Copyright and Educational Fair Use

Center for University Teaching, Learning and Assessment: Faculty Friday
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Notes from Bob Dugan post Presentation

• This is a combination of the PowerPoint slides presented at CUTLA’s Faculty Friday on March 22, 2013 (in black text) and my notes (in red text).

• I added slides at the end identifying a few, very selected resources as well as web addresses for the text of the court decisions of three cases highlighted during the presentation.
Introduction

• The intent of copyright is to advance the progress of knowledge by giving an author of a work an economic incentive to create new works.

• Copyright is a legal device that provides the creator of a work of art or literature, or a work that conveys information or ideas, the right to control how the work is used.
What Cannot be Copyrighted?

• Works in the public domain:
  – generic information, such as facts, numbers and ideas.
  – all works first published in the United States prior to 1923.
  – works published between 1923 and 1963 on which copyright registrations were not renewed.
  – works created prior to March 1989 that failed to include a proper notice of copyright.
  – works created by the U.S. federal government.

• Words, names, slogans, or other short phrases
Fair Use

• Copyright laws provide an exception for fair use, where you don’t need the permission of the copyright owner to copy or perform their work.

• The fair use doctrine is perhaps the most significant limitation on the exclusive rights held by a copyright owner. It provides for the legal, non-licensed citation or incorporation of copyrighted material into another author’s work under certain circumstances.
Fair Use

• Fair use allows for uses of a copyrighted work by others for purposes that are deemed socially beneficial, for example in education, criticism, commentary, scholarship, research, reportage, or parody.

• Generally, the principle of fair use means that you are allowed to use short quotations from a copyrighted work while writing a review or a commentary without having to obtain permission from the work’s copyright holder even if the copyright holder objects.
Fair Use and Education

• Fair use is especially important in classroom teaching, the reasoning being that education is such an important social good that a considerable latitude is allowed in the use of copyrighted materials.

• However, not all educational uses are fair uses.
  – Just because a copyrighted work is copied or performed in a school, college, or university, or is used in such a way that has educational overtones, the use may not necessarily be fair.
Fair Use

• The current copyright law mandates a "checklist" approach: if a proposed use fails to comply with any condition, prohibition, or exclusion, the fair use exemption does not apply.
Fair Use Checklist

1. Purpose and character of use, including whether such use is of a commercial nature or is for nonprofit educational purposes
   
   – Basically, the “purpose” part of this particular rule asks whether the use of the copyrighted work was intended to serve some sort of public or societal interest such as education, scholarship, or research, or was strictly intended for commercial profit-making purposes.

   – It essentially boils down to the question--did you make any money when you incorporated someone else’s copyrighted work in your own work, when you performed it in public, or when you made and distributed copies? If you made money on the deal, that might be construed as against fair use.
Fair Use Checklist

2. The nature of the copyrighted work
   - Is the work that was copied factual or creative?
   - If a copyrighted work is predominately factual in nature (such as a news article, a scientific paper, or an official report), then reuse of the work is more likely to be considered as fair use.
Fair Use Checklist

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

- Generally, the more that is taken from the original, the less likely it is that it will be considered fair use.
4. The effect of the use upon the potential market for or value of the copyrighted work.

- This rule asks whether a new work that reuses parts from a copyrighted work competes economically in the marketplace with the original work from which it borrowed.

- Will the new work cause fewer numbers of people to buy or rent the original work, adversely affecting its economic value? Will the new work result in lost business for the original work’s copyright owner?
Educational Exemption

• Section 110(1) of the 1976 Copyright Act (which gives copyright exemptions to certain performances and displays) says that the performance or display of copyrighted works in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, is not copyright infringement.

• The educational exemption gives nonprofit educational institutions a great amount of leeway in how they deal with copyrighted materials in the classroom.
Fair Use

• It is usually OK for an instructor in a nonprofit educational institution to show a video, read a poem, or play recorded music in class.

• There are restrictions:
  – that the use of copyrighted materials must take place in a place devoted to instruction
  – that the teaching and learning must take place at the same time.
  – all of the materials displayed or performed must be legally acquired.
Fair Use

• When a teacher reads a poem, shows a movie, plays a recording, or displays a photograph in the classroom so that students can study the work, it is being used for pedagogical purposes.

• This use is **transformative** and is generally protected under fair use.

  – transformativeness changes the way the work is used, putting it to a use that recontextualizes it from its intended purpose.
Fair Use

• However, the same transformative argument would probably not be valid for works intended specifically for the academic market, such as college textbooks, standardized tests, educational videos or workbooks.

