
From IALL '95

Copyright Issues for Media Decisionmakers (or, "Don't Expect Simple Answers to Complicated Questions!")

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[Editor's Note: This paper is one of two in this issue based on presentations made at the IALL '95 Conference at the University Notre Dame. The Editor wishes to express his gratitude to Ursula Williams for obtaining and presenting these articles.]

Introduction

When faculty want a program taped, or slides made, or a cassette duplicated, they aren't looking for a debate—they just want good service to support their teaching. Of course you can do the job, technologically speaking. But when should you get permission, or even refuse the job entirely?

Complex issues such as intellectual property rights are often addressed by Congressional bills that are general, not specific, in nature. The result of bills such as the Copyright Act of 1976 becoming law is that the courts, considering common *de facto* practices in the context of public interest, have to determine whether any specific action is legal. At the same time, the relentless pace of technological change is creating new specific questions far more quickly than the law or the courts can address them.

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Meanwhile, media managers must make functional decisions every day: can we perform this particular dub/scan/conversion/digitizing/copy request? We know that there are few clear "safe" areas; we are often concerned about how to approach "gray" areas; and we want to avoid clearly illegal activities on behalf of our institutions, departments, and clientele. I propose that we stop calling this decision just "copy-

right"—instead a broader perspective on intellectual property issues can help you identify what to do in specific situations. We each need to be able to say "yes" or "no" to a client, and to determine who should make the final decision on any request for media-transfer.

It All Started With Print...

In the oral tradition there was no copyright! Oral learning was meant to be memorable and repeatable, so that it could be readily passed on from person to person and generation to generation. Ideas had a power of their own, honed in the dialectic style of Aristotle or evoked through the speeches of great orators. While an idea might become associated with its originator, it was meant to be passed around. Our traditions in education are founded on similar principles, valuing the integration of the known with a thirst for further discovery.

Early printers were similarly concerned with the continuation of knowledge, offering to preserve information and ideas beyond the limits and accuracy of human memory. Gutenberg thus chose the Bible as the first project for his revolutionary printing press, giving not only fixed form to its content but also broad dissemination to the power of the written word.

It is the "fixed medium of expression", not the information or ideas themselves, that is protected under the U.S. copyright law. This is consistent with oral traditions that ideas were to be shared. Yet print media reflect the point-to-point origins of oral conversation; that is, they are by nature an indirect medium of communication between one author and one reader. The degree of difficulty involved (until recently) in reproducing printed works helped to cement in the public mind that books had a legitimate claim to copyright protection. Selling books was readily understood to be different than hoarding ideas.

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Many newer "fixed media" are by their nature one-to-many communications, such as is clearly the case with radio and television. This one-to-many model made possible by modern technological media intuitively contradicts the notion that the "broadcast" is somehow a privately-owned property, seeming instead to seek broad dissemination as with public oratory. McLuhan's admonition that "the medium is the message" reflects the inherent difficulty we have in unlinking the message, which is free, from its mode of delivery which is potentially proprietary. Thus the same court decision that affirmed the right of individuals to receive satellite signals in their homes (already a common practice) had to also affirm the right of programmers to scramble their signals.

**"Can I Do This?":
(Fill in the Blank)**

The reason copyright law alone is often an inadequate resource for making specific copying decisions is that too little is clearly either right or wrong! Both producers and consumers of media materials will agree that some things are clearly legal, and that others are clearly illegal—they just can't agree on where to draw those lines!

Meanwhile in the middle is a huge gray area. Many users, especially non-profit educators, were intended to venture into that vast chasm under the protection of fair use. Fortunately, common practice and the "public good" have been major considerations in court cases such as Sony Corp. vs. Universal Studios. You can thank this court decision for the existence of a RECORD button on your VCR today. But limiting your activities to clear safe areas, without considering other activities that might arguably constitute fair use, is in effect giving away your rights under the copyright law.

When legal issues aren't clear, ask yourself: What is the *right* thing to do? This can include the consideration of ethical, contractual, risk management, and format-specific issues that go beyond copyright alone. This broader test, in conjunction with a knowledgeable application of fair use, is extraordinarily useful in determining whether to say "yes" to a specific media production request.

Ethical Issues

Respect for intellectual property is at the foundation of the copyright concept. Each of us in a teaching environment has invested large amounts of time in structuring lessons, so we readily understand the difference between the knowledge itself and its structured presentation. Appreciation for the creative "structure" an author, composer, director, or other artist imposes on ideas in his or her chosen medium (a fixed medium of expression) should make us readily sympathetic to the artist's investment in the work. It is no great leap to agree that the artist should have some say in how that work is distributed, performed, and otherwise used. We need to admit that it may not always be *right* to copy a work without permission, and we need to weigh that into the reproduction decision. This is not simply a matter of law.

Even in a not-for-profit setting, educators are paid for their work; it is simply part of the "cost of doing business" for an educational institution. We generally extend this thinking to the purchase of textbooks as well. Commercially available media materials such as videos also need to be considered in this context, particularly where these materials may be specifically designed for schools. It is only right that the produc-

ers of these materials receive appropriate revenues to support the investments they have made in the program, permitting them to continue creating such works.

