

COPYRIGHT OVERVIEW FOR FACULTY

EDUCATIONAL FAIR USE & BEST PRACTICES

2010
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- This workshop is informational and designed to provide you with the tools to make good decisions.
- MU's training re: fair use and best practices does not constitute legal advice.
- Questions regarding the legality of a specific use of copyrighted material should be directed to your copyright reps who may in-turn, consult legal counsel on your behalf.

Disclaimer

- 1974 revision to Title 17 (addition of sections 107 & 108)
- 1976 National Commission on New Technological Uses of Copyrighted Works (CONTU)
- 1994 Working Group on Intellectual Property Rights sponsored the Conference on Fair Use (CONFU)
- 1998 Sonny Bono Copyright Term Extension Act
- 1998 Digital Millennium Copyright Act (DMCA)
- 2000 Anti-Circumvention Provision of the DMCA
- 2001 State Sovereign Immunity
- 2002 TEACH Act

2002- present: court cases & decisions in the news.

Recent © Timeline

The TEACH Act expanded our non-profit educational fair use:

- Include conversion of some analog formats to digital for educational use.
- Also allowed individuals within an institution to be named in copyright litigation.
- An individual who knowingly and willfully violates copyright may be personally named in a lawsuit and subjected to punitive damages per infringement.

Educators need to know

The © police...are watching!

- Companies have been created to deliver blanket threats of litigation and/or sue offenders.
- Companies use sophisticated automated techniques such as copyright search engines, spiders, & web-bots.
- The entertainment industry is fighting to protect its commercial interests.

Litigious Trends

- Penalties for infringement can be harsh.
- The law allows for penalties that range of \$750 to \$30,000 **per infringement**, or up to \$150,000 if the violation was "willful."
- Ignorance of the law is no excuse. Educators should know how to apply fair use.
- Providing current policies and regular workshops on campus helps alleviate confusion.

www.marshall.edu/library/copyright/

Infringement

Applies © protections and fair use to use of electronic media in education.

- Expands & clarifies fair use.
- Increases the types of useable works.
- Protects copyright owner & media distributor.
- Attempts to limit institutional liability.
- Allows temporary copies on pc & for IT to make copies for archives.

TEACH Act Summary

- **MU Librarians & IT Staff -**
 - must maintain copy protections, restrict access to registered students and prevent improper use during transmission and/or electronic delivery of copyrighted materials.
- **MU Faculty -**
 - must use copyrighted materials related to the teaching content and as regular face-to-face or online class sessions and related instructional activities.

TEACH Act Summary

- **With instructor oversight, TEACH allows:**
 - Performances of nondramatic literary & musical works
 - Performance of any other work, including dramatic works and audiovisual works, but only in “reasonable & limited portions”
 - Displays of any work “in an amount comparable to that which is typically displayed in the course of a live class session.”

TEACH Act Summary

○ TEACH does **NOT** allow:

- Works marketed “primarily for performance or display as a part of mediated instructional activities transmitted via digital networks.”
- Performances or displays given by means of copies “not lawfully made and acquired.”
- **Creation/sale of print or electronic “Course Packs” designed specifically to avoid the students’ financial burden, circumvent authors’ economic rights or avoid the paying royalties.**

TEACH Act Summary

Purpose

- Copyright protects the author of an original work

Eligibility

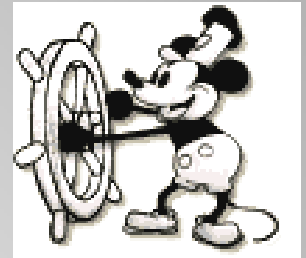
- Any original work that is **fixed in a tangible medium of expression** is protected.
- Protection is automatic- it is not necessary to register with the US Copyright Office
 - Registering does yield additional protections
 - Registration is advised for those who may gain profit from original works (such as inventions)

Purpose & Eligibility

- Title 17 of the US Code was written to protect the **economic rights** of the copyright owner for
 - Reproduction
 - Distribution
 - Derivative works
 - Public performance and display
- The 1998 CONFU additions to the code include a **moral right** to preserve copyright, and:
 - Digital transmission of sound recordings
 - DMCA provisions

