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COPYRIGHT

COPYRIGHT AND DISTANCE EDUCATION

JANIS H. BRUWELHEIDE

Professor, College of Education, Health and Human Development Department of Education, Montana State University Bozeman MT 59717 Internet: iedjb@msu.oscs.montana.edu

This paper was written in early spring of 1996 and is current as of that time. The Conference on Fair Use hearings have since concluded. An interim report with recommendations is available for review and comment through May 19, 1997, at the US Patent and Trade Office web site (http://www.uspto.gov). The area of intellectual property, particularly copyright, is dynamic and changing constantly. Readers should monitor developments through web sites such as Fair Use Site (http://fairuse.stanford.edu) and the Copyright Management Center at the University of Texas highlighted at the Fairuse site.

Abstract—Distance educators are concerned about copyright and unsure about how current Copyright Law applies, since many areas are gray in this environment. No guidelines currently exist, although there is discussion, and scenarios have been developed by the Working Group on Intellectual Property Fair Use Conference Subcommittee on Distance Learning that merit consideration. This paper reviews copyright concerns and issues for those involved with distance education, presents suggestions, and highlights resources available to assist readers on the subjects of copyright and intellectual property.

OVERVIEW

Distance educators are increasingly concerned about copyright and frustrated by the difficulty of compliance with a law that seems to ignore distance education applications. Information about copyright and distance education is not plentiful and appears to conflict with the responsibility to provide access to information. Distance educators must abide by copyright law while simultaneously ensuring access to information and using technologies appropriately. The dilemma occurs in understanding copyright implications and what can and cannot be done in a distance education setting. A great deal of misunderstanding exists even though the current Copyright Act was

implemented in 1978 [1]. New technologies make it easy to perform tasks not considered to be fair use and this ease contributes to confusion. A perception that anything copied for educational applications can be considered fair use is *not* correct. However, many situations are legal, or permission may be obtained by request. The problems are to decide where fair use begins and ends and how to protect rights of distance educators as well as copyright owners. These are not easy tasks since technology continues to become sophisticated and the market for distance education is growing rapidly. The growth, as well as high profile nature of some distance education technologies, makes telecourses more visible than traditional classroom settings and perhaps more open to detection. A lack of clarification and case law concerning distance education applications of fair use and face-to-face instruction further complicates the issues. Legal opinion varies on applications to distance education settings.

CHALLENGES FOR DISTANCE EDUCATORS

Not only do distance education providers have to acquire the rights *to use* materials in a telecourse, they also may have to acquire different rights to *transmit* the course over various types of networks. Telecourse developers must think ahead about possible uses, prior to course development and acquire appropriate rights and licenses. In order to deal with student and guest lecturer issues, many distance education providers are making permission to be videotaped a condition of registration in a telecourse. The various possibilities of media formats that may be used, combined with live lectures, preexisting materials, and new material create an environment in which copyright questions and confusion multiply.

A general rule to follow is to ask whether copying an item is being done to escape purchasing, renting, or licensing use of a legal copy. An affirmative answer indicates that the use may not fall within fair use guidelines. The current Copyright Act and guidelines that have been developed provide guidance for using copyrighted materials in nonprofit educational institutions. However, several areas now exist that need clarification in light of new technologies. One is face-to-face instruction. Now that technologies, specifically interactive video, allow instructors to be face-to-face electronically and to be interactive with students in several sites, the old, literal definition does not apply completely. Is the problem the transmission or the possibility of illegal copying at a site? These areas currently need revisiting for clarification in a distance education setting.

OVERVIEW OF THE COPYRIGHT LAW AND ISSUES: PUBLIC LAW 94-553, TITLE 17, 1976 [2]

What is Copyright and Why is it Important?

