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## **What's Wrong with Copyright: Educator Strategies for Dealing with Analog Copyright Law in a Digital World**

by J. Patrick McGrail and Ewa McGrail

Article I, Section 8, Clause 8 of the [U.S. Constitution](#) states that "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," Congress may pass laws to protect the intellectual property of the citizens of the United States. Today, the controlling statute of copyright, [Title 17, Chapter 1, Section 102](#), covers books, graphical material, written music, manuscripts, paintings, architecture (in the form of plans), and sculpture as well as various forms of musical, dramatic, pictorial, and motion picture work and sound recordings. This title of U.S. Code comprises all of U.S. copyright law, including the [Copyright Act of 1976](#) (effective January 1, 1978).

The 1976 Act, now more than 30 years old, is the current law of the land with regard to copyright. The act gives remarkably broad protection to authors, requiring only that a creative work be fixed in a "tangible means of expression," such as a tape, disc, hard drive, or piece of paper. This means that copyright protection is sweeping, potentially covering artifacts as quotidian as e-mails, laundry lists, and love notes. Online, such activities as downloading a Web page for later reference or posting a video made while the television plays in the background, may constitute violations of copyright. Since the act was passed, the [digital](#) age has fundamentally reshaped the relationship between original works and their copies that held with the [analog](#) duplication processes of the former era ([Exhibit 1](#)). This transformation has created a host of legal, ethical, and social circumstances that the 1976 law could not anticipate.

In this article, we explore how the technological, social, cultural, and legal developments of the digital age challenge educators and students who seek to make use of copyrighted material for educational purposes and offer educators strategies for dealing with today's copyright challenges. We conclude with a call to revise the copyright law and suggest the direction that a revised copyright law should take to support responsible, creative use of both traditional and new media content, both within and beyond the physical walls of the classroom.

### **Copyright and Today's Students**

Digital transmission transforms the act of copying in two ways. First, digital technology enables mass copying; e-mail and Internet technologies allow users to send high-quality copies of graphical, visual, or musical materials to a huge number of recipients. Second, [generation loss](#) disappears (Nakano and Nakamura [1997](#)); that is, each copy is precisely the same as any other copy. Indeed, if the work in question begins in the digital realm (as is the case with today's digital audio recorders, camcorders, and cameras), not only does every copy exactly resemble every other copy, but each copy is also precisely similar to the original. In this context, the essential difference between the original and a copy—the *raison d'être* for copyright law—becomes nothing more than a legal fiction.

Educators struggle with these changes on the front lines as they are confronted with the task of educating young people about the boundaries of a copyright law that, when read conservatively, prohibits virtually all of the casual copying and [remixing](#) in which students often engage. According to Lenhart and Madden ([2005](#)), today's content creators are mostly young people who generate material for a wider Internet audience, branching outside of traditional educational venues to disseminate their content on personal Web sites, blogs, and various other kinds of sites, such as chat rooms and social networking sites. In doing this, they borrow

from the work of many other creators, choosing many different kinds of content to mix, such as cartoons, [manga and animé](#), background tracks, and movie clips, including those originally produced and those found.

Although industry groups such as the Record Industry Association of America ([RIAA](#)) and the Motion Picture Association of America ([MPAA](#)) run advertisements that attempt to equate unauthorized duplication with the theft of physical objects, such as cars and clothing ([Exhibit 2](#)), the targets of these ads, young people, have been slow to amend their behavior. Aufderheide, Jaszi, and Brown ([2007](#)) found that undergraduate and graduate college students who created online video content were "universally under-informed and misinformed about [copyright] law" (1). However, a study by University College London's [CIBER](#) group on information behavior by adults and children (aged 12-15) concluded that rather than indicating a lack of knowledge about the basic principles of intellectual property, the evidence revealed that young people demonstrated "a collapse of respect for copyright" (Rowlands and Nicholas [2008](#), 20).

Some of this collapse may be attributed to the inadequacy of current copyright law with respect to the Web 2.0 applications that young people have increasingly embraced. These applications, which take their power from user-created and user-shared content, encourage young people to share both content they have created themselves, whether from scratch or by remixing, and content they have found or borrowed. Young people's heavy involvement in these Web-based sharing technologies has fostered an eagerness to share data, photographs, music, and movies with little concern for the legal status of these items (van Hooff [2007](#)).