The explosion of today's convenient, low-cost technologies for every type of copying—photocopying, video dubbing, cassette duplication, and digitizing, to name a few—makes it tempting for users to bypass ethical issues and label everything "fair use" if it is not being resold. It is more important than ever to be reasonable in using media materials, even though the reproduction may be simpler than the process of obtaining permission for the materials you want to use.

Contract Issues

Often teaching materials and computer software are sold with restrictive terms in the form of contracts or licenses. These are often confused with copyrights, but are in fact a totally different area of law. Contracts may be part of an order form, appear as a shrink-wrap license, or be explicitly signed between the buyer and the seller. Whether they are subtle or explicit, they are binding and take precedence over copyright in the law!

The one advantage of contractual arrangements for media materials is that they are usually unambiguous about the rights you are purchasing. In a typical satellite videoconference, for example, you are generally given the technical data necessary for tuning in the conference at the time you license it, and taping rights may either be purchased separately or may be included in the original license. Compared to the ambiguity of an off-air taping (do you limit yourself to the Guidelines or make a fair use decision of your own?), such contracts make the decision about using the resource very straightforward.

We are generally accustomed to thinking of computer software in licensing terms, but may not always apply this thinking to other media decisions. For example, a video program labeled "home use only" may arguably be used for classroom teaching under the umbrella of "fair use", but transmitting it over a closed-circuit TV system or showing it in a student film series may require a special public performance license. This must not be construed as greed on the part of producers; their contractual agreements with writers, actors, directors, and sponsors create a complex web of rights that are legally enforceable under contract law. The courts have consistently upheld most types of contracts, including shrink-wrap licenses, and we are obliged to read and adhere to them when they exist.

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Copyright Issues

Copyright protection is extended to a work from the moment it takes on a "fixed medium of expression"; thus the lack of a copyright notice is not adequate basis for a copying decision. Under the Copyright Act of 1976, the owner of any copyrighted work is guaranteed a number of "exclusive rights" in Section 106. Among these are the right "(1) to reproduce the copyrighted work...[,] (2) to prepare derivative works...[,] (3) to distribute copies...of the copyrighted work to the public...[,] (4) ...to perform the copyrighted work...[or to] (5) ...display the copyrighted work publicly." These rights of the copyright owner are, however, subject "to sections 107 through 120", which provide dozens of limitations. For educational media reproduction the most significant of these lies in the first sentence of Section 107:

Notwithstanding the provisions of [section 106], the fair use of a copyrighted work, including such use by reproduction...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

"The courts have consistently upheld most types of contracts, including shrink-wrap licenses, and we are obliged to read and adhere to them when they exist."

This doctrine of "fair use," which judicial decisions have long recognized, was made a part of the Copyright Act. Section 107 lists four criteria which must be considered, but teachers who assert fair use need not be restricted to these criteria alone: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the 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.

Schools by their nature disseminate information and ideas, and the "fair use" provisions of Section 107 specifically recognize the overwhelming public interest in the unrestricted flow of ideas in teaching and related areas. It also places great responsibility on media users to make informed fair use decisions, while placing an obligation on institutions to make sure their faculty are equipped to make such informed decisions. The media lab staff are thus not "the copyright cops", but rather partners with faculty in media acquisition and production processes.

"Fair Use Guidelines" have also been put forward in off-air, photocopying, and multimedia areas to date. While it is well known that these Guidelines do not in themselves carry the force of law, they do represent substantive agreement by

a cross-section of industry producers and consumers as to a zone of "safe use." That is, reproduction of materials within the constraints of the Guidelines constitute a minimum standard of fair use.

Thus it becomes important for faculty, media support departments, and institutions to become proactive in copyright policy development. Before a "cease and desist" letter comes, find out what your institution will stand behind: a minimum or an assertive standard of fair use.

Risk Management

Only an open dialog can define how assertive a stance should be taken in the application of fair use as a matter of institutional philosophy. Is academic freedom best served by an aggressive fair use stance? Is the institution more comfortable in the restrictive "safe use" zones? Or is it best to ignore the issues entirely at an institutional level to avoid the public eye in hopes that no litigation will come?

It is difficult to get an institution such as a university to commit itself to policy development in the absence of litigation. Those that have done so often had risk management as a priority over academic freedom issues, reflecting the success of some producers in evoking a fear response over copyright questions. A restrictive approach that adopts the Guidelines as the maximum standard of behavior does minimize the risk of litigation for the institution, allowing it to disassociate itself from liability for more liberal faculty activities.

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Yet the indemnification of the institution from responsibility for undue financial risk can be achieved in other ways. For example, some schools are recognizing that an informed faculty should make the primary decision on any educational media reproduction. The institution's responsibility, then, is to educate the faculty on the application of fair use and to provide ongoing consultation to support this. Workshops, copyright manuals, and consultation with the General Counsel or with media support staff are examples of such commitments. If litigation arises, the school then has a firmer foundation for the "innocent educational infringer" defense, since it has demonstrated a good-faith effort to apply fair use as required by the courts. No law requires an institution to be the "copyright cop" for its faculty; that responsibility is the copyright holder's.

