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LEGAL ISSUES & LLT



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Update on the Kirtsaeng vs. Wiley case: I went on and on about this case last time (*IALLT Journal* 42.2), when the ruling was pending in the Supreme Court. The decision, announced on March 19, 2013, is very favorable to language teaching (and libraries, and everybody who wants to buy foreign books and media): the majority opinion was that where a legal copy of a copyrighted item was manufactured does not affect what the first owner of that particular copy can do with it. It can be resold, loaned, or subjected to Fair Use—or shown in the classroom. Now, today's topic:

CLASSROOM USE OF MEDIA

The law gives copyright proprietors a number of exclusive rights: to reproduce a work, to perform or display it publicly, or to adapt it—for example,

by editing it, translating it, or adding subtitles. Fair Use (Title 17, Section 107) allows a person some exceptions to these rights—provided the use is nonprofit and/or for a good purpose, and/or the amount used is not too large, and/or the copyright proprietor is not losing much money because of this free use; also, the more creative the work is, the weaker the argument for Fair Use. All these factors come into play in deciding whether a particular act of copying or displaying is legitimate Fair Use. For example, even if the use is commercial, it might still be justified if the amount used is very small and other factors favor it.¹

As teachers, though, we expect to be able to exploit at will all kinds of copyrighted material for students, perhaps by copying pages from the textbook for exams, illustrating an exercise using images grabbed off the web, editing a text or video to make it more accessible to students, or simply by playing a film or showing slides in class.

Fortunately, Congress is sympathetic. U.S. schools get special exceptions (Title 17, Section 110) to use media without asking permission from the publishers. Most other countries do not have these options. It is acceptable in the U.S. to make “multiple copies for classroom use” of printed material and also to “perform or display” various types of media for an assembled class.

In 2012, Canadian law was changed to allow a teacher to play a legal copy of a video in class without asking permission.² Consider the impact of this change: up until then, whole businesses depended on buying up Public Performance Rights to videos that schools might need, and then selling the schools the right to show that film in class;³ schools, in the meantime, needed to budget to pay for these rights, and if the money wasn't there then the teacher would have to find a

¹ For example, Jon Stewart's *Daily Show* makes free use of very short clips or images from “factual” programs (i.e. not creative) for satirical purposes. See the “Fair Use Checklist” at the Columbia Libraries Copyright Advisory Office, <http://copyright.columbia.edu/copyright/fair-use/fair-use-checklist/>

² The Canadian term equivalent to Fair Use is “fair dealing.” This change is so new and radical that most guides to fair dealing do not include it. Kevin Smith of Duke Scholarly Communications notes the event in his blog for July 16, 2012, <http://blogs.library.duke.edu/scholcomm/2012/07/16/redefining-research/>

³ The website of one such company, Criterion (not the same as the Criterion which issues DVDs of classic films), still says on 5/20/13 “Elementary Schools, High Schools, Camps, Resorts, Hospitals and Prisons are all required to have a Public Performance License if they are showing movies in the classroom; in a common room, for profit or for non-profit; for educational or entertainment use.” http://www.criterionpic.com/CPL/lcl_movielicence.html. The new law, however, allows schools “the performance in public of a cinematographic work, as long as the work is not an infringing copy,” when this takes place on school premises for an audience primarily of students and/or teachers, for education or training. Section 25.9(d), <http://laws-lois.justice.gc.ca/eng/acts/C-42/page-21.html#docCont>.

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different way of presenting the material. We in the U.S. have had this right all along, under Section 110,⁴ and now the Canadian legislature decided to disrupt an established commercial realm to give it to their teachers. This tells us how important education is to society in our two countries: education can be *more important than commercial interests*.

Since 1976 various committees of educators and publishers (or other groups representing copyright proprietors) have tried to formulate guidelines for educational use.⁵ Such guidelines provide a “safe haven”: if you don’t go beyond them, you have a good defense in court. Some of the elements they point to for print materials are

- Brevity. How many pages of a book can be turned into handouts?
- Spontaneity. The copyrighted material should not become a regular part of the course materials without permission. Impulsive or spontaneous, but temporary, infringement of copyright for teaching is acceptable.
- Cumulative effect. Copying without permission should not substitute for purchasing individual copies of a book or anthology.

When video comes into the picture, agreements are harder to reach. The law and most parties recognize the need to show a class a film in its entirety, but if the film was recorded without permission from a broadcast, use is limited by the spontaneity guideline—the recording has to be erased after 45 days. It’s important to realize that these guidelines offer “the minimum and not the maximum standards of educational fair use.” If one abides by them, one is safe, but it may be necessary and defensible to go beyond them.

As for online materials, there is more disagreement as to the amount that can be put online for a distance education course, or for home study by students. Some rights are defined. Section 110 includes TEACH Act provisions which allow online courses to include “the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course

⁴ Some American distributors of educational films insist on charging schools a much higher price for DVDs, claiming that the price includes “classroom PPR” or an “educational license” which in fact simply allows teachers to do what is already legal under Section 110. If you have a choice between buying a cheap copy on Amazon or an expensive one from the distributor, it is perfectly legal to buy the cheap one so long as it will be used only in the classroom or loaned to teachers and students for private viewing. A license would be needed for a showing outside a class, though.