The U.S. Constitution grants Congress the authority to regulate copyrights. Such protection is important in order to ensure authors protection for their creative work during a specified time and simultaneously ensure societal rights to access to information. Copyright protection generally does not protect ideas, per se, but does protect the format of the expression of ideas. This protection begins at the moment of creation whether registered or not. For published or unpublished works created on or after January 1, 1978, copyright protection begins at creation and lasts for fifty years after the author's death. Different time limits apply for works created prior to 1978. Works for hire, pseudonymous works, and anonymous works have copyright protection for seventy-five years from first publication or 100 years from the year of creation, whichever expires first. Upon expiration of copyright, the work passes into the public domain where it may be used freely [3]. Registration is filed

with the Copyright Office in Washington, D.C. The owner of a copyright is granted exclusive rights, which are delineated in the following paragraphs concerning Section 106 of the law. Violations of these rights may result in legal action for copyright infringement and carry severe penalties.

Some additional pieces of legislation may be relevant to distance education and copyright. The first piece, "the computer amendment," is actually part of the 1980 Patent Law. Section 117 of Public Law 96-517 [4] amended the Copyright Law in order to allow the owner of a copyrighted computer program to make or authorize the creation of an archival copy (backup copy) of a program, which is to be stored in case of damage to the original. However, the individual copyright holder may state that one should store the original and use the copy or may even provide additional rights to purchasers. This amendment to the Copyright Law allows limited copying for creation of a backup copy, addition of features to a program if the program is for one s own use, and the making of adaptation for the owner to use the program correctly. The copy is to be destroyed if the original is sold or given away. Thus, owners may make an archival copy to use in case of damage to the original. The archival copy is not a second copy and must not be used as one.

Another piece of legislation is called the Copyright Remedy Clarification Act, PL 101-554 [5], passed in 1990. The Act stated that governmental agencies can be sued and also overruled the Constitution's 11th Amendment, which deals with sovereign immunity. This Act means that an agency can be sued as well as individuals. In other words, a university can be sued and individuals also named in the suit.

Authors of the 1978 Copyright Act tried to include language that would encompass forms of expression then known, as well as those later to be developed. This task was not easy considering the current technological environment. The wording used includes language such as "works . . . fixed in any tangible means of expression, now known or later to be developed, from which they can be perceived, reproduced, or otherwise communicated, either directly, or with the aid of a machine or device" [6]. Works of authorship include:

- 1. literary works;
- 2. musical works, including accompanying works;
- 3. dramatic works, including accompanying music;
- 4. pantomimes and choreographic works;
- 5. pictorial, graphic, and sculptural works;
- 6. motion pictures and other audiovisual works; and
- 7. sound recordings.

Newer forms of technology such as CD-ROMs, video cassettes, databases, and computer programs fall into these protected areas. Readers should remember that the *medium* is not the issue; the *copying* of copyrighted works is the issue.

Absence of copyright notice does not mean that the work is automatically in the public domain. Since March 1, 1989, when the United States joined the Berne Convention, affixation of the copyright notice has not been mandatory. One must assume that if an item is "fixed," it is copyrighted unless told otherwise. Internet materials are included. Copyright notice information usually appears on the title page or general media designated substitute, such as title frame or credit frame on a videocassette recording. Illustrations in a work, such as a collection of photographs, are possibly individually copyrighted, requiring that the copyright owner of each photograph be contacted for permission.

Exclusive Rights of Copyright Holder (Section 106)

The copyright owner has certain exclusive rights according to the current Act. The copyright owner may sell or give away these rights, whether in whole or in part. Unless the copyright holder grants permission, other uses of copyrighted material are an infringement. It is illegal:

1. To reproduce the copyrighted work in copies or phono records; 2. To prepare derivative works; 3. To distribute copies or phono records of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; 4. In the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures and other audiovisual works, to perform the copyrighted works publicly; 5. In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Definition of Fair Use and Factors to Determine Eligibility (Section 107)

The copyright law contains provision for limited use of a copyrighted work without obtaining the copyright holder's permission. This use includes reproduction of portions of the work and is called "fair use" for the purposes of criticism, comment, news reporting, teaching, scholarship, or research. Four factors are applied to determine whether use of a copyrighted work is a "fair use":

- 1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- 2. The nature of a 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.