Ironically, when policies are being developed in higher education institutions, the greatest risk of copyright infringement is often overlooked—the use of copyrighted materials in student and faculty activities outside the classroom: semi-public showings of "home use" videos by student groups,

music for fraternity slide shows, scans of unknown origin on Web pages, or slides of copyrighted cartoons to introduce a faculty professional presentation. I'm sure you could add other risky activities to this list. Few would argue that all non-teaching activities in schools should be defended as fair use; this alone should be a motivator for the development of some institutional copyright policy.

"Risk management values can often be the final deciding factor for media reproduction..."

Risk management values can often be the final deciding factor for media reproduction even in the academic setting. Imagine, for example, a student in an English course who has to do a class presentation on character development in Othello. He decides to use clips from a video, but rather than cue up each part individually on an original (legally obtained) tape and waste class time, he edits clips together in the Media Center. Is this fair use? Arguably, yes. Is it unethical? Well, he did rent or own the tape. Risk management comes into play here: it is doubtful that any vendor would take such a case as this to court, even if it was discovered, for a loss would create a devastating legal precedent for media producers. Reasonable assertion of fair use rights carries little institutional risk, but generates great academic rewards.

Format-Specific Issues

Computer application programs are primarily protected by the contractual terms of their licensing rather than by copyright, although copyright issues might come into play when one vendor accuses another of including its "program code" in competing products. Thus no fair use defense is possible. Computer software cannot be treated with any blanket policy such as "we'll never use more than four of this at a time, even though it's installed on every hard disk in a facility, so we'll only buy what we need." Each program license must be read and understood, and a good-faith effort must be made to administer its use within the limits of that contract.

Fortunately for schools, many software vendors offer special pricing to make their products more affordable. Academic licenses may even permit a teacher to use the software on a home computer after school hours. Supplemental license packs may allow a school to install one copy on multiple machines, or the license terms may permit sharing programs over a local area network. Better yet, concurrent-use licensing permits a single installed copy to be run by multiple simultaneous users, saving tremendous disk space on each machine. Combined with application metering tools on a file server, there is no technological obstacle to "staying legal" on computer application software in a network environment.

Telecommunication laws also add restrictions over and above copyright law in satellite, cable, telephone, and other related technology areas. While U.S. telecom law recognizes as a "broadcast" those media such as television and radio that use public airwaves and require no special equipment, cable and satellite are considered private communication media with a closer kinship to telephone and cellular services. Be careful in using what you know about "broadcast" media to apply to these technologies—for example, taping from cable (telecom + copyright) is not the same as taping off-air (copyright only), and a review of your city's cable franchise agreement may be in order. And when you use satellite programming in language or other instruction, be sure you have a letter or contract on file from the program provider authorizing you to do so. Many vendors such as Deutsche Welle will gladly give permission, but you must ask.

Conclusion

The regulation of telecommunication media will continue to be a hot topic for national debate as the Information Superhighway and other manifestations of digital media continue to emerge. And new media seem to develop at a far greater rate than we can absorb the issues they spawn—the explosive growth of the Internet alone is beyond the technical comprehension of most users. As video and audio move into the digital realm, "digital duplication" brings to multimedia productions the same potential for abuse that has long been a concern about photographic scanning. High-definition television, digital video discs, and new cable-delivered interactive services are sure to raise questions of comparable complexity. And as we do our own work in an increasingly "connected" environment, from Web pages to multimedia authoring, will the copyright laws be sufficient to protect our creations?

"The complexity of any specific 'copyright' decision can seem overwhelming, but both producers and consumers have an interest in simplifying the process."

The complexity of any specific "copyright" decision can seem overwhelming, but both producers and consumers have an interest in simplifying the process. Look for new online copyright research tools, copyright clearinghouses, and improved standard procedures for obtaining permissions to become available soon as a result of this common need. And despite all the apparent complexity of intellectual property issues, non-commercial fair use copying should not be a rare occurrence in our schools. Apply all the tools you have to the final decision, and help your faculty understand how to make those decisions themselves.

As noted recently in the Saint Louis University Draft Copyright Policy (1994): "Be prudent. Be reasonable. Do not be paranoid." ■

[Editor's Note: For citation information regarding the items mentioned in this talk, as well as for additional materials on copyright, see Lynne Crandall's "Copyright Corner" column in this issue.]

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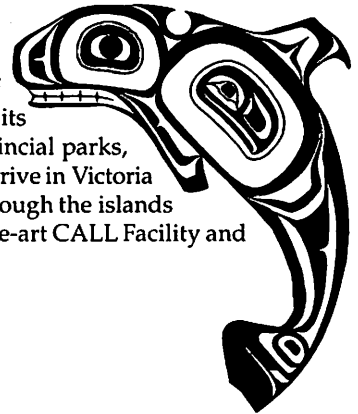
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