Ownership Rights

- **CREATED during or after 1978:**
 - Original work: author's life plus 70 more years from date of author's death
 - Work-for-hire: 95 years from publication & 125 years from creation
- **PUBLISHED before 1978:**
 - 95 years since 1923
 - Short-term if no renewal found
- **CREATED before 1978:**
 - Author's life plus 70 years (implemented 1/2003)



Steamboat Willie - 1928

Duration

Title 17, US Code, Section:

- **107 - Fair use**
- **108 - Library copying**
- 109 - First-sale
- 110 - Displays/Performances
- 114 - Transmissions of Sound Recordings
- 115 - Compulsory License/Recordings
- 120 - Architectural Works
- 121 - Persons with Disabilities

Exceptions



What is the **PURPOSE** of the use?



What is the **NATURE** of the work to be used?



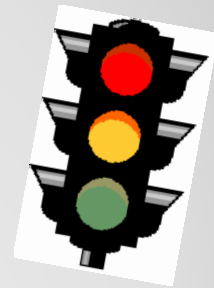
What **AMOUNT** of the work will be used?



What **EFFECT** will your use have on the market for this work?

Section 107: Fair Use

- There are very few court cases against professors and librarians because our **PURPOSE** is generally obvious and we are generally acting within the scope of our employment at the university.
- Fair use is meant to be loose & flexible but does not erase our responsibility to apply the factors & keep good records should a challenge be initiated against the university or an individual faculty member.



Fair use

Examples - *#1, Purpose*



GO

- Nonprofit, Educational & Personal



YIELD

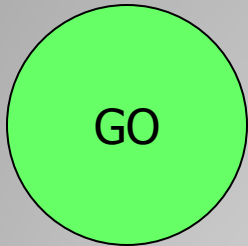
- Criticism & Commentary
- News Reporting & Parody
- Otherwise "transformative" use



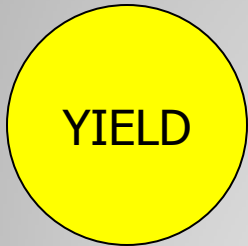
STOP

- Commercial

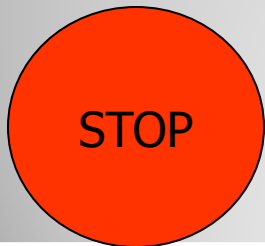
Examples - #2, *Nature*



- Fact or published work

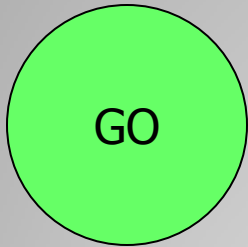


- Mixture of fact & imagination

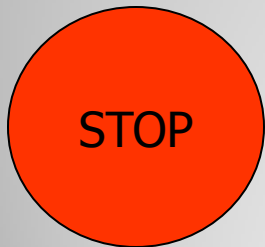


- Imaginative or unpublished work

EXAMPLES - #3, AMOUNT



- A little in relation to the whole
Less than 10%
...when applied to public consumption



- A lot in relation to the whole
More than 10%
...is permissible within MU Online for your registered students only

EXAMPLES - #4, *EFFECT*



GO

- Factors 1-3 do not impact market



YIELD

- Original out of print/unavailable
- No permissions market established
- Cannot find copyright owner



STOP

- Takes sales from original work
- Avoids paying royalties

SPONTANEITY



GO

- Decide at last minute to use item
- Item is dated/short usable period



YIELD

- Decided to use work in previous term
- Plan to discontinue use in near future



STOP

- Item becomes course foundation

Fair use

(according to Copyright law for Librarians & Educators by [Dr. Kenneth Crews](#), MLS, JD, PhD, Professor of Law & Director of the IUPUI Copyright management Center)

- ***“Fair use is more of a balancing test”*** - you need to evaluate and apply the four factors and ask yourself if they lean in favor or against your use of the item(s) in question.
- ***“Fair use is highly fact sensitive”*** - every situation has a different set of facts that impact the meaning and application of fair use.

