Copyright and Fair Use: An Issue of Ethics in a Changing Learning Environment

Jeff M. Allen, Russell K. Elleven, Charles G. Andrews, and Lynne S. Cagle
University of North Texas

Karen E. Clem
FedEx Kinko's

Abstract

Copyright infringement is one of the most talked about, yet most misunderstood topics in the curriculum and instructional development areas. The field of copyright protection is fraught with gray areas that undermine an individual's honest ability to discern what might be lawful uses of copyrighted materials. This article begins with a brief history of copyright law in the U.S. and provides examples, references, and discussion of "fair use." Additionally, issues related to the Internet are addressed, including: Web Linking, Framing, Plagiarism, Web-based referencing. Finally considerations and suggestions for teaching and using ethical practices in the industrial and educational classroom are discussed. Fair use and copyright in educational institutions is largely an ethical issue. Ethics are not dependent on individual's actions. All parties involved must contribute to the ethical nature of an event and must accept both the responsibility for their actions or their non-actions.

Introduction

At the core of copyright and fair use is ethics:

"I walked into my classroom the first day of class and one of my students had a photocopy of the textbook on her desk? The unbelievable part is that I was the author of the book!"

As the copyright infringed author, this faculty member's first desire was to strive to have his student dismissed from the university, but a few questions came to mind: Did the student know better? Was the student ignorant of copyright infringement? Did the student really care what anyone thought? Did it matter the student was a doctoral student at a research university?

The teacher did approach this student, in a questioning manner, and the student was not concerned about the issue of copying the teacher's book or about the general issue of copyright ownership. The teacher let

the matter drop after their brief conversation, however, the teacher still has difficulty understanding the student's unethical behavior — the illegal copying of his materials and the nonchalant attitude toward ownership of copyright protected materials.

Legal discussion and testing of copyright issues began in England in the 1700's with the 1709 Statute of Anne (Spigelman, 1998). By the early 1900's, copyright laws were enacted in the U.S. to protect the intellectual rights of creators/authors/publishers. Obviously, federal leadership could not have foreseen the changes in technology that would affect copyright laws. Consequently, the laws have been consistently reviewed and tested for validity and applicability over the past 100 years. Congress and the courts have addressed issues such as the types of works protected and the length of time pieces of work are protected as well as established standards for those situations that fall outside of the original scope of the law. In 1980, Congress passed the Computer Software Copyright Act though software was accepted for copyright purposes as early as 1964 (Bowyer, 2000). In 1989, Community for Creative Nonviolence v. Reid established "work-for-hire" standards to distinguish between works produced individually or as part of an organization (Costello, 1994). The most recent amendment to Title 17, the codification of the United States Copyright Code, is found in the Digital Millennium Copyright Act which became effective January 2001. As it stands now copyright law protects personal expressions of ideas presented in a "fixed" tangible form for the life of the author plus 50 years (Bowyer, 2000). Excepting the "first sale" rule, the copyright owner retains all rights to the expression including making direct copies, disseminating copies, creating other works that are derived from the original expression, and publicly displaying or performing the work. Unfortunately, most educators, when asked, are under the impression that they are allowed to utilize copyright protected work if it's for "educational purposes". While the idea of "fair use" addresses the use of portions of copyrighted materials in the classroom, let us begin by dismissing this myth: "Educational purposes" is not an allowance for copyright infringement.

Distance/distributed learning environments are more susceptible to copyright infringement than traditional face-to-face classrooms. The copy and paste commands are becoming the most used means of circumventing copyright protection (Gajadhar, 1998). This practice has replaced the copy machine of earlier decades. While the ease of access to and the relative accessibility of information on the Internet affect both environments, distance education more severely limits the ability of the instructor to rely on nonverbal communication to model appropriate behavior and to assess performance thus making it more difficult to identify and correct unethical behavior.