While all factors are supposed to be considered equally when deciding whether a use is fair, the court system has demonstrated consistently that the fourth factor appears to be weighted more heavily.

The 10% Rule

There is no such "rule," though many people wish there were one. A clause in Section 107 that is a continual source of friction is number 3: the amount and substantiality of the work. The guidelines for classroom copying and music suggest that copying 10% or less of the total work is "fair use." However, if the amount is a "substantial portion" or represents the essence of the work, which might affect sales if copied and distributed, then the use is not considered to be "fair use." It is not prudent to apply these guidelines to various forms of multimedia materials or anything else until appropriate guidelines are developed.

Copyright owners hold the exclusive rights to reproduction, but they may give permission to use a work that exceeds fair use limits, if asked or remunerated. The guidelines for classroom copying provide minimum guidance to use copyrighted materials in an educational setting. Users should affix copyright identification to copies. When in doubt, the distance educator always may ask for permission and explain the purpose. The use may be granted or negotiated, subject to specific limitations and, perhaps, a fee payment.

Photocopying and Facsimile (Fax)

Digitizers, scanners, and facsimile machines now offer copying ability, in addition to the photocopier. Under the law, these copying technologies are viewed the same as photocopiers. All machines capable of making copies, not just photocopiers, should be labeled with the copyright notice. A fax copy of an article is considered to be the same as a photocopy. A prevalent abuse of copying devices by many educators has been the illegal creation of anthologies, both print and nonprint.

Current opinion indicates that it is not considered fair use to create anthologies, defined here as course packs, or collections of copyrighted works, without permission, regardless of the media format. It would be permissible, however, for distance education students to obtain required readings from interlibrary loan procedures. Another idea might be to secure a photocopying business service to prepare the packet and pass on the costs of photocopying and fees to the students. The commercial service would acquire necessary permission to duplicate the materials. Using this approach could cost the student a bit more to obtain course materials at a distance. However, this cost for convenience might be offset by travel and other considerations if the interlibrary loan option is not viable. Permission from the copyright owner to extend the privilege could be requested. Another idea would be to establish a reserve area for remote classes at a school or public library setting. Many libraries are experimenting with electronic support, which may be an option if licensing agreements permit.

Face-to-face Teaching Activities (Section 110)

One of the most frustrating parts of the current Act for distance educators is Section 110. "Face-to-face" teaching activities is a term applying to a part of the Act that exempts instructors and pupils involved in "face-to-face" instruction in a nonprofit educational institution from copyright liability. This permits display or performance of a work in class. This exemption assumes that copies of audiovisual works used are lawfully made copies or originals. However, profit making institutions usually are excluded from using copyrighted materials [7]. According to the House Report, "Broadcasting or other transmissions from outside locations into classrooms . . . whether open or closed circuit" is prohibited [8]. The students and teacher must be present simultaneously in the same general area, although not necessarily in sight of each other. Some legal entities have interpreted this to mean that the activity can occur on the same physical plant as long as the buildings are joined together. Entertainment and recreation applications are excluded from using Section 110.

The report uses the terminology that the instruction must take place "in a classroom or similar place devoted to instruction which is being used as a classroom for systematic instructional activities" [9]. Under these conditions, authorization is given to students and instructors engaged in face-to-face instructional activities to use copyrighted works. When in doubt, an instructor should ask permission. However, permission is not extended to transmitting these materials via networks such as interactive video or satellite without the copyright holder's approval. Attorneys for various distance education organizations within higher education are very divided on these issues. Readers should ask their local counsel for clarification and support and make sure that a policy statement exists. Nothing in this section of the Act gives permission to tape at a remote site for archival or review purposes.

Off-Air Recording Guidelines

The Guidelines for off-air recording of television programs were introduced into the Congressional Record in 1981 [10] and are not part of the Act. The guidelines should be used carefully and not liberally applied, but they are considered to be a "safe harbor." The guidelines apply only to broadcast programs transmitted to the general public without charge. Use of the programs is limited to educational applications. Premium channels or cable fee services, such as The Disney Channel

J.H. BRUWELHEIDE

or HBO, are not included in the guidelines. It is assumed that satellite transmission could be taped under these guidelines, as well. However, transmission of a program via a closed circuit television system should not be done without an appropriate license from the copyright holder.