Fair use

(according to Copyright law for Librarians & Educators by Dr. Kenneth Crews)

- ***“Don’t reach to hasty conclusions”*** - the question of fair use requires we apply all four factors. Don’t make the assumption you are ok because you are a nonprofit educator.
- ***“If your use is not “fair” don’t forget the other statutory exceptions to the rights of owners”*** - fair use and other exceptions apply independently to one another. You only need to comply with one of them to make your use lawful.

Fair use

(according to Copyright law for Librarians & Educators by Dr. Kenneth Crews)

- ***“If your use is not within any of the exceptions, permission from the copyright owner is an important option”*** - Unless you plan to change how you are using a copyrighted work, you might have no choice but to seek permission.
- ***“Fair use is relevant only if the work is protected by copyright”*** - Don't overlook the chance that the item is in the public domain.

Liability & Good Faith

(according to Copyright law for Librarians & Educators by Dr. Kenneth Crews)

- Statutory damages can be assessed for copyright infringement; however, educators & librarians typically enjoy some protections in this area.
- If you were acting within the scope of your employment and you “**believed and had reasonable grounds for believing**” that the copies you made were fair use, the court may be required to reduce statutory damages to \$0.
- You must be able to demonstrate “**reasonable grounds**” for fair use by providing a reasoned and reasonable conclusion re: whether you are acting within the law.
- Even if the court disagrees with you, they may see that you acted in ***good faith*** and may cut your liabilities accordingly.

Sovereign Immunity

(according to Copyright law for Librarians & Educators by Dr. Kenneth Crews)

- Non-profit public higher education faculty, students, & librarians who implement *fair use in good faith for educational purposes* fall under a form of immunity that is usually not subject to punitive damages.
- Faculty must prove they acted in good faith.
 - A paper/email trail is recommended if/when seeking permissions to use copyrighted materials in an online or face-to-face class.
 - A paper/email trail is admissible in court.

Recent Cases

Court records: MPAA sought info on PirateBay founders

- http://news.cnet.com/8301-1023_3-9999018-93.html

MPAA Says No Proof Needed in P2P Copyright Infringement Lawsuits

- <http://blog.wired.com/27bstroke6/2008/06/mpaa-says-no-pr.html>

MPAA loses in case against Cablevision, *Cartoon Network v. CSC Holdings*

- <http://recordingindustryvspeople.blogspot.com/2008/08/mpaa-loses-in-case-against-cablevision.html>

Recent Cases

MPAA Wins Court Case Against BitTorrent Site, LokiTorrent

- <http://digital-lifestyles.info/2005/02/11/mpaa-wins-court-case-against-bittorrent-site-lokitorrent>

RIAA wins court case

- http://www.fudzilla.com/index.php?option=com_content&task=view&id=9124&Itemid=38

RIAA's unethical investigations to be dragged into the open in court case

- <http://www.boingboing.net/2008/03/14/ri-aas-unethical-inve.html>

- Copyright law changes frequently as cases are decided and precedents are set.
- Always apply fair use logically and keep good records.
- Ask if you aren't sure - if we don't know the answer, we will help you find it!
- Once you learn that some practices have changed or become illegal, modify your behavior ASAP!

On October 4, 2007, Ms. Thomas was found guilty of willfully downloading music via Kazaa, a file sharing network. A jury in Minnesota handed down \$223,000 fine for statutory damages against Ms. Thomas ([Capital Records, et al v. Jammie Thomas](#)).

SOME EXAMPLES WORK TODAY BUT...

From the CHE in April 16, 2008

Three scholarly publishers — Oxford University Press, Cambridge University Press, and SAGE Publications — sued George State University in federal court on Tuesday, alleging “systematic, widespread, and unauthorized copying and distribution of a vast amount of copyrighted works.”

The [complaint](#) focuses on course reading materials that are digitally distributed through “a variety of online systems and outlets” run by Georgia State.

The publishers allege that Georgia State has “facilitated, enabled, encouraged, and induced professors” to use those systems to distribute “many, if not all, of the assigned readings for a course” in a manner that far exceeds fair use.

Publishers Sue Georgia State U. for Copyright Infringement

The publishers are supported by the Association of American Publishers (AAP), charges GSU with "pervasive, flagrant, and ongoing unauthorized distribution of copyrighted materials" via its "electronic course reserves service, its Blackboard/WebCT Vista electronic course management system, and its departmental web pages and hyperlinked online syllabi available on websites and computer servers controlled by GSU."