This article discusses the topic of copyright infringement from a different aspect than many other research articles. Copyright articles, typically, discusses this issue from a legal perspective, but it is our opinion that teacher/trainers and performance technologists must also be concerned with the practical application of these laws to ethical dilemmas encountered in the learning environment. Many educators are also authors and therefore have both a professional and ethical responsibility to accept the role of educating other teacher/trainers and students about the legal and ethical practices associated with copyright and fair use. Copyright infringement is one of the most talked about, yet most misunderstood topics in the curriculum and instructional development areas. Many educators and trainers will claim to have a general idea of the limitation of copyright and fair use, yet cannot provide solid definitions and examples of when it is acceptable, or more importantly, ethical to use another author's work. More importantly, the field of copyright protected material utilization is fraught with gray areas that undermine an individual's honest ability to discern what might or might not be lawful uses of copyrighted materials. This article began with a brief history of copyright law in the U.S. and provides examples, references, and discussion of "fair use." Additionally, issues related to the Internet are addressed, including: Web Linking, Framing, Plagiarism, Web-based Referencing, and finally considerations and suggestions for teaching and using ethical practices in the industrial and educational classroom.

Fair Use

Fair use is defined as the "privilege in others than the owner of a copyright to use the copyright [protected] material in a reasonable manner without his consent, privilege in others than the owner notwithstanding the monopoly granted to the owner" (Basic Books, Inc. v. Kinko's Graphics, 2001). Fair use has encouraged

more creative expression and guaranteed these creators whether they are authors, web developers, trainers or teachers the right to produce and gain from their work.

According to the United States Copyright Act of 1976 (Fair Use in Copyright, 2001), four factors should be considered when determining if a specific action is "fair use." These factors are stated as followed:
- Purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- Nature of the copyright protected work. For example, copying from works primarily factual in nature is tolerated more than copying from more creative works.
- Amount and substantial use of the portion in relation to the copyright protected work as a whole. For example, a person may use for educational multimedia projects 10% or 3 minutes of motion media, 10% or 1000 words for text, 5 images by an artist or photographer or 10% or 15 images from a collective work.
- Effect of the use upon the potential market for or value of the copyright protected work. (Section 107)

In the 1991 case, Basic Books, Inc. vs. Kinko's Graphics Corporation (2001), publishing houses in New York City declared that Kinko's store was alleged to copy excerpts from books and create course "packets" for college students. The plaintiffs noted their copyrighted materials were used without permission and without payment of required fees and copies sold for profit. Kinko's claimed their use was in "fair use," however the courts determined it was not due to the commercial use of the copyright protected material for profit gain (2001).

BitLaw, a comprehensive Internet resource on technology law (Fair Use in Copyright Law, 2001) recaps four examples of "fair use". These include:
- Small excerpts in a review of criticism for purposes of illustration or comment.
- Parody incorporating some elements (but not all) of the work parodied.
- Quotations from a speech, address, or position paper in a news report.
- Limited copying made by a student for academic work

Every educator, student, and web developer should possess an understanding of the concept of fair use. Without this understanding they are likely not to recognize the contributions of others. This is especially true when the Internet is involved.

The Application of Copyright Law to the Internet

Harper (2000) of the Office of General Counsel, University of Texas System states that Fair Use not only applies to copies but to the:
- Copies of copyright protected works such as electronic photographs.
- Making of derivative works.
- Distributing of works, including electronic distribution.
- Displaying and performing of works publicly such as electronic message boards.

In training, a growing trend to teach a widespread audience is through distributed/distance learning. This type of instruction reaches a broad range of people using the Internet as its method of instruction. Universities and corporations have implemented distance learning or web-based instruction into their departments as an alternative to face-to-face instruction. In 1994 the Conference on Fair Use (CONFU) created a set of fair use guidelines for using distance learning within nonprofit educational institutions. These guidelines summarized in the following:
- Works performed must be integrated into the class, must be part of systematic instruction and must be directly related and of material assistance to the teaching content of the transmission. The performance may not be for entertaining purposes.
- Transmission must be over a secure system.
- Reception must be in a classroom or other similar place normally devoted to instruction or any other site where the reception can be controlled by the eligible institution.