A concern with many distance learning situations is the possible recording of class, i.e., via interactive video or satellite transmission at either site. Such recording might be for the purposes of critiquing the session or viewing by an absent student. While many materials that might be recorded could come under the fair use provision, recording the transmission of copyrighted videos, films, or other audiovisual media would not be allowable without permission or licensing.

Performance Versus Classroom Use

Confusion concerning fair use in an educational setting often occurs concerning classroom use and how this application differs from a performance. A use that is often legitimate in a classroom is not permissible in another setting without obtaining permission or licensing. An example would be an instructor using background music to accompany a Powerpoint presentation. Such use in a traditional class might fall under fair use provisions. If the instructor takes his or her presentation to a national conference session, the use changes into a public performance and the music and materials used have to be cleared. The same principle applies to creating "anthologies" from the Internet, scanned images, videodisc, CD-ROMs, and videotapes. The problem escalates when a classroom presentation is copied for distribution (free or not) or placed in a media center. A related issue is use for instruction as opposed to entertainment. Often a classroom use changes into a performance for entertainment when it is removed from the classroom.

Videocassettes Labeled "Home Use Only"

Section 107, fair use, can be applied also to use of videocassettes labeled "home use." The use, however, must be for instruction and not entertainment. Videocassettes sold for educational purposes, which do not have "home use" restrictions, may be used for entertainment, which explains the extra cost for performance rights. It is not considered fair use to show either version over a network without permission. This particular area is one of the most sensitive to video producers. Some believe that educators have been too cavalier about use of home use-labeled videocassettes in elementary and secondary school, as well as in higher education. "Home use only" restriction is not settled law and there is considerable debate over the matter.

THE FUTURE

In September 1995, the "White Report" [11] was issued and subsequently introduced into legislation. No recommendations were made for distance education, but guidelines may be developed based on the scenarios that follow. The NII Copyright Protection Act of 1995 [12] is under discussion as of this writing and has been described as very proowner. Controversy is rampant and no one can predict the outcome. A recent article by Pamela Samuelson [13] summarized many problems with the report and subsequent legislation. A significant proposed change is the addition of a sixth right to the copyright owners giving them control of digital distribution. Fair use rights usually would be eliminated whenever a use could be licensed.

Multimedia guidelines for using copyrighted materials are nearing agreement. Readers will want to consult sources listed on the Internet as well as the professional literature to keep current in this rapidly changing area.

SCENARIOS

During the fall of 1994, individuals convened in Washington, D.C. as part of subcommittees to discuss fair use issues concerning comments and recommendations made in the Department of Commerce "Green Report" [14]. One subcommittee was charged with examining distance learning (a term used to mean distance education) issues. A series of issues was identified that required further discussion and examination. Subsequently, issue papers were developed that defined topics, explored present as well as future uses, and described applications likely to emerge on the information highway. The papers were developed as a foundation for understanding terminology and uses and to provide a framework for future discussions concerning development of fair use guidelines for an electronic environment. At the time of this writing, no action has been taken beyond this phase. Readers must remember that the scenarios are not to be construed as legal guidelines; they are being used for discussion purposes only at this time.

The material that follows was pulled from the Association of Research Libraries gopher server [15]. Readers may wish to read the issues papers archived there. The scenarios are from the Information Infrastructure Task Force Working Group on Intellectual Property Fair Use Conference Subcommittee on Distance Learning. According to the subcommittee, the following scenarios probably are fair use:

- 1. A teacher has been assigned to a 30-person classroom for her popular basic geology course, but 60 students have registered. Half the students meet in an "overflow" room with a camera and other equipment linking the rooms.
- 2. For a distance learning class, a faculty member uses computer screen displays from a commercially-produced software package that the educational institution has purchased. Students are registered for the course and they receive the transmission in community college classrooms dispersed throughout the greater metropolitan area. The course is videotaped and will be used in subsequent semesters also for distance learning.
- 3. The library reserve room provides to the media resource center in each location where a distance learning course will be received around the state a copy of the reserve materials assigned to students in a class.
- 4. A public university offers college credit for courses through distance learning opportunities. The music appreciation course necessitates the playing of music (much of which is copyrighted) and the display of the sheet music for the class. Students are registered for the course and the course is received in the students homes.