## The Growing Power of Copyright

The Copyright Act of 1976 has been augmented by the passage of three amendments to the original law, the first two of which give original content creators even broader rights. The first is the [Sonny Bono Copyright Term Extension Act](#) of 1998, which extends the protected life of certain popular works that were about to fall into the public domain, including that most famous of fictional characters, Mickey Mouse. The second is the Digital Millennium Copyright Act ([DMCA](#)) of 1998, which imposes stern new penalties both for unauthorized copying and for circumventing technologies designed to protect content. The third is the Technology Education and Copyright Harmonization ([TEACH](#)) Act of 2002, the only bright spot for educators in these amendments, which grants certain permissions to nonprofit educational institutions for the limited transmission of digital course materials beyond those allowed by the [fair use](#) doctrine ([Exhibit 3](#)).

Considered separately, none of these amendments seems unreasonable. However, taken together, several aspects of the amended law create the potential for disturbing scenarios for educators. First, these amendments make violation of copyright not merely a civil tort settled by the concerned parties in a civil proceeding, but potentially a federal criminal offense under the jurisdiction of the Federal Bureau of Investigation (FBI [2007](#)). The DMCA, in particular, grants rights holders extraordinary powers of administrative subpoena that permit them to force institutions that are the alleged conduit of the infringement, such as universities, to produce personal information about perceived perpetrators—often, students.

The second disturbing element of current copyright law is that nothing in it prevents a powerful rights holder, such as the RIAA, from pursuing an infringement case against a perceived violator even if that "violator" reasonably believes—or even has been advised by legal counsel—that he or she is acting under the aegis of fair use as defined by copyright law. This is because fair use is a set of guidelines only; it leaves room for a range of interpretations as to what is and is not permissible ([Exhibit 4](#)). As a result, universities have endeavored to protect themselves by requiring faculty members and students to adhere to sometimes rigid policies that often do not reflect the actual content of the law ([Exhibit 5](#)).

Of course, not every alleged violator is worthy of the attention of a wealthy or influential rights organization. Trade groups such as the MPAA or the RIAA are interested in protecting the content of their member organizations; they strategically pursue court action in order to send a message to perceived violators (Alderman 2001). Because the law specifies that infringement may be vicarious or contributory (Imfeld and

Ekstrand 2005, 301), a university may be legally construed by the copyright owner as engaging in contributory infringement if it fails to take reasonable measures to curtail the flow of copyrighted material onto the hard drives of its students and employees. Copyright holders sometimes mount "deep pocket" attacks directed at an institution (for example, a university) that has significant financial resources in order to score both a financial and a public relations victory (Imfeld and Ekstrand 2005, 306). In cases against individuals, the rights organization typically demands a sum of money, sometimes in the thousands of dollars, to settle the matter out of court ([Exhibit 6](#)). Many impecunious students have taken the deal and settled as was the case in the 2007 litigation brought against 40 Indiana University students (Brubeck [2008](#)). Once again, the rationale is to score a public relations victory and get the word out that violations will not be tolerated.

## The Limitations of Fair Use

At the same time, fair use exemptions from copyright, intended to allow limited use of copyrighted materials for the purposes of education, journalism, commentary, criticism, scholarship, and research, have not adapted well to the digital era. In fact, as Starr ([2005](#)) maintains, there are no fair use guidelines for using the latest digital technologies to support the needs of content creators, some of whom are students, and of consumers, who are also often students; the old guidelines restrict both the audience and the publication venue for multimedia educational projects created with copyrighted material to a closed classroom space and a course or school audience. Fair use standards also do not recognize the for-profit online classroom as a legitimate venue. The most expansive definition of fair use covers only uses "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" (Title 17, Chapter 1, Section 110, U.S. Code). Although the TEACH Act (2002) makes clear that fair use allows for limited uses of copyrighted audiovisual materials in virtual classrooms, these virtual spaces do not enjoy the same level of protection afforded to the face-to-face classroom ([Exhibit 7](#)).

Additionally, while educators are able to use many types of audiovisual material under fair use in face-to-face educational settings and, in a somewhat more restricted way, in distance learning (SCMS [2007](#)), students are considerably more constrained in their ability to use material to comment on the media world around them, especially when they seek to do so for audiences and venues outside the classroom. Today's technologies enable students to produce material on the Internet for an audience that potentially includes anyone with Internet access. The irreverent, critical, highly commentative content that students produce and publish on weblogs, videoblogs, podcasts, and YouTube makes liberal use of satire. Creators in these venues borrow from and ape the icons of contemporary visual culture, often by utilizing snippets of the material that is the target of their commentary. All of this use is potentially in violation of current copyright law in spite of the fact that, as Stephen Marshall ([2008](#)) shows, creating new work from previously existing material creates value.

## Changing the Copyright Law

Changes in copyright law are unquestionably needed to address these challenges to education. The question is exactly what those changes should look like. We make the following tentative recommendations while also urging that educators themselves engage thoughtfully in copyright reform efforts.