The suit seeks injunctive relief but not monetary damages.

**Publishers Sue Georgia State U.
for Copyright Infringement**

E-reserves and other digital means of distributing copyrighted material have become an increasingly sore subject for publishers. In a [statement](#) supporting the publishers' action, the Association of American University Presses noted that electronic distribution of books and journals "has become a significant problem for university presses, who depend upon the income due them to continue to publish the specialized scholarly books required to educate students and to advance university research."

**Publishers Sue Georgia State U.
for Copyright Infringement**

From the CHE in February 2010:

The University of California at Los Angeles has stopped posting copyrighted videos on course Web sites after complaints from an educational-media trade group, leaving other colleges worried about repercussions.

The Association for Information and Media Equipment contacted the university in the fall, alleging that it had violated copyright laws by letting instructors use the videos, which were accessible only to students then enrolled in specific courses. The university temporarily stopped using online videos beginning this semester and is negotiating with the trade group.

UCLA Pulls Videos From Course Sites After Copyright Challenge

Current copyright laws allow "fair use" exceptions for teaching and research, and one specific exception in copyright law lets instructors use legally made audiovisual material in face-to-face teaching activities.

The university argues that posting the material to password-protected sites falls under these exceptions and that technology is "a critical component of our instructional mission here and at a lot of other universities," according to a spokesman, Phil Hampton.

UCLA Pulls Videos From Course Sites After Copyright Challenge

Offering to Distribute = Distribution

- Deeplink by [Fred von Lohmann](#)
- On March 31, 2008, a federal court [ruled](#) in [Elektra v. Barker](#) that "an offer to distribute ... for the purpose of further distribution" may be enough to violate a copyright owner's distribution right.
- This ruling opens the door open for civil attempt liability when it comes to distribution.
- ***In other words...having a song in a shared folder without authorization might be infringing, even if no one ever downloads it from you.***

[Elektra v. Barker](#)

Making Available is Not Distribution

- Deeplink by [Fred von Lohmann](#)
- Same day, two federal courts, two different rulings on "making available."
- As we [mentioned yesterday](#), a New York court in *Elektra v. Barker* gave a boost to the recording industry by ruling that an offer to distribute a file on a P2P network can infringe the distribution right, even if no one ever actually downloaded it from you.
- ***Well, on the same day, a Massachusetts court in London-Sire v. Doe [ruled just the opposite](#), holding that "merely exposing music files to the internet is not copyright infringement."***

[London-Sire v. Doe](#)

BEST PRACTICES

- Always evaluate using the 4 fair use factors.
- Use a copyright checklist to manage your written or verbal copyright requests.
- Save a trail for each item you seek permission/use.
- Do a self-review regularly- especially when you plan to use an item every semester.
- Use a disclaimer on online or face-to-face syllabi:
 - *“Some materials used in this class may be copyrighted and should not be shared with individuals not enrolled in this course.”*

BEST PRACTICES

- Use legal copies.
- Do not circumvent technological protections.
- Use only what is needed (10% rule).
- Check documentation before posting materials (many items now include “shrink-wrapped” license agreements that supersede fair use).
- Place all copyrighted material (in any format) within MU Online for face-to-face and online classes.

*Once you seek permission, fair use applies.
Use the item until the owner says stop!*

Copyright @ Marshall

Online resources:

<http://www.marshall.edu/it/copyright/>

- Includes check-lists, tips, self-help tools, & guides for various types of materials, uses, & questions.
- The committee members are listed & can also serve as helpers in answering tough questions.

Campus © Help:

- Dr. Monica Brooks
696-6474 or brooks@marshall.edu

Copyright @ Marshall

- MU Copyright Policy:
www.marshall.edu/itc/copyright%20policy%2024Nov03.htm
- Teach Act Compliance Checklist:
www.copyright.iupui.edu/teachlist.htm
- Copyright Management Center:
www.copyright.iupui.edu/index.htm
- The Teach Tool Kit:
www.lib.ncsu.edu/scc/legislative/teachkit