



LEGAL ISSUES IN HIGHER
EDUCATION:
APPLICABILITY OF COPYRIGHTS
IN ONLINE COURSES

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Lawyer-ese

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Copyright Law

- Fair Use
- Course Packets
- Online Classrooms



What is Fair Use?

Fair use is a legal doctrine that promotes freedom of expression by permitting un-licensed use of a copyrighted work.



When Can You Use It?

- Criticism, comment, news reporting, teaching, scholarship, and research.
- Does “fair use” give teaching a free pass?
 - NO



When Does Fair Use Apply?

- Consider these four factors:
 - The *purpose and character of the use*, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - The *nature of the copyrighted work*;
 - The *amount and substantiality of the portion used* in relation to the copyrighted work as a whole; and
 - The *effect of the use upon the potential market* for or value of the copyrighted work. (Section 107 of US Copyright Law of 1976)



Factor 1: Purpose and Character of Use

What will the Court consider?

- If claiming fair use, how are you using the copyrighted work?
- Is it transformative?
 - ▣ Transformative adds something new, with a further purpose or different character, and does not substitute for the original use of the work.
- Not all non-profit educational uses/non-commercial uses are fair
- Not all commercial uses are not fair.



Factor 2: Nature of Copyrighted Work

What will the Court consider?

- The degree the work that is used relates to copyright's purpose of encouraging creative expression
- A more creative work (i.e., a novel, movie, or song) vs. a factual work
- An unpublished work is less likely to be considered fair.



Factor 3: Amount and Substantiality of the Portion Used

What will the Court consider?

- Amount/Substantiality of the portion used in relation to copyrighted work as a whole.
- Courts look at both quantity and quality of © material that was used.



Factor 4: Effect of Use upon the Potential Market or Value of Copyrighted Work

What will the Court consider?

- Whether and to what extent the unlicensed use harms the existing or future market for the copyright owner's original work.
- Whether the use is hurting the current market for the original work (displacing sales of the original)
- Whether the use could cause substantial harm if it were to become widespread.



Comments on Fair Use



- Educational, *nonprofit use* does not automatically create a blanket fair use exemption
- Commercial use much more likely to require permission
- Imaginative, unpublished work is more likely to require permission than factual, published work
- Using less is better than using more



Classroom Guidelines:

Prohibitions



- Copying may not be used to create or replace or substitute for anthologies, compilations or collective works
 - No copying from works intended to be consumable
- Copying shall not substitute for the purchase of books
 - No charge may be made to the student beyond the actual cost of copying



Classroom Guidelines:

Single Copying for Teachers

- ❑ A single copy may be made by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation of class of:
 - ❑ A chapter from a book
 - ❑ An article
 - ❑ A short story, essay or
 - ❑ Poem
 - ❑ A chart graph, diagram,
 - ❑ Etc...



Litigation on Fair Use

- Difficulties associated with fair use in the classroom:
 - ▣ The fair use doctrine lends itself to a case-by-case determination of exactly what constitutes fair use
 - ▣ The fair use guidelines for education were created in the 1980's and fail to address today's digital age



Litigation on Fair Use – Educational Exemption

- Publishing houses brought suit against Kinko's for copyright infringement alleging violation because Kinko's copied excerpts from books without permission and sold the packets for profit



- Basic Books v. Kinko's Graphics Corp., 758 F.Supp. 1522 (S.D.N.Y. 1991)



Litigation on Fair Use – The Educational Exemption

- Kinko's admitted to the copying and selling of packets without permission but claimed the use fell within the fair use exception of § 107



Litigation on Fair Use: Educational Exemption

- In the end, the court applied the fair use standards established by Congress and then turned to the classroom guidelines and found that the Kinko's actions were not within the bounds of fair use



Litigation on Fair Use – Educational Exemption

- Comments from the Kinko's Court
 - In almost every case Kinko's had copied at least an entire chapter – court found this substantial because it meant the excerpts were meant to stand alone
 - The court found it likely the purchase of the packets were to obviate the purchase of the text books



Litigation on Fair Use – The Educational Exemption

- Comments from the Kinko's Court
 - ▣ Although the student's use of the packets was educational, *Kinko's had the intention to make a profit – therefore the use was deemed commercial*



Litigation on Fair Use – The Educational Exemption

- Comments from the Kinko's Court
 - Then the court turned to the classroom guidelines and found that the packets did not meet the brevity, spontaneity and cumulative effects test.
 - The court awarded the publishers **\$500,000** in damages and forced national photocopying chains to rethink their policies on creating course packs.