- Performance of an entire copyright protected work or a large portion thereof may be transmitted only once for a distance learning course. This recording or copy may be retained for up to 15 consecutive class days for viewing by students enrolled in the course.

A person creating distance learning for a nonprofit institution requires permission for use of copyright protected material in the following situations:
- Utilizing material for commercial use. For example, a nonprofit educational institution conducts courses for a for-profit corporation for a fee.
- An institution wants to disseminate the recordings of the course or portions that contain performance of a copyright protected work.
- An institution wants to offer a course or program containing the performance of copyright protected works to non-employees.
- An institution wants to retain the recorded or copied class session containing the performance of a copyright protected work for longer than 15 days (Harper, 2000).

At many universities across the nation, copyright procedures for distance learning are created for faculty to follow. Using CONFU's guidelines as a foundation, universities such as the University of Texas and Indiana University — Purdue University Indianapolis have created copyright procedures that detail steps and regulations to follow when developing and teaching distance learning courses (e.g., http://www.utsystem.edu/ogc/intellectualproperty/distguide.htm; and http://www.iupui.edu/~copyinfo/distedsum.html).

The Internet has created new situations that have required new copyright questions to be considered. While most copyright laws predate the Internet, copyright and "fair use" issues as they relate to technological advances are still being considered on the basis of these longstanding legal principles (O'Rourke, 1998). Web linking is one of these questions that is creating court activity due to the rapid growth of the browser-based Internet.

Web Linking

The definition of web linking is providing a direct hyperlink to another website. The law currently states "one can link to the front of a Web site, with several caveats. Commercial outfits need a cross link license" (Hillis, 1998, p. 2). Another type of web linking is deep linking, which is "linking to a page of another site other than the other's home page" (Kubiszyn, 2000a, p.2). Deep linking has become quite controversial. The first major case about deep linking was Ticketmaster v. Microsoft. Without consent or a linking agreement from Ticketmaster, they deep linked on their "Sidewalk" web guide to information on specific events on interior pages of the Ticketmaster web site. In turn, Ticketmaster filed suit for illegal use of their website and bypassing its homepage, and Microsoft consequently agreed to remove the deep link and link only to Ticketmaster's home page (Kubiszyn, 2000a).

In another case, Ticketmaster v. Tickets.com, Ticketmaster stated that Tickets.com was deep linking to their site, similar to the Microsoft case, and "copying material from the Ticketmaster site and posting false information about the availability of tickets from Ticketmaster" (Kubiszyn, 2000a, p. 4). In October, 1999, Ticketmaster placed a linking statement on their website declaring that users "agree not to deep-link to the site for any purpose, unless specifically authorized by Ticketmaster to do so" or linking "for distinctly commercial reasons" similar to the previous two cases (http://www.ticketmaster.com/h/terms.html). In March 27, 2000, U.S. Judge District Judge Harry Hupp dismissed the four counts of Ticketmaster's complaint and stated, "Hyper linking does not itself involve a violation of the Copyright Act (whatever it may do for other claims) since no copying is involved. The customer is automatically transferred to the particular genuine web page of the original author. There is no deception in what is happening. This is analogous to using a library's card index to get reference to particular items, albeit faster and more efficiently" (Kubiszyn, p. 4-5, 2000a).

Some web pages are constructed using frames. Generally, one frame provides the table of contents for the site and a second frame displays the results of selecting a link. When a link causes a web page authored by

another organization to display, a copyright protected image is being displayed. This process is known as "framing."