• Such works were actually created by their publishers for educational use, and to use them in a classroom setting without permission might not be considered as being fair use.

• Example: it would not be fair use for a professor to put a copy of the course textbook up on their website, letting the students have access to it for free, since this would be competing with the targeted market for the text.
Fair Use

• These Copyright Office guidelines allow teachers to copy and hand out in class without permission the following things:
  – A single chapter from a book
  – A single article from a journal
  – An excerpt from a work that combines language and illustrations, such as a children's book, not exceeding two pages or 10 percent of the work, whichever is less.
  – A poem of 250 words or less or up to 250 words of a longer poem
  – An article, short story, or essay of 2,500 words or less, or excerpts of up to 1,000 words or 10 percent of a longer work, whichever is less; or
  – A single chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.
Coursepacks

• An academic coursepack is a (usually photocopied) collection of materials used in the classroom, distributed either in book format or as class handouts.

• Until 1991, many instructors and photocopy shops assembled and sold coursepacks without permission and without compensating the authors or publishers. This was based on the assumption that educational copying qualified as a “fair use” under copyright law.
Coursepacks

• However, in 1991, a federal court ruled that a publisher’s copyright was infringed when a Kinko’s copy shop reprinted portions of a book in an academic coursepack. (Basic Books Inc. v. Kinko’s Graphics Corp., 758 F. Supp. 1522 (S.D. N.Y. 1991).) The court said that reprinting copyrighted materials in academic coursepacks was not a fair use and that permission was required.

• This and similar court rulings establish the rule that you need to obtain permission before reproducing copyrighted materials for an academic coursepack. Many campus copy shops still perform coursepack assembly. However, these copy shops have either affiliated with established clearance services or are prepared to obtain clearance on behalf of instructors.
The Technology, Education, and Copyright Harmonization (TEACH) act of 2002 was designed to clarify the role of copyright in online or distance education. It expands the scope of educators’ rights granted in face-to-face classroom teaching into the realm of distance education.

- Previously, when U.S. copyright law applied to the classroom, it applied only to face-to-face settings.
- The TEACH Act says that the same materials which can be shown in a live classroom can now be displayed in the digital classroom.
TEACH Act

• The transmission has to be under the actual supervision of an instructor, must be an integral part of a class session, and the reception must be limited to the students enrolled in the course.
  – Most of course management systems allow teachers to manage their courses entirely online and only allow the students that are taking the class to access the materials. Password protection is typically used to prevent nonstudents from accessing the material.
TEACH Act

• Educators cannot make materials available online in the digital classroom if the purpose is simply to avoid requiring the students to purchase copies. This means that textbooks, coursepacks, or other materials that are typically purchased or acquired by students for their individual use cannot be shown.
TEACH Act

• Works that are marketed primarily for use in a digital classroom cannot be shown, unless permission is obtained or if their use would qualify under the fair use exemptions.
  – they would not be “transformative” because the intended purpose is educational
TEACH Act: UCLA

• the Association for Information and Media Equipment, a trade group that represents educational media producers, threatened to sue UCLA because their professors were streaming copyrighted films on password-protected private course web sites.

• Plaintiffs claimed that in order for UCLA to stream a film from a hard copy DVD, it was first necessary to decode the DVD into a digital copy and store it on a server. They argued that this act was illegal, because a copy was being made without the permission of the rights holder.
TEACH Act: UCLA

• UCLA claimed that what its professors were doing is fair use, and is allowable under the nonprofit education exception as well as being allowed under the provisions of the TEACH Act.

• UCLA argued that the screening of a full-length film in a physical classroom in a nonprofit educational institution is perfectly legal, and that the uploading a feature film to a course website so that students could stream it for the purpose of analysis would count under the fair use exception as a repurposing, a reuse of the work for a different purpose.

• UCLA said that it considers its video streaming process essential for its online courses, since it allows students to watch videos on their own computers and on their own time rather than having to gather in a classroom.
TEACH Act: UCLA

• In October of 2011, the federal judge in charge of the case threw out the lawsuit, arguing that the type of access that students or faculty have, no matter where they may actually be located, does not take the DVD out of the educational context.

• The judge ruled that streaming them on a secure site was simply a different sort of classroom performance and was also permissible.

• However the judge’s ruling did not resolve the question of whether streaming is fair use when no public performance license has been given.
There has been an ongoing controversy between Georgia State University and some academic presses (including Cambridge University Press, Oxford University Press, and Sage Publications) over the university’s handling of “electronic reserves” of their copyrighted materials.