Litigation on Fair Use: (Course Packs)

- On April 15, 2008, Cambridge University Press, Oxford University Press, and Sage Publications (“Publishers”) filed suit against the President, Provost, Dean of Libraries, and Associate Provost for Information Systems and Technology, *in their official capacities*, of Georgia State University (“GSU”) for violation of U.S. Copyright Laws



VS



Cambridge University Press, et al, v. Georgia State University, et al

- This case is similar to Kinko's in that copies of copyrighted works (course packs) are being distributed to students under the educational exemption of the fair use doctrine
- This case differs from Kinko's because the copying is being facilitated by a Governmental entity rather than a private commercial enterprise and because the course packs are in a digital format



Cambridge University Press, et al, v. Georgia State University, et al

- Nature of the dispute:
 - The publishers allege that GSU has facilitated, enabled, encouraged, and induced GSU professors to upload and post-and GSU students to download, view, print, copy, and distribute-many, if not all the assigned readings for specific courses



Cambridge University Press, et al, v. Georgia State University, et al

□ Nature of the dispute:

- The publishers allege that GSU, through its Blackboard/WebCT Vista systems as well as its library e-reserve system, posts digital copies, called “course packs” or “copy-packs,” of numerous copyrighted works with little oversight as to further distribution by students
- Done without license from or compensation to copyright owners



Cambridge University Press, et al, v. Georgia State University, et al

- GSU's fair use defense:
 - ▣ GSU claims that its use of digital copies of copyrighted material is within the guidelines established, and judicial interpretation of the fair use doctrine
- Educators wait in anticipation for a ruling on GSU's fair use defense...



District Court Ruling

- GSU appeared to have won the battle
- May 2012: In a 350 page opinion, Judge Evans, a federal Judge in Atlanta, ruled that in almost all cases the alleged infringements were fair use.



The May 2012 GSU Ruling

□ Some key findings

- For over 1/3 of their claims, publishers did not adequately prove their copyright in the material
- GSU had not exceeded 1976 congressional guidelines for classroom copying GSU guidelines were a “good faith effort” to help faculty members interpret copyright law, despite some shortcomings
- Publishers did not lose significant amounts of revenue because of alleged infringement



GSU Fair Use: Factors 1 and 2

1) The Purpose and Character of the Use

- ▣ Excerpts used by nonprofit educational institutions for teaching and scholarship
- ▣ Win for GSU

2) The Nature of the Copyrighted Work

- ▣ Works were nonfiction and educational
- ▣ Win for GSU



GSU Fair Use: Factor 3

3) Amount and Substantiality of Portion Used

- Judge rejects CCC's stringent guideline that copying not "be repeated with respect to the same item by the same teacher from term to term" as "an impractical, unnecessary limitation"
- Judge made test for a "**decidedly small**" amount of copying:
 - If book has ≤ 9 chapters, then threshold = 10% copying of total page count
 - If book ≥ 10 chapters, then threshold = single complete chapter



GSU Fair Use: Factor 4

4) Effect of the Use Upon Potential Market

- If no digital license was available for GSU, this factor favored GSU
- If a digital license was available, and the book made significant revenues from the licensing, this factor favored publishers

- **Policy:** incentivizing authors to create works
 - The judge found that since neither authors nor publishers make a huge profit from the licensing, the e-reserves do little to harm the market and provide no disincentive to create



