

The Technology Source Archives

at the University of North Carolina



[APRIL 1998](#) // [COMMENTARY](#)

Copyright Law and Fair Use: Why Ignorance Is Not Bliss? A Case for Using Guidelines

by [Linda K. Enghagen](#)

Note: This article was originally published in *The Technology Source* (<http://ts.mivu.org/>) as: Linda K. Enghagen "Copyright Law and Fair Use: Why Ignorance Is Not Bliss? A Case for Using Guidelines" *The Technology Source*, April 1998. Available online at <http://ts.mivu.org/default.asp?show=article&id=1034>. The article is reprinted here with permission of the publisher.

While lawyers find sport in the mental gymnastics associated with legal analysis, the typical layperson is more likely to be frustrated, annoyed, or intimidated. There is little comfort to be found in the two words that correctly respond to most legal inquiries. "It depends" is simply not a very satisfying answer to any question. Nevertheless, it is often the only answer that lawyers have to offer. For the most part, law is not prescriptive—it does not spell out a list of "dos and don'ts" with the nicety of a mathematical formula. The law is framed in general rules. And these general rules are not systematically reviewed, which sometimes means they are ill-equipped for the new applications required of them. For example, the case can certainly be made that existing copyright law is deficient when applied to burgeoning technologies like the Internet. But, from a legal standpoint, that begs the question. The rules are the rules and everyone is obliged to follow them, regardless of the poor fit.

Why Out of Sight Out of Mind is a Poor Strategy

It is easy to be tempted to ignore that which is not readily available or easy to understand. In order to find the law, you have to go looking for it. And, once you find it, what you get is a lot of legalese that does not clearly tell you what is and is not permissible. Furthermore, the very nature of certain technologies, such as the Internet, creates additional disincentives. The speed, ease, and low cost of downloading materials readily obscures the possible illegality of doing so. Nevertheless, technical capacity and legality are not the same thing.

In the case of educators and educational institutions, ignoring the rules or confusing technical capacity with legality is simply foolish. As educators, one of our primary roles is to educate, and we cannot escape the fact that we teach both by what we do and by what we do not do. Whether by words or example, if we teach our students that copyright concerns are insignificant or to be flouted, we have failed in our educational mission. It is intellectually dishonest to ignore or diminish the reality of

Congress Offers Educators a Break

For comparatively little in exchange, Congress gives educators a break in copyright infringement cases. The break is this: educators and nonprofit educational institutions are essentially exempt from paying certain types of damages (i.e. statutory damages) in copyright infringement cases, even when an infringement has occurred. However, this exemption applies only when the infringement was based on an "honest belief" that the use constituted a "fair use." In other words, all we need to do to gain the protection of the exemption is to make an honest effort. That is not much to ask.

Copyright infringement cases work like this. When a copyright owner sues someone for infringement, he or she has two choices. The owner can sue for "actual damages," which are what they sound like—for example, lost profits. However, putting a precise price tag on an infringement is not always easy. Consequently, copyright owners have the option of suing for what are called "statutory damages," which do not require proof of any particular loss. Congress wanted to preserve the deterrent effect of the threat of a copyright infringement lawsuit even in cases where actual damages could not be proven. The person claiming the infringement gets to choose between requesting actual or statutory damages. And, if statutory damages are chosen, it is left to the court's discretion to award a sum of not less than \$500, or more than \$20,000 per infringement. Statutory damages also allow an additional sum of up to \$100,000 to be awarded for willful infringements. It can get expensive.

The exemption from the payment of damages, however, applies only to statutory damages, and only when the infringement was based on an "honest belief" that the use was a "fair use." As educators we need to be concerned with the following reality. If no effort was made to determine whether a use is "fair," it is likely to be difficult to persuade a court that someone with a Ph.D. "honestly believed" it was permissible.