These reserves included excerpts from texts that had been scanned from their copyrighted publications and made available to students, either through the library or through course websites. Faculty have been doing this for years under the educational exception in the copyright law, as well as under the generalities of fair use.

The academic presses want to prevent professors from doing this without paying licensing fees to publishers.
In April of 2008, claiming that they were unable to get Georgia State to talk to them about this matter, the publishers filed a lawsuit.

The publishers wanted the court to impose some rather restrictive guidelines on what can be put on “electronic reserve” in the library or on course websites, similar to the guidelines which were suggested by the US Copyright Office for limits on the use of copyrighted materials in face-to-face teaching.

These might include the requirement of permission for the scanning of more than 1,000 words out of a book, or for scanning a poem longer than 250 words, or an essay longer than 2,500 words.
Georgia State University

• The Georgia State University library objected, claiming that the publishers were asking for the impossible and that the administrative costs and the permission fees would be staggering.

• E-reserves are similar in many respects to the way an earlier generation of students might have gone to the library to read print materials placed on reserve by the faculty.

• The reserve readings at the crux of the dispute are chapters, essays or portions of books that are assigned by Georgia State professors to their undergraduate and graduate students.

• While the materials are frequently referred to as "supplemental," they are generally required readings that augment the texts that the professors tell students to buy.
Georgia State University

• In May of 2012, Federal judge Orinda D. Evans rejected many of the claims brought in the suit by the publishers against Georgia State University.
  – this decision is currently the leading case on fair use.
Georgia State University

• In 94 of the 99 instances cited by the publishers as copyright violations, the judge ruled that what Georgia State and its professors were doing was actually covered by fair use.

• And the judge also rejected the publishers' ideas about how to regulate e-reserves.

• Judge Evans in her decision noted that most book (and permission) sales for student use are by large for-profit companies, not by nonprofit university presses.
Georgia State University

• The decision in this case notes a number of steps taken by Georgia State including restrictive password protection AND a notice instructing students not to further distribute course content to others.
Georgia State University

- Judge Evans found that the **first two fair use factors** strongly favored Georgia State. The university is a nonprofit educational institution using the e-reserves for educational purposes. Further, the works in question were nonfiction and "informational," categories that were appropriately covered by fair use.
The analysis of the **third fair use factor** (amount and substantiality of the portion used) was less straightforward to Judge Evans.

– She rejected the claim of the publishers that a 1976 agreement between publishers and some education groups should govern fair use for e-reserves.
The 1976 agreement was "very restrictive," she writes. For example, only work that did not exceed 2,500 words was covered. Still other limits were set on how many times an instructor could invoke fair use in a single course.
While rejecting the 1976 agreement, Judge Evans writes that there are legitimate questions about how much material may be fairly used. She notes that the publishers had asked her to base any percentages on only the text portion of a book (excluding introductory pages, footnotes and concluding tables) while Georgia State had wanted everything counted. Evans based her percentages on Georgia State's view that the book is the entire book, cover to cover.
– The judge also ruled out the possibility of putting one chapter on reserve for a while, and then replacing it with a second chapter later on while asserting that only one chapter (at a time) is being used.
The judge imposed a strict limit of 10 percent on the volume of a book that may be covered by fair use. The judge also rejected the “cumulative effect” test. Essentially, this means that you should not copy the same works for more than one term, class, or course.

- she found that the idea that professors be prohibited from unlicensed use of the same chapter from one academic term to the next is an impractical, unnecessary limitation.
- the right approach is to select a percentage of pages which reasonably limits copying and to couple that with a reasonable limit on the number of chapters which may be copied. Number of pages first, then number of chapters.
On the fourth fair use factor (market impact), the judge wrote that "Because the unpaid use of small excerpts will not discourage academic authors from creating new works, will have no appreciable effect on plaintiffs' ability to publish scholarly works, and will promote the spread of knowledge...."
She rejected the idea that Georgia State's actions have had a significant impact on the ability of the publishers to sell books.

But she did see an economic cost to students of passing along more of the cost of materials.

"Plaintiffs offered no trial testimony or evidence showing that they lost any book sales in or after 2009 on account of any actions by anyone at Georgia State. The court finds that no book sales were lost."
The judge wrote that there is a clear impact if and only if the publisher has in place some sort of system for selling access to excerpts that are "reasonably available, at a reasonable price."

This factor did not help the publishers more in this case is evidence cited by the judge that much of the material in question was not available through an online licensing program.