These scenarios probably are not fair use:

- 1. The college offers free sunrise semester courses. There is no initial registration for the course; students are officially enrolled only when they submit the first three homework assignments. The course is contemporary American culture and the faculty member uses excerpts from fiction, clips from recorded television programs, and clips from purchased videotapes. Students receive the transmission wherever they choose.
- 2. A community college teacher contracts with a private company to provide industrial safety education courses for its employees. The faculty member uses copyrighted materials in the course, which is provided through distance learning. Transmission is received on-site at the company.
- 3. A faculty member develops a video course in art history that he decides to market as a package to nonprofit educational institutions for their use in distance learning teaching. The

video course contains displays of copyrighted slides of works of art, excerpts from broadcast television, programs, two copyrighted motion pictures performed in the entirety, and copyrighted music is used as background for several presentations of lecture and other materials. Colleges purchase the video course and plan to use it either in its entirely or parts of it in distance learning courses to be received in traditional classrooms around the state.

These scenarios may not be fair use under the current law, but perhaps should be:

- 1. A college course is offered on campus, but also is broadcast to seven branch campuses. During the course, the instructor plays a videotape the library has purchased. The videotape is central to the teaching content for that day's class. The broadcast is received only in the several locations in traditional classrooms. Students seeing the performance of the videotape are registered for the course. No videotaping is permitted except under the off-air guidelines. The course, with exactly the same content and use of copyrighted materials, will be presented in subsequent semesters.
- 2. A faculty member uses presentation software to display original material to his class. He also scans copyrighted works, including graphs, charts, and cartoons and displays those to the class using the software. The transmission is received at various sites in the region.
- 3. In a modern drama class offered via distance learning, the professor and several students at the home campus perform the first three scenes of act one of a copyrighted play. The broadcast is received by students, all of whom are registered for the sources. Some students receive the broadcast in their homes, ten students receive it in a classroom at the state prison, and five students receive the broadcast in a classroom facility at the factory at which they work.
- 4. A teacher demonstrates how to use various word processing programs to her class. The software is licensed for her computer. The screen displays are received by each student in a distance learning site on their personal computers, which are linked to the teacher's via a network.
- 5. A community college presents a series of fifteen one-hour sessions that, taken together comprise a course on modern American fiction. Faculty members teaching the various sections use a variety of copyrighted materials including literary works, computer software, videotapes, and illustrations. The course is broadcast for reception anywhere.

SUGGESTIONS

Until guidelines for distance education are available, what can be done to avoid problems? Those involved in the delivery and support of distance education may wish to consider these suggestions.

- 1. Engage the support of the educator's governing body to develop a copyright policy and a manual and make sure it is adopted by the governing body. Work with a small team consisting of representatives from various factions.
- 2. Provide training to develop awareness and explain the policy.
- 3. Ask permission from copyright holders.
- 4. Understand the copyright provisions, but realize that some educational copying is legitimate.
- 5. Place copyright credit on legally made copies.
- 6. Think about the setting in which the use will occur.

- 7. Know how to help instructors locate legitimate alternatives (i.e., selection aids, sources of clearing services, clip art clearinghouses).
- 8. Develop a form letter for requesting permission for various media formats from copyright holders and develop a centralized tracking system
- 9. Label equipment that can be used for copying with restriction notices.
- 10. Maintain a paper trail.
- 11. Facilitate return of permission slips by including two copies and a self-addressed envelope. Ascertain the appropriate party who can grant permission and address the letter accordingly.
- 12. Think ahead and anticipate all possible problems before designing and distributing a telecourse. Conduct an "audit."

