

Overview of Legal Issues Affecting Instructional Technology

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## Copyright Law

The idea of protecting the creators of works is ingrained in the United States since the birth of the nation. The U.S. Constitution states that "the Congress shall have 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" (1787, Article I Section 8). From 1787 to the present day, copyright law has evolved to protect creators in nuanced ways. The current copyright law is contained in Title 17 of the U.S. Code entitled the Copyright Act of 1976 (Copyright Law, 1976). Amendments have been added over the years, some of which are discussed later in this paper.

Copyright is the legal right of a creator, such as an author or artist, to control how others use his or her original work. Copyrighted works can include writings, musical compositions, artwork, photographs, software, and any other "tangible form of expression" (Copyright Law, 1976, sect. 106). Almost any original work can be copyrighted, from a thank you note to a directory of phone numbers (HU, 2016). Though it is not necessary to register new works with the Copyright Office for it to be protected by law, those who do register formally receive additional benefits (Tsyver, n.d. "Copyright Law"). Copyright law is complicated and leaves much room for interpretation, but ultimately is meant to encourage and protect creative expression. The challenge of copyright legislation is finding a way to for the law to ensure the protection of works in a way that encourages creative expression rather than inhibits it (Ventose & Forrester, 2010).

### Scope of Protection

The U.S. Copyright Act grants copyright holders certain rights regarding their work. Section 106 of the Copyright Act details these exclusive rights. The first and arguably most important right is the right to reproduce, or make copies, of the work (Tsyver, n.d. "Copyright Law"). Copyright holders may also distribute copies of their work to the public by sale, rental, lending, or donation (Copyright Law, 1976). The copyright holder has the right to create derivative works, such as adaptations, translations, and modifications (CSU, n.d.). Section 106 also grants the copyright holder the right to publicly perform or display the work (Copyright Law, 1976). These rights are all limited by "fair use," which is discussed later in the essay.

### Copyright Infringement

Copyright infringement is the act of exploiting any of the rights discussed above without the permission of the copyright holder. The copyright holder then has the right to sue the infringer for any existing or potential damages (CSU, n.d.). Courts look for two factors when determining if a copyrighted work has been infringed upon—first, the two works are notably similar, then proof that the infringer had access to the copyrighted work (CSU, n.d.). It is also necessary to understand that copyright infringement is not the same thing as plagiarism. Correctly citing a copied work does not protect the user from liability (HU, 2016).

## Copyright Online

The internet provides an ever-moving target for copyright law. Immediately the idea of a work “fixed in a tangible medium,” as is stated in the legislation, is called into question when the work exists in cyberspace. Regardless of this technical gray area, copyright law is effective online (HU, 2016). The same duplication and distribution restrictions apply. People are free to view any material they have authorized access to, regardless of copyright status. Because downloading and printing are both considered to be making copies of copyrighted material, the user must first have the author’s permission (HU, 2016). It is a good idea to assume a website or any online content is copyrighted and to request permission before engaging in activities that could be viewed as infringement. The fair use doctrine may apply in some instances of online copyrighted material usage.

## Fair Use

The concept of Fair Use was first applied as law in the U.S. Copyright Act of 1976. It is very close to the beginning of the Act in Section 107 entitled “Limitations on Exclusive Rights: Fair Use.” The language is placed somewhat ironically just after a lengthy section of the DMCA dedicated to defining legal terms as if legislators foresaw that the public would never be able to clearly define it despite their best efforts. Copyright.gov defines Fair Use as “a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances” (U.S. Copyright Office Fair Use Index, 2018, para. 1). In their Frequently Asked Questions, Harvard University describes Fair Use as “a legally permissible use of copyrighted material for specific purposes such as commentary, criticism, news reporting, research, teaching or scholarship” (n.d., para. 1).

Section 107 develops the framework from which the public can determine what types of uses are protected under the umbrella of fair use. The U.S. Copyright Office clearly states on their website that they do not offer any specific legal advice to individuals and that courts analyze claims on a case-by-case basis (U.S. Copyright Office Fair Use Index, 2018). There are four factors to take into account when deciding whether an action is “fair use,” but ultimately there is no black and white chart to consult outside of the 175 words in Section 107.

## Purpose of the Use

First, the user must consider the reason for the use of the copyrighted work and determine whether it is meant for commercial or nonprofit purposes (Copyright Law, 1976). Courts examine how the user is using the copyrighted work. According to the U.S. Copyright Fair Use Index (2018), courts are more likely to support fair use claims that are for educational and non-commercial uses. The Index (1998) further allows for “transformative” applications, which are uses that expand on the original work such as commentary, criticism, or parody. A teacher copying a clip of a news article to use in a lesson would be considered a transformative use (Stim, 2010).

### **Nature of the Copyrighted Work**

The next factor to examine is the nature of the copyrighted work (Copyright Law, 1976). Determining the nature of a work in this context involves two considerations—whether the work is published or unpublished and how creative the work is (HU, 2016). As copyright laws are largely meant to protect creative expression, using factual and less creative works are more likely to be protected by fair use than highly imaginative works (HU, 2016). According to the Copyright Fair Use Index (2018), the use of published work is considered fair more often than the use of unpublished work.