⁵ See the *Reproduction of Copyrighted Works by Educators and Librarians* circular. Print guidelines, and the quotation in this paragraph, are on p. 6; rules for using programs taped off broadcast are on p. 23. <http://www.copyright.gov/circs/circ21.pdf>

of a live classroom session.” Problem: some classroom sessions are devoted to screening entire films (for example, in film studies courses), so that the “reasonable portion ... typically displayed” is not a “limited portion.” The UCLA streaming case (see my column in *IALLT Journal* 41.2) was not a good enough legal procedure to allow the justice system to really work out this issue. However, Judge Consuelo Marshall implied, in an opinion on 11/20/2012, that if the whole dramatic film would have been viewed in the brick-and-mortar version of the class, this film may be presented in its entirety to the class online as well.⁶

Consider first what one is allowed to do in a brick-and-mortar classroom, the “face-to-face teaching” situation. **Professor X** standing in front of the students enrolled in his class can do almost anything for the duration of the scheduled class period. X can show a whole movie (using a legal copy), hand out copies of a short story or recent play for students to read aloud in class, play any audio recording, leaf through an art book on the overhead projector. Behind this generosity of the law is an understanding that professors do not want to waste precious class time on anything that does not contribute strongly to students’ mastery of the material. The “classroom use” concept ensures that copying, display, and performance are necessary for learning.

Professor Y wants to put together a film festival from school-owned DVDs without paying for public performance rights, and post songs by her favorite Spanish pop singers which she has subtitled with the lyrics on YouTube for students to listen to, and xerox half a book for her students’ homework because that book is just too expensive for them to buy. All these activities are educational but they take place *outside the classroom*, and in the first two cases they are not even directed primarily at students in her class. So Professor Y is not protected by Section 110. She has to abide by the rules of Fair Use, which limit much more strictly the amount of material one can copy or display, and take into account any loss of income the proprietors suffer from not being asked to license the material. She could argue that the YouTube video “transforms” the copyrighted lyrics and the copyrighted performance into a teaching tool, but if the copyright proprietors ask YouTube to take her video down, YouTube will comply.

⁶ This opinion was expressed when AIME (Association for Instructional Media and Equipment) and Ambrose Video renewed their lawsuit against UCLA for the second time; it can be viewed at <http://www.scribd.com/doc/114021241/UCLA-dismissedWithPrej-pdf> Judge Marshall’s comments in favor of UCLA are not binding in any way, though they might be taken into consideration if another case against educational video streaming is ever brought.

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Professor Z, who is teaching an online class, does not have the freedom of Professor X, though she is not as limited as Y. She can put up digital versions of copyrighted materials in her password-protected course management system, but she has to restrict the period during which they are accessible, and try to prevent students from downloading the files. She also needs to post a policy opposing copyright infringement. Moreover, if she wants to show a DVD to her students, she is not supposed to rip and stream the whole movie without permission; she may have to try to license it through the library or computing services so that her students can access it. An online classroom is much bigger, in terms of time and space, than the physical room; but Professor Z is supposed to consider just as carefully as Professor X whether a resource is important enough to spend “class time” studying it. If not, she is supposed to treat it as subject only to Fair Use, like Professor Y.

Of course, Professors X, Y, and Z may all be the same person (with some gender nudging). Educators don’t stop teaching when the bell rings for the end of class, and are excited about the possibility of giving students more options via a course management system, or of giving a larger number of potential students stimulating experiences via the Web or community experiences. “Education”—especially in languages—can’t be restricted to the old model of classroom interaction.

As the MOOC movement and Open Access models develop, the courts will have to consider new possibilities for Fair Use, and perhaps new concepts of the classroom. A recent decision in a lower court, *Authors Guild vs. HathiTrust*, vindicated as Fair Use the HathiTrust digital library, where scanned copies of books reside in a database where they can be searched (though not read) by any Web user. The Authors Guild, representing copyright proprietors, sued. Judge Baer saw the use as favoring research and scholarship so strongly that this outweighed the authors’ desire for compensation.⁷

Postscript. I drafted a column on this topic last spring, relying on principles cited by other educators or by copyright proprietors defining *limitations* to classroom use. Since then, lower-court decisions like HathiTrust and Georgia State’s “course packet” ruling, and the comments of Judge Marshall on the UCLA streaming case, have challenged some of those principles, and Canada’s extension of privileges to the classroom further heartens me. As cases move

⁷ District Judge Harold Baer’s opinion can be found at <http://www.scribd.com/doc/109647049/HathiTrust-Opinion>.

through the courts, there may be reversals, but at the moment good arguments can be made for uses that seemed at best “iffy” a year ago.

ABOUT THE AUTHOR

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ABOUT THE COLUMN

Legal Issues & LLT is a column dedicated to examination of the legal considerations of copyright, fair use and ownership within the context of language teaching and learning.