Framing

Another issue in developing web-based instruction is framing which is "building a multi-pane web page where another person's web page is contained inside a frame with your own content" (Templeton, 2000). The law currently states, "If one is framing another site, and has advertising in the navigation frame, a license from the framed site is needed" (Hillis, 1998, p.2). When framing a web site within another web site, its URL or domain name is not displayed, therefore stirring up hot debate in the area of copyright and trademark law since the original creator of the web site has the copyright. In 1998, courts ruled in Futuredontics v. Applied Anagramics, Inc. that "by placing a frame around plaintiff's web page, the defendant [Applied Anagramics] was not unlawfully reproducing the copyright protected content. Rather, the court found that the defendant's presentation of the framed page as a whole, containing the content and the frame, could be considered an unlawful derivative work of the original content" (Kubiszyn, 2000b, p.4). In other framing cases suits have been filed resulting in removal of frames due to violation of copyright laws such as Washington Post v. TotalNews, The Journal Gazette and The News Sentinel v. Ft-Wayne.com, and Playboy v. Web21 (Kubiszyn, 2000).

Displaying another site's web page without giving them recognition is plagiarism. Whether the page contains a copyright statement or not, it is still copyright protected. With the current developments in technology and the resulting court activity, educators will need to be vigilant in their pursuit of the latest copyright and fair use decisions and will need to be able to quickly and appropriately apply the information to the classroom environment.

Plagiarism in the Learning Environment

What is plagiarism? According to the American Psychological Association (APA), plagiarism is presenting someone else's work (ideas or written words) as if it were their own work (American Psychological Association, 1995). Spigelman (1998) found that students were observed to have conflicting ethical views regarding authorship in general. She found that students approached the writing/publishing process with different opinions about the value and use of input from other students in peer writing groups. While some students had no problems modifying their work on the basis of input from other members of the group or adding changes created by other students, some students had a very strong sense of individual ownership and struggled with the ethical question of original authorship. Obviously, the dilemma over what constitutes plagiarism does exist and each individual has a different perspective on exactly which behaviors are academically dishonest.

With the advent of the Internet and accessibility of electronic publications, students in schools and universities worldwide have information as fast as a click of the mouse. Consequently, plagiarism has become harder to detect and easier for students to do. Ryan (1998), while teaching an information security concepts course, caught 7 out of 42 students in one semester plagiarizing most or all of their research papers from the Internet. During the next semester she found one out of every six students plagiarized their entire papers.

According to Gajadhar (1998), Internet plagiarism (cyber cheating, cyber shoplifting) is on the rise. In the educational environment, Internet plagiarism includes changing the context of the information, skipping footnotes, and "citing nonexistent books or journal articles or referring to sources unrelated to the subject matter" (Ryan, 1998, p. 3). Walker (as cited in Gajadhar, 1998) reports that this is not just a problem in the United States and it is not limited to higher educational institutions. Wilhoit (1994, p. 162) states "few students enter college fully understanding the relationship between plagiarism and the rules about quoting, paraphrasing and documenting material." In addition, if an educator uses the same test over and over, students quickly learn that they may obtain copies of the test via their local Internet connection.

Students are being prepared to fulfill the push for teams in the business world by being assigned group projects. This causes potential problems for the student. If the instructions call for each team member to

submit a paper on the team's activity, plagiarism naturally comes into play. If the team produces only one document then the temptation disappears. Donohue (as cited in Gajadhar, 1998, p. 7) suggests that "the best way to eliminate even the temptation to plagiarize if for professors to be more creative, assigning papers and essays that call on a student to relay personal experiences or that draw from classroom discussions."

One structured method employed to fight plagiarism is an Honor Code. The university-wide Honor Code used by Southwestern University in Georgetown, Texas requires, on any exam or homework produced and submitted for assessment, students to write the phrase: " I have neither given nor received aid on this examination, nor have I seen anyone else do so" (Babcock, personal communication, October 6, 2000). If a student is caught cheating either by another student or his/her professor, s/he is turned into the Judiciary Council for a hearing. According to the Advisor to the Judiciary Council and Dean of Students, Sherry Babcock, in the 1999-2000 school year, only one hearing occurred for any plagiarism case proving the Honor Code as an effective method (personal communication, October 6, 2000). Monash University provides a clear set of guidelines for students and faculty titled "Guidelines for Assessment in Undergraduate Subjects and Responsibilities of Examiners" (2001, section 6.1). The guideline includes advice for students and states the "appropriate action in the case of collusion, cheating or plagiarism." Other tactics to combat plagiarism include checking commonly used search sites, search help sites, category search sites, online bookstores, and people search sites (Ryan, 1998).