Therefore, Georgia State did not have the "reasonably available option" to acquire a license, even if it wanted to.
The judge ruled that publishers may have more claims against college and university e-reserves if the publishers offer convenient, reasonably priced systems for getting permission (at a price) to use book excerpts online.

“Decision watchers” are speculating that some publishers might be prompted now to create such systems, and to charge as much as the courts would permit.

- because of the phrase “reasonably priced”
Georgia State University

• The three academic publishers against Georgia State University entered its appeals on February 1, 2013.
  – The publishers state that e-reserves amount to course packs or anthologies of reading material.

• The U.S. Department of Justice considered filing an amicus brief in support of the publishers.
  – however, under pressure from education associations, the DOJ decided on February 25 not to move forward with the brief.
HathiTrust & Digital Fair Use

• The University of Michigan library, along with several other university libraries, had decided to make the full texts of digitized “orphan works” that had been created during the Google Scanning project available online to their students and faculty.
  – orphan works are generally those works still under copyright for which the copyright owner cannot be identified or contacted

• The university consortium is known as the HathiTrust, and has its primary goal to make books in university collections more easily searchable and accessible to people with disabilities.
HathiTrust & Digital Fair Use

• The Authors Guild (along with several other authors group) objected, and brought suit in September of 2011.
  – named the University of Michigan and several other major research universities as defendants.

• The Authors Guild found that the copyright owners of some of the works that had been added to the orphan list could actually be easily found, indicating that the libraries had been much too careless in their addition of works to the orphan list.
HathiTrust & Digital Fair Use

• Michigan supporters argued that giving faculty members and students access to digital orphan works ought to be protected under fair use.
  – the library was not selling anything or making any money on the deal, but was simply offering students and faculty additional access to these works.

• In addition, the Michigan library claimed they were not using these books in any way whatsoever that was competing with any conceivable marketplace for these works.

• In any event, these works were already in the library in hard copy form, and by giving access to the digital copies simply increases the number of students who can get access to them.
HathiTrust & Digital Fair Use

• The plaintiffs argued that the copyright law as applicable to libraries actually says that a library may not create or maintain digital copies of their print holdings unless the purpose is to replace a deteriorated book that is no longer usable, and that there can be no further distribution of the book in digital format, and that the digital copy cannot be used outside the premises of the library.
HathiTrust & Digital Fair Use

• The plaintiffs argued that allowing the full text of digital copies to be searched by researchers without paying for permission would deprive authors and publishers of potential sales.

  – Just because the library doesn’t charge for access to the digitized orphans does not necessarily mean that they have not profited in some manner from the arrangement.
HathiTrust & Digital Fair Use

• In October 2012, Federal judge Harold Baer, Jr. rejected the Authors Guild suit and ruled that what the HathiTrust was doing was covered under fair use, because the goal of making books in university collections more easily searchable and accessible to people with disabilities is indeed protected by fair use.

• What the HathiTrust was doing was transformative.
HathiTrust & Digital Fair Use

• The judge’s interpretation of fair use, including indexing, the need to preserve the cultural record, and making books accessible to the blind, is an endorsement of Fair Use.
  – indexing: the judge has said that creating an index using digital copies of works is transformative enough to be a fair use, even if it’s on a large scale.
  – “a search index is fair use” and “search indexing is a transformative use”
HathiTrust & Digital Fair Use

• The Authors Guild filed an appeal on February 25, 2013.
Select Sources Used

• Library Profession’s Perspective
  – Fair Use and Electronic Reserves
    • http://www.ala.org/advocacy/copyright/fairuse/fairuse
      andelectronicreserves
  – TEACH Act
    • http://www.ala.org/advocacy/copyright/teachact
  – HathiTrust
    • http://www.americanlibrariesmagazine.org/features/0
      1152013/unlocking-riches-hathitrust
Select Sources Used

• General Information about Copyright
    http://www.joebaughers.com/copyright.htm
  – University of Maryland at
    http://www.umuc.edu/library/libhow/copyright.cfm
  – Stanford University at
    http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/index.html
  – Copyright Clearance Center (CCC) at
    http://www.copyright.com/content/cc3/en/toolbar/education/resources/copyright_basics.html
Select Sources Used

• Sources of the Text from the Case Decisions
  – Georgia State University
  – UCLA and TEACH
    • http://newsroom.ucla.edu/portal/ucla/document/UCLA_A_Streaming_Video_Ruling.pdf
  – HaitiTrust and University of Michigan
    • http://www.scribd.com/doc/109647288/Ag-v-Ht-Opinion-Order
Select Sources Used

• about the Georgia State University case