations of facts can be copyrighted if works are compiled and arranged in a new and unique way.

In *Feist*, the Supreme Court found that it matters little how much hard work goes into making something new, such as when students create projects using factual information from other sources. According to the Court, what does matter is how original and transformative the new works are. At the same time, the Court defended the rights of users, pointing out that "copyright assures authors the right to their original . . . expression, but encourages others to build freely upon the ideas and information conveyed by a work" (*Feist* 1991, pp. 349–50).

After works are created, they are automatically protected; creators do not need to file forms to apply for copyright protection as was common for decades. However, works must be fixed in their tangible form, a notion that has been problematic for the courts. Fixation occurs "when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration" (17 U.S.C. § 101).

The Fourth Circuit considered the issue of fixation in *United States ex rel. Berge v. Board of Trustees of the University of*

Alabama (1997), indicating that student abstracts, notes, and drafts are copyrightable because they are in a fixed and tangible medium. That means that copyright protection automatically attaches to student work, such as art projects, blog posts, video programs, Websites, reports, and even their written notes and drafts. Likewise, teachers' notes, lesson plans, original activities, and other materials are copyrighted the moment they are created. Work does not need to be published or posted to be copyrightable.

Much confusion has arisen about what constitutes fair use in today's media-rich classrooms.

The length of copyright protection keeps expanding, most recently with the Sonny Bono Copyright Term Extension Act of 1989. Now, works created after January 1, 1978, are protected for the lives of their authors plus 70 years; for corporate authors, copyright is the shorter of 95 years from a work's first publication or 120 years from when it was created. For works created before 1978, the term is whichever is shorter: the life of the author plus 70 years or December 31, 2047 (17 U.S.C. § 302).

Fair Use

Perhaps no change in the law affected education more than the 1976 Copyright Act, which established the fair use doctrine. Fair use is a limitation on copyright law that generally allows individuals to use copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" (17 U.S.C. § 107).

Unfortunately for educators, the act does not definitively define fair use. Moreover, because it was written before the advent of personal computers and the Internet, much

confusion has arisen about what constitutes fair use in today's media-rich classrooms.

Instead of providing a litmus test for fair use, Congress suggested four factors for the courts to use on case-by-case bases when deciding whether situations qualify as fair use.

Under fair use, individuals who wish to use copyrighted material must consider the following:

- The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use on the potential market for or value of the copyrighted work.

The fact that a work is unpublished does not negate a finding of fair use if the finding is made based on consideration of all four factors (17 U.S.C. § 107).

As challenging as it may be, because courts weigh all these factors when disputes arise, it is essential for school boards to have policies in place that address these key points.

Digital Millennium Copyright Act

The Digital Millennium Copyright Act allows teachers to incorporate "short portions of motion pictures into new works for the purpose of criticism or comment" (37 C.F.R. § 201.40) while creating new protections for copyright holders that use technical protection measures on their digital works. Allowable uses under this exemption include using copyrighted material in documentary films and noncommercial videos, as well as showing audiovisual works in film and media classes.

Not surprisingly, the only way to ensure correct use of copyrighted materials is to obtain permission by contacting copyright holders directly or by visiting the Copyright Clearance Center at <http://www.copyright.com> to obtain additional information on how to do so.

TEACH Act

Aware of the growing reliance on online distance education via the Internet and cyberschools, Congress enacted the Technology, Education, and Copyright Harmonization Act of 2002, expanding copyright exceptions for educational and library users. The TEACH Act expands fair

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use by affording distance-learning educators easier access to copyrighted materials as long as school boards meet the act's key provisions, all of which are readily achievable. Schools must (1) remain accredited and not for profit, (2) develop and enforce copyright policies, (3) ensure that students and staff are aware of their policies, (4) install safeguards to protect copyrighted materials from external dissemination, and (5) limit the use of copyrighted materials to reasonable, mediated instructional use for classes.

Policy Recommendations

To ensure that education users comply with the law, especially regarding fair use, school business officials should make sure that district policies include the following 10 provisions with regard to educators:

Ensure that works are transformative, meaning that users should recontextualize and repurpose works as much as possible in adapting them to their own usages.

Rely on published rather than unpublished works. Although the courts are inconsistent on this point, they generally provide greater

protection for creators regarding who can use their works and the circumstances under which they may do so.

- **Use factual rather than artistic or fictional works as much as possible** because facts cannot be copyrighted.
- **Keep copied portions of works to a minimum.** Avoid using the essence of works no matter how small excerpted portions may be.
- **Be careful not to diminish the market value or the potential income of copyright owners when using materials.** This provision can be met by restricting copies to one per student.
- **Credit sources and include copyright notices on reproduced materials.**
- **Obtain written permission from students and their parents if you wish to use student work in teaching or scholarship.**
- **When in doubt about copyright and fair use, seek permission.**
- **When dealing with distance learning, incorporate the additional requirements of the TEACH Act into provisions, such as making sure safeguards are in place**

protecting copyrighted materials from external dissemination and limiting their use to reasonable, mediated instructional purposes.

- **Disseminate policies in teacher and student handbooks as well as via professional development sessions** to ensure that all users are well informed about the limits on how they can use fair use and copyrighted materials.

Conclusion

In light of the rapid rate at which technology has changed the way schools operate, copyright and fair use combined are one more important area on which school business officials and other education leaders must focus some of their attention.

References and Resources

Code of Federal Regulations (CRF) as cited.

Copyright Act, 17 U.S.C. §§ 101 *et seq.*

Digital Millennium Copyright Act of 1998, 17 U.S.C. §§ 512, 1201–5, 1301–32, 4001.

Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991).

Sonny Bono Copyright Term Extension Act, 17 U.S.C.A. §§ 108, 203, 301–4.

Technology, Education and Copyright Harmonization Act, 17 U.S.C. 101 §§ 110, 112, 802.

United States ex rel. Berge v. Board of Trustees of the University of Alabama, 104 F.3d 1453 (4th Cir. 1997).

U.S. Copyright Office. 2009a. Fair use. <http://www.copyright.gov/fls/fl102.html>.

———. 2009b. Reproduction of copyrighted works by educators and librarians. Circular 21. <http://www.copyright.gov/circs/circ21.pdf>.

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