

COPYRIGHT ISSUES FOR DISTANCE EDUCATION ©2004

Overview

- Copyright application and protections
- Exceptions and their application
- Alternatives

Disclaimer

- This presentation is intended for informational purposes only and should not be construed to replace competent legal advice.

Source of Copyright

- Article I, Section 8 of the United States Constitution gives Congress the power 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 .”

Source of Copyright

- Congress enacted laws to establish and protect copyrights.
- The framework for current copyright law is based on the Copyright Act of 1976; though it has been amended as recently as 2002.
- Copyright law is found in 17 U.S.C. §§101-810.

Copy-rights

- A copyright holder has the right to:
 - Reproduce the work
 - Prepare derivative works
 - Distribute copies of works
 - Perform the work publicly
 - Display the work publicly

When Do Rights Attach?

- A copyright arises immediately upon the expression or creation of the work.
- No registration or publication is necessary.
- For works published after March 1, 1989, no copyright symbol is required to secure copyright protection. The inclusion of the symbol could evince notice and be considered for the award of damages.

What Is Copyrightable?

- Generally, copyright protects original works of authorship that are fixed in a tangible form of expression.

What Works Are Protected?

- Literary works
- Musical works, including accompanying words
- Dramatic works, including accompanying music
- Pictorial, graphic, and sculptural works
- Audiovisual works
- Sound recordings

What Is Not Protected?

- Works that have not been fixed in a tangible form of expression (e.g. improvisational speeches that have not been recorded)
- Titles, names, short phrases, and slogans
- Familiar symbols or designs
- Listing of ingredients or contents

What Is Not Protected?

- Ideas, procedures, methods, processes (as distinguished from a description, explanation, or illustration)
- Works consisting entirely of information that is common property containing no original authorship (e.g., calendars, weight and measurement tables)

What Is Not Protected?

- Works that are in the public domain:
 - The term of the copyright has expired
 - The author or creator failed to satisfy the formalities to perfect the copyright
 - The work is of the U.S. Government

Copyright Expiration

- Generally, a copyright expires 70 years from the death of the author or creator.
- The specific term of a copyright is dependent upon the date of creation, the date of publication, and the applicable law in effect at the time of either or both.
- See www.unc.edu/~uncclng/public-d.htm for a chart outlining the term of copyrights.

Exceptions

- Although a work may be within the scope of copyright protection, there may be exceptions to allow use of the work without infringement.

TEACH Act

- In 2002, the Technology, Education, and Copyright Harmonization Act was signed into law.
- This Act was a specific response to issues related to distance education and the application of §110, which provides limitations on the exclusive rights of copyrights.

TEACH Act

- TEACH outlines specific requirements that must be met before using copyrighted works.
- TEACH is more restrictive than the law allowing face-to-face instructional use of copyrighted materials.

TEACH Act

- Type of work
 - Nondramatic literary or musical work
 - Reasonable and limited portions of any other work
 - Display of a work in an amount comparable to that which is typically displayed in a live classroom

TEACH Act

- Performance or display must be made by, at the direction of, or under the actual supervision of an instructor
 - As an integral part of a class session
 - Offered as a regular part of the mediated systematic instructional activities
- AND

TEACH Act

- The performance or display is directly related and of material assistance to the teaching content of the transmission; AND
- The transmission is made solely for, and, to the extent technologically feasible, the reception of the transmission is limited to
 - Students officially enrolled in the course
 - Officers or employees as part of duties

TEACH Act

- Type of work does not include:
 - A work marketed primarily for performance or display as part of a digitally mediated instructional activity
 - A textbook, course pack, or other material in any medium that is typically purchased or acquired by students for their independent use and retention

TEACH Act

- The institution must not know or have reason to believe that the copy of the work to be transmitted was not lawfully made and acquired.

TEACH Act

- The institution must have policies regarding copyrights and compliance with applicable laws (Handbook p.17).
- The students must receive notice that materials used in connection with the course may be subject to copyright protection.

Sample Notice To Students

- The materials on this course Web site are only for the use of students enrolled in this course for purposes associated with this course and may not be retained or further disseminated.

TEACH Act

- The institution must also apply technological measures that reasonably prevent
 - The retention of the work in accessible form by recipients for longer than the class session
 - Unauthorized further dissemination of the work by the recipients

Class Session

- There are varying interpretations of a “class session” under TEACH.
- One argument is that the work should only be available for a limited duration while the instructor covers the relevant material.
- Another provides that as long as the student can only access the work during the log on period, then the “class session” limitation is met.

TEACH Act

- It is permissible to use course materials for more than one semester. Works may remain on the server of the institution for the duration of its use in one or more courses. Access should still be limited to officially enrolled students.

TEACH Act

- The institution must not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent the retention or unauthorized further dissemination.

TEACH Act

- No copy of a work shall be maintained on the system or network in a manner ordinarily accessible to the recipients for a longer period than is reasonably necessary to facilitate the transmission for which it was made.

TEACH Act

- If all the above conditions are satisfied, then use of the copyrighted work does not constitute infringement.
- Compliance with these criteria are the responsibility of each instructor and the college.

TEACH Act Guidelines

- Avoid the use of commercial works that are sold or licensed for the purpose of digital distance education.
- Avoid the use of pirated works or works where you otherwise have reason to know the copy was not lawfully made.
- Generally limit the use of works to an amount and duration comparable to a physical classroom setting.