Wilhoit (as cited in Gajadhar, 1998) outlines several steps that classroom instructors can use to educate students and prevent plagiarism. He noted all instructors should begin the learning process with an open and thorough discussion of plagiarism that includes concrete guidelines for avoiding plagiarism. Initial instruction should be followed with reinforcement as actual learning occurs in structured settings (e.g., multi-drafts of papers, structured proofreading exercises, collaboration guidelines, etc.). Finally, instructors should address violations individually and design appropriate consequences. The focus should not be on punishment, but rather be on identifying ways students can avoid similar mistakes in the future.

Resisting the temptation to practice academic/professional dishonesty can be very difficult. Whether one person gives proper credit for an item created by another person is a ethical issue. A person's ethical code reflects their personal ethics.

Ethics in the Learning Environment

According to the Academy of Human Resource Development's Standards on Ethics and Integrity, one of the responsibilities of the Human Resource professional is to ensure that "no data, information, or knowledge presented in a learning environment is distorted, manipulated, or misused" (Academy of Human Resource Development, 1999, p. 16).

In any profession, regardless of the particular field, a code of ethics is outlined for practitioners to follow. The primary benefit of a code of ethics is social in nature — rather than creating an atmosphere of forced compliance, the intent is to educate professionals so that they are accountable to the public (Anderson, Johnson, Gotterbarn & Perrolle, 1993). Luguenbiehl & Bowyer (1992) summarizes 12 major functions of a professional code of ethics: 1.) Symbolize professionalism, 2.) Protect group interests, 3.) Specify membership etiquette, 4.) Inspire good conduct, 5.) Educate members, 6.) Discipline members, 7.) Foster external relationships, 8.) Enumerate principles, 9.) Express ideals, 10.) Put forth rules, 11.) Offer guidelines and 12.) Codify rights.

Ethics must be instilled and nurtured in people. There is no room for apathy regarding ethical practice in the educational environment. Every educator must share in the responsibility of protecting the rights of an author and educate others about academic integrity. What follows is a list of practical suggestions for modeling and teaching ethics in the learning environment:
- Assume that all colleagues and students may need clarification of copyright guidelines.
- Discuss ethical issues in the academic environment. Provide concrete examples of ethical and unethical behaviors as well as relevant case studies that allow students to apply rules and principles to new situations.

- Collaboratively establish a "code of ethics." Professional organizations, advisory committees and legal experts have valuable input and feedback on the correlation between classroom and professional practices.
- Model ethical behaviors. Allow students to witness your efforts to cite references, apply "fair use" guidelines, and utilize resources appropriately.
- Expect students to practice and document ethical behaviors. Require students to obtain written permission to use copyright protected materials and to properly cite references in assignments. Require copies of permission documents as well as original copies of sources referenced.
- Take advantage of teachable moments. Realize that there will be violations of guidelines. Continue to stress the importance of intellectual property and respect for ownership of work. Correct the inappropriate behavior. Restate the guideline that was violated, enforce appropriate/meaningful consequences, and provide opportunities for people to correct their mistakes and turn these situations into positive learning experiences.

Fair use and copyright in educational institutions is largely an ethical issue. Ethics are not dependent on one individual's actions. All parties involved must contribute to the ethical nature of an event and must accept both the responsibility for their actions or their non-actions.

Fair use and copyright use in education and training is a looming ethical issue. Fair use and ethics in a digital age is dependent on both the individual and group efforts of creators/inventors/authors. All parties involved must accept the responsibility of their action and non-action.

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