### **Amount of Work Used**

The third factor to consider is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole” (Copyright Law, 1976, sect. 107/3). The Index (2018) describes this factor as the point where courts examine the quantity and quality of the work that is used. The use of a small portion such as a short passage is more likely to be protected by fair use than the use of an entire chapter of a novel (Tsyver, n.d., “Fair Use”). Determining the quality of the copyrighted material used is less clear. If the portion used, regardless of amount, is considered the heart of the work, it is less likely to be fair (Copyright Fair Use Index, 2018).

### **Effect of the Use**

The fourth factor to consider is how the use will affect the potential market or value of the copyrighted work (Copyright Law, 1976). If the use of the copyrighted material might have an impact on the market of the original work or harm sales in any way in the present or future, then the unlicensed use cannot be considered fair (Copyright Fair Use Index, 2018). This factor is often the most important to the courts (Tsyver, n.d., “Fair Use”).

## **Digital Millennium Copyright Act**

In 1998, Congress passed The Digital Millennium Copyright Act (DMCA); it subsequently went into effect in 2000. This legislation was added to the existing Copyright Act, officially Title 17 of the U.S. Code, and was intended to update the law to better accommodate growing technological innovation and use in the Digital Age (ALA, 2017). Congress also needed to meet the requirements of international standards such as the World Intellectual Property Organization (Band, 1998).

While updated legislation was greatly needed, the DMCA further complicates the balance of information protection and information access. In an analysis of the act, the American Library Association (2017) laments that the new law tilts heavily on the side of information protection over access. While the legislation has broad implications regarding the ideas of ownership and intellectual property, this paper focuses on several specific ways the DMCA directly impacts the access and distribution of information.

### **Circumvention of Protection Technologies**

Title I of the DMCA enacts restrictions against bypassing specific protection measures used in technology (ALA, 2017). These protection measures can include passwords, encryption keys, captchas, and any other security measure meant to limit access. This section also prohibits the creation of any device, software, or service intended to circumvent any existing technological security efforts (Kravets, 2008). One year after the law went into effect, a computer programmer was arrested for developing and sharing software that bypassed Adobe encryption codes and allowed people to make copies of previously purchased e-books to read on other devices—this was before cloud technologies (Zetter, 2016).

Although the law makes no explicit changes to the fair use policy, the act attempted to set protections for fair use if it was threatened by the anti-circumvention restrictions (ALA, 2017). Every three years the Librarian of Congress reviews this part of the DMCA with the U.S. Copyright Office and approves select requests for exceptions (Kravets, 2008). One such exception allows for nonprofit libraries, archives, and educational institutions to access review copies of textbooks and other works to help determine whether to ultimately purchase copies (Band, 1998).

### **Limited Liability for Online Service Providers**

Title II of the DMCA protects online service providers (OSPs) from copyright liability due to content made by a user (ALA, 2017). In a reflection of the legislation ten years after enactment, an author from Wired claimed that this protection of OSPs is the primary reason for the success of Web 2.0 (Kravets, 2008). For better or worse, platforms like YouTube and Google could exist without the worry of being sued for user's copyright infringement every day. The Act allows OSPs protection, or "safe harbor," given they abide by several conditions including the implementation of a termination policy and the accommodation of standard methods by copyright holding users to protect their work (Band, 1998).

One major relief for OSPs is that the Act states that there is no requirement for active monitoring for infringing content (Band, 1998). Instead, users report activity of copyright infringement, the OSP must then take down the content, and the copyright holder decides whether or not to allow the restoration of it (Kravets, 2008). This protection significantly impacts online learning platforms by enabling them to continue supporting user content without continual monitoring or fear of penalty for hosted materials. Canvas cannot be sued by the original authors of papers that have been plagiarized or illegally copied videos that are posted online.

### **Digital Preservation**

Title IV of the DMCA includes several miscellaneous provisions to the Copyright Act, one of which updates the digital preservation standards (ALA, 2017). The rigidity of the Copyright Act interfered with the processes that protect works from becoming obsolete. It granted an exception for libraries and archives allowing them to use digital technologies to preserve works (Band, 1998). This section permits libraries to make three copies of a work when practicing preservation activities (ALA, 2017). While this section may not impact the field of

instructional technology, it does ultimately impact the sharing of information by enabling the digitization of endangered print, audio, or video materials.

### **Digital Transmission and Webcasting**

Another section in Title IV examines the relationship between distance education and the digital transmission of sound recording via webcasting (U.S. Copyright Office, 1998). The 1995 Digital Performance Right in Sound Recordings Act (DPRA) of the U.S. copyright law limited the rights of broadcasted sound recordings (U.S. Copyright Office, 1998). Although the legislation was intended to protect against piracy, it became a hindrance to educational institutions when distance education became popular. This threat to the fair use doctrine was acknowledged in the DMCA with an amendment that permits specific duplication and distribution measures necessary for distance education (Band, 1998).

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