TEACH Act Guidelines

- Ensure that the copyrighted work is an integral part of a class session and interactively use it as part of the class assignment.
- Ensure access is limited to officially enrolled students.
- Notify students that works may be subject to copyright protection.

TEACH Act Analysis

- Professor wants to link to another web site for specific information. The linked site is generally available to the public and is not password protected.
 - There is generally no prohibition to linking.* The question that would arise is whether professor knew or reasonably should know whether the site contains unlawfully obtained copyrighted works.

TEACH Act Analysis

- Professor wants to create an online presentation using digital images that accompany the instructor text for the course.
 - Is the proposed display in an amount comparable to that of a live classroom setting?
 - Is the work marketed primarily for performance or display for digital instruction?

TEACH Act Analysis

- Is the work to be used a textbook or coursepack typically purchased by students for their independent use?
- Is the display made at the direction of the instructor as an integral part of the class session?
- Is the display directly related and of material assistance to the teaching content?

TEACH Act Analysis

- Does the institution know or have reason to believe that the copy was not made or acquired unlawfully?
- Is access limited to enrolled students?
- Is retention for longer than the class session and unauthorized further dissemination prevented?
- Is notice given to the students?

Other Exceptions

- In course development, an instructor should first attempt to satisfy the TEACH requirements.
- If this is not possible, then the instructor should look to the statutory exception of fair use.

Fair Use

- §107 provides the statutory exception of fair use to the exclusive ownership of a copyright.
- Factors for fair use are
 - The purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes
 - The nature of the copyrighted work

Fair Use

- Factors (cont.)
 - The amount and substantiality of the portion used in relation to the copyrighted work as a whole
 - The effect of the use upon the potential market for or value of the copyrighted work

Purpose

● Favoring fair use

- Teaching
- Research
- Scholarship
- Nonprofit educational institution
- Criticism
- Comment
- Parody

Purpose

● Opposing fair use

- Commercial activity
- For profit use
- Entertainment
- Denying credit to the original author

Nature

- Favoring fair use
 - Published work
 - Factual or nonfiction
 - Important to educational objectives

Nature

- Opposing fair use
 - Unpublished work
 - Highly creative work
 - Fiction

Amount

- Favoring fair use
 - Small quantity
 - Portion used is not central to the work
 - Amount is appropriate for educational purpose

Amount

- Opposing fair use
 - Large portion or entire work used
 - Portion used is significant to the work

Effect

● Favoring fair use

- User owns a lawfully acquired or purchased copy of the original work
- Few copies are made
- No significant effect on the market for the work
- Lack of licensing mechanism

Effect

● Opposing fair use

- Could replace the sale of the work
- Significantly impairs the market for the work
- Reasonably available licensing
- Affordable permission available
- Numerous copies are made
- You make it accessible in a public access web site

Fair Use

- The analysis of fair use is fact-specific.
- Each factor should be weighed independently, though the determination should be made in reference to all factors.
- No factor is of greater importance.*
- If you make a reasonable determination, there is a safeguard from statutory damages for infringement.

Fair Use Analysis

- Professor would like to post multiple newspaper articles from a local paper. The articles are relevant to the subject matter of the course.
 - Purpose – educational = fair use
 - Nature – fact based = fair use
 - Amount – single articles = fair use
 - Market effect – limiting access = fair use

Fair Use Analysis

- Beware. If the newspaper is subscription-based and password protected, then the license agreement would govern its use. If the agreement contains a prohibition of the proposed use, then it would supercede the copyright law.

Fair Use Analysis

- Professor would like to post a copy of a commercially-printed workbook that corresponds to the course he is teaching.
 - Purpose – educational = fair use
 - Nature – consumable materials = not fair use
 - Amount – entire workbook = not fair use
 - Market effect – intended market is students – not fair use

Fair Use Analysis

- Professor would like to post portions of a book of poems that has been out of print for five years. He will use only portions relevant to the course.
 - Purpose – educational = fair use
 - Nature – highly creative = not fair use
 - Amount – limited* = fair use*
 - Market effect – limited access = fair use

Alternatives

- When both a TEACH Act and fair use analysis would not allow the use of the copyrighted work, then you should decide whether you want to consider alternative works or seek permission from the copyright holder.

Permission

- To obtain permission from the copyright holder, you must first determine who holds the copyright.
 - Look at the work and copyright notice
 - Conduct an online search for the work
 - Contact the U.S. Copyright Office – www.copyright.gov
- No method is foolproof or certain

Permission

- Once the copyright holder has been identified, you should make contact with your request.
 - Telephone
 - Email from web site
 - Letter

Permission

- Request should include:
 - Who will view the work
 - What work or portion you want to display
 - When – duration
 - Why - purpose

Permission

- There are collective rights organizations or clearinghouses for granting permission to use copyrighted works.
- The Copyright Clearance Center at www.copyright.com is one such organization.

Permission

- Keep a record of all permission requests and approvals.
 - Work
 - Copyright holder
 - Duration
 - Fee (if any)

When All Else Fails

- If you are unable to secure the permission to use the copyrighted work and are unable to determine whether an appropriate exception applies
 - Consider alternative works
 - Conduct a risk/benefit analysis

Possible Repercussions

- Injunctive relief
- Damages
 - Statutory damages or actual damages
 - Remember good faith defense for educational institutions
- Criminal sanctions for willful infringements made for commercial advantage or personal gain

Additional Resources

- www.copyright.gov
- www.lib.ncsu.edu/scc/legislative/teachkit
- www.copyright.iupui.edu
- www.findlaw.com

Questions?