Declaratory Relief

- **“Decidedly small”** applies to the **aggregate** of all excerpts from works assigned during a semester course
 - “excerpt” includes all protected material used from a book during a course
 - E.g. a professor cannot upload 9% of a book in September and then replace it with different 9% in October



Declaratory Relief: Clarifications

- ▣ Fair Use analysis does not apply to “**textbooks**” intended solely for classroom instruction
 - A book that is authoritative and informative is not necessarily a “textbook”
 - Intended readership is controlling



Declaratory Relief: Clarifications

- Fair use in e-reserves and course management conditioned on **strict controls** that prevent unwarranted distribution; i.e.:
 - ▣ Only students who are enrolled in the class may access the materials
 - ▣ Students must receive a notice not to further distribute the excerpts



11th Circuit on Appeal

- Affirmed lower courts holdings on the first factor- course reserve were not transformative but non-profit favors fair use
- Reversed 2nd Factor: needed a closer examination of the original works and the relative composition of original works and the relative composition of original analysis data (little importance).
- 3rd Factor: District Court erred in establishing a strictly quantitative test for the amount “substantially taken”
- Agree with District Court that the 4th factor analysis correct
 - Small excerpts do not substitute for available full books
 - Ok to take license availability into account.
- Case reversed and remanded- attorney’s fees reversed



Lower Court on Remand

- 4 of 49 were considered infringements
- No error in giving each factor equal weight and treating mechanically.



TEACH Act

- **TEACH ACT**
 - Technology,
 - Education,
 - and
 - Copyright
 - Harmonization
- 17 USC 110(2)
- Became law in 2002



TEACH Act

- Provides educators with a set of rights, in addition to fair use, to display (show) and perform (show or play) others' works in the classroom
- Provides educators with the ability to digitize works for use in digital distance education, but only to the extent educators are
 - authorized to use those works pursuant to the TEACH Act, and
 - so long as they are not available digitally in a format free from technological protection



TEACH Act

- Fair use remains important because the in-classroom activities (even if the classroom is virtual) the TEACH Act authorizes are a small subset of the uses of electronic resources educators may wish to make.
- TEACH only covers in class performances and displays, not, for example, digital delivery of supplemental reading, viewing, or listening materials. **For those activities, as well as many others, we'll need to continue to rely on fair use.**



TEACH Act Checklist

- ✓ My institution is a nonprofit accredited educational institution or a government agency
- ✓ It has a policy on the use of copyrighted materials
- ✓ It provides accurate information to faculty, students and staff about copyright
- ✓ Its systems will not interfere with technological controls within the materials I want to use



TEACH Act Checklist

- The materials I want to use are specifically for students in my class
- Only those students will have access to the materials
- The materials will be provided at my direction during the relevant lesson
- The materials are directly related and of material assistance to my teaching content
- My class is part of the regular offerings of my institution



TEACH Act Checklist

- I will include a notice that the materials are protected by copyright
- I will use technology that reasonably limits the students' ability to retain or further distribute the materials
- I will make the materials available to the students only for a period of time that is relevant to the context of the class session



TEACH Act Checklist

- I will store the materials on a secure server and transmit them only as permitted by this law
- I will not make copies other than the one I need to make the transmission



TEACH Act Checklist

The materials are of the proper type and amount the law authorizes

Entire performances of nondramatic literary and musical works

Reasonable and limited parts of a dramatic literary, musical, or audiovisual work

Displays of other works, such as images, in amounts similar to typical displays in face-to-face teaching



TEACH Act Checklist

The materials are not among those the law specifically excludes from its coverage:

Materials specifically marketed for classroom use for digital distance education

Copies I know or should know are illegal

Textbooks, coursepacks, electronic reserves and similar materials typically purchased individually by the students for independent review outside the classroom or class session



TEACH Act Checklist

If I am using an analog original, I checked before digitizing it to be sure:

I copied only the amount that I am authorized to transmit

There is no digital copy of the work available except with technological protections that prevent my using it for the class in the way the statute authorizes

<https://guides.lib.utexas.edu/copyright/teachactchecklist>



Questions



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Thank you!