Basic Copyright Law

The basics of copyright law are pretty straightforward. In its simplest terms, copyright law governs the ownership and use of copyrighted material. To provide an incentive for undertaking the risks inherent in creative activity, the owner is granted a limited monopoly on his or her creations. As a general rule, the creator of a work entitled to copyright protection does not need to do anything to "get" a copyright. The copyright automatically comes into existence at the time the work is created (i.e. when the work comes into existence in a tangible form).

Copyright law gives copyright owners five exclusive rights. These exclusive rights are, however, not absolute. The fair use exception serves as one limitation to the

3. The right to distribute the work;
4. The right to publicly perform the work;
5. The right to publicly display the work.

The fair use exceptions were an attempt to resolve the competing interests with which Congress was confronted. On the one hand, creators needed an incentive for undertaking risky (i.e. often costly and unsuccessful) endeavors. Hence, creators are given a monopoly in the form of the exclusive rights. The theory is that at least some creators will be successful enough at some of their endeavors that they will be able to make a living at it and therefore continue generating other creations. Society as a whole benefits from this, so social policy in the form of copyright law should encourage it. On the other hand, precisely because some of these creations are beneficial and of interest to society, it is appropriate that some public access to the creations be given for limited purposes without requiring the permission of or payment to the copyright owner. The fair use exceptions permit limited use of copyrighted works for criticism, comment, news reporting, teaching, scholarship, or research. That is, if properly used for one of these purposes, such use does not constitute an unlawful copyright infringement.

To determine whether a use is fair use, Congress outlined four factors courts must consider. First, the "purpose and character" of the use must be evaluated. Of primary concern here is whether the use is commercial or for a nonprofit educational purpose. Second, the nature of the copyrighted work must be considered. Generally, courts are more inclined to permit the use of factual information under fair use and are less inclined to permit the use of fictionalized works. Third, the portion of the work used in relation to the whole work is examined. The use of excerpts is often within fair use while the use of a whole work is less likely to be permitted. Finally, the impact of the use on the market value of the work is assessed. While Congress did not explicitly identify it as such, many consider this to be the most important factor. If the market value of a work is seriously impaired by a use, a significant incentive is lost. Consequently, if a use impairs the market value of a work, it is not likely to be found a "fair use."

Wading Through the Quagmire of Generalities

Understanding the general principles governing copyright law and the fair use exceptions takes educators only so far. The question of what they mean in a specific context remains. In an attempt to fill the gaps created by general legal principles, various affected groups have joined to establish fair use guidelines for a variety of copyrightable works: books and periodicals, music, broadcast programming, multimedia, distance learning, digital images, and software.

may be more restrictive than the law requires. Furthermore, the guidelines that came out of the recent Conference on Fair Use (multimedia, distance education, digital images, and certain software guidelines) are highly controversial and not widely accepted. Despite the truth in the cons, there are pros to the use of the guidelines. First, using them as a benchmark is evidence of an "honest belief" that a given use is "fair use." Second, using the guidelines as a benchmark is far less time-consuming and expensive than consulting a lawyer every time a question arises. Third, the guidelines, because they are guidelines and not laws, can be used as a benchmark only. There is no requirement to follow them literally, though it is safe to assume that the further one deviates from the guidelines by using copyrighted work without permission, the more likely one has exceeded "fair use."

In the end, each of us must decide how we wish to proceed. Undoubtedly, from a legal standpoint only, the individual risk to any one of us is low. Most of us will complete our careers in higher education without the whisper of a threat from litigation. Yet, it would be remiss of us to ignore the example of the recent *Kinko's* course packet case, the most salient lesson of which is that copyright infringement suits do occur. Nevertheless, at least in my view, the most important part of our decision is not a function of risk tolerance. It is in the lessons we offer our students—the lessons they learn from what we do, the lessons they learn from what we do not do. We owe them intellectual honesty. Intellectual honesty demands respect for fair use.

[VIEW RELATED ARTICLES >](#)

THIS SITE IS SPONSORED & HOSTED BY:



HEALTH POLICY AND ADMINISTRATION
EXECUTIVE MASTER'S PROGRAMS