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- 15. Association for Research Libraries' online resources can be found on ARL's Web site at: URL: http://arl.cni.org or ARL's gopher at: URL: gopher://arl.cni.org.

APPENDIX

COPYRIGHT RESOURCES

Agencies: Association for Information Media & Equipment (AIME) P.O. Box 1173 Clarksdale, MI Phone: 601-624-9355 Fax: 601-624-9366. Video and sample copyright policy packet available. American Library Association—Washington Office 110 Maryland Avenue, NE Washington, D.C. 20002 Phone: 202-547-7363 The Association for College and Research Libraries has a Copyright Committee. ALA has an ad hoc subcommittee on copyright.

Association of American Publishers, Inc. 1718 Connecticut Avenue, NW #700 Washington, D.C. 20009-1148 Phone: 202-232-3335

Cable in the Classroom 1900 North Beauregard St. Suite 108 Alexandria VA 22311 Produces a magazine and maintains information concerning copyright for cable programming.

Copyright Clearance Center, Inc. 222 Rosewood Drive Suite 910 Danvers, MA 01923 Phone: 508-750-8400

Copyright Office, Library of Congress URL: http://lcweb.loc.gov URL: http://www.loc.gov URL: gopher://marvel.loc.gov and select copyright

Motion Picture Licensing Corp. 5455 Centinela Aveneu Los Angeles CA 90066-6970 Phone: 1-800-462-8855 or 310-822-8855 URL: http://www.mplc.com

Software Publishers Association (SPA) 1740 M Street, NW Suite 700 Washington, DC 20036-4510 Phone: 202-452-1600 or 1-800-388-7478

U.S. Copyright Office. Library of Congress
101 Independence Avenue
Washington, DC 20559
Public Information Office Phone: 202-707-3000
Forms Hotline: 202-707-9100 (Number 21 is the educational circular)
Many forms and circulars are available via the Internet as is other information from the Copyright Office.

RESOURCES AVAILABLE VIA THE INTERNET (SELECTED LISTING)

General Resources for Users:

There are a variety of materials dealing with copyright available for information or downloading. Listed below are selected sources (current as of April 1996). Gopher servers and World Wide Web sites are provided. American Library Association URL: http://www.ala.org URL: gopher://ala.org Association of Research Libraries URL: http://arl.cni.org URL: http://arl.cni.org Coalition for Networked Information URL: http://www.cni.org/CNI.homepage.html There are links to the page on the Coalition s Gopher server and readers can access the CNI-Copyright list and archive this way.

Copyright Management Center

URL: http://gold.utsystem.edu/OGC/IntellectualProperty/cprtindx.htm

This is an excellent source of information and policies for the University of Texas system.

Digital Future Coalition URL: http://gurukl.ucc.american.edu/dfc/dfc.html

Electronic Copyright Management System URL: http://www.cnri.reston.va.us/home/cstr/LoC.html

Electronic Frontier Foundation URL: http://www.eff.org URL: gopher://gopher.eff.org:70/

Electronic Reserves Clearinghouse/Jeff Rosedale URL: http://www.cc.columbia.edu/[00ff]7Erosedale/ This site is a resource for designers of electronic reserves systems. Copyright information is also available.

National Multimedia Association URL: http://www.NMAA.org

U.S. Patent and Trademark Office URL: http://www.uspto.gov/ URL: gopher://eff.org Multimedia Primer on Copyright is here.

Organizations Representing Owners Rights Copyright Clearance Center URL: http://www.openmarket.com/copyright/ ASCAP URL: http://www.visualradio.com/ascap/

Broadcast Music, Inc. URL: http://www.bmi.com Harry Fox Agency URL: http://www.nmpa.org

Motion Pictures Licensing Center URL: http://www.mplc.com

Software Publishers Association URL: http://www.spa.org/

NOT COPYRIGHT, PER SE, BUT GOOD SOURCES ON DISTANCE EDUCATION

Western Interstate Cooperative for Higher Education URL: http://www.wiche.edu

Distance Education Clearinghouse, University of Wisconsin Extension URL: http://www.uwex.disted/home/html

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