With 83% of higher education institutions now providing distance learning opportunities in at least some of their programs (Allen and Seaman [2007](#)), distance learning is likely to flourish alongside traditional physical universities. With this in mind, we believe that the disconnect between what is permitted in face-to-face teaching and what is allowed in distance education needs to be remedied. It is neither fair nor practicable to expect educators to treat the presentation of course content and the work of students differently based on whether the student is physically present or is attending class via a virtual learning environment.

Changes should also be made to address the ways in which contemporary copyright law constrains the creative options open to students. We suggest the reconsideration of regulations on transformative content (Aufderheide and Jaszi [2008](#)). Borrowing a line, a snippet of a song, or a picture and transforming it in order

to comment on the underlying material, we contend, does not interfere in any significant way with the commercial potential of the original. If anything, if proper attribution is given to the original sources, it may make people more aware of the original. With this as well as the educational value of creating such commentary in mind, broader rules for commentative, parodic, and satiric matter must be considered.

## What Educators Can Do

The first step an educator should take is to become aware of recent developments in copyright reform. Consumer organizations, librarians, researchers, and educators have begun to realize how easy it is to run afoul of copyright law in everyday professional activities, and the unlikelihood of being caught is cold comfort. A little proactive behavior on the part of educators—for example, contacting relevant copyright reform organizations or e-mailing legislators—can go a long way toward shaping meaningful change. Educators should also be aware that they have colleagues in library science, research, and even politics who strenuously maintain that current copyright law is, at the very least, impermissibly vague (Samuelson [2007](#)). Organizations and conferences, such as the [Electronic Frontier Foundation](#), the [Association of Research Libraries](#), and the Conference on Fair Use ([CONFU](#)), have produced significant, concrete suggestions for amending the law, each taking a somewhat different view of what needs to be fixed.

In the meantime, educators must be realistic and assume that current copyright law will remain the controlling structure for some years into the future. Students who may want to use previously existing work must be provided with alternatives. Educators should encourage students to create projects entirely from original work, which may be both creatively liberating and legally prudent. Students might also work from preexisting pieces that are copyright free. Several new audio software programs, such as [Garage Band](#) and [Soundtrack](#), provide small snippets of copyright-free musical material that may be blended and mixed in different ways to create original work, which may then be copyrighted by the student user. Other programs like [Ableton Live](#) and Fruity Loops (recently renamed [FL Studio](#)) offer similar functionality for more professional users. On the visual side, camcorders have become inexpensive and many cell phones have video capability; applications like Apple's [iMovie](#) make digital film editing easy. In this environment, there are few barriers to students creating their own motion pictures from the ground up.

As students engage in creating their own original work, they would benefit from some discussion of the intellectual property issues involved in online and face-to-face communication and information sharing (for educational purposes and otherwise) and common misconceptions regarding copyright law. Georgia Harper's [crash course](#) in copyright might be a useful resource for facilitating such a conversation. [Creative Commons](#) offers an alternative view of copyright, presenting a variety of available licenses that preserve copyright while allowing the creator to define what kinds of reuse is allowable ([Exhibit 8](#)). Such conversations will engender more respect for intellectual property and encourage more responsible uses of it in online creations, broadening the vision of what copyright can be and prompting students to recognize that they too can be creators with copyrights that are valid and enforceable.

A third and rather more difficult issue that educators must unite to address is the changing nature of the classroom and its ramifications for copyright law. Today's educators may reasonably want to make limited use of copyright-protected materials in the creation of wikis, blogs, videoblogs, or [Second Life](#) avatars for educational purposes. This would rarely result in substantial commercial harm to a copyright holder's interests, yet according to current copyright regulations, these virtual venues for learning must not include copyright-protected material.

As this article goes to press, a bill is languishing in the U.S. House of Representatives, HR 1201, the Freedom and Innovation Revitalizing U.S. Entrepreneurship Act of 2007 (the FAIR USE Act), sponsored by Congressman Rick Boucher (D-VA). This bill, which has the support of numerous copyright reform organizations, will codify some of the Copyright Office's suggestions regarding fair use so that, as a matter of law, clearly defined fair use exemptions will not be subject to litigation by copyright holders ([Exhibit 9](#)).

## Conclusion

The copyright challenges discussed in this article have resulted from the law's failure to keep pace with technology and technology's impact on society. In subtle ways, the digital revolution has altered what the very act of copying means; however, a more than 30-year-old analog copyright law remains in effect. This situation presents vexing legal difficulties for a variety of stakeholders, educators being one of the most important. We urge educators to consider our recommendations and to be proactive in the movement for better copyright law, including supporting the passage of HR 1201 and remaining engaged in the legislative process. At the same time, educators must work to help students understand both the strictures and the opportunities of copyright.

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