Changes to Copyright & Fair Use: What Faculty Need to Know

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Changes to Copyright & Fair Use: What Faculty Need to Know

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CopyrightCompliance.net
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FACTS

In the spring of 2008, Georgia State University officials were sued by three academic publishers claiming extensive copyright infringement over the posting of book excerpts to GSU’s e-reserves and learning management systems. Though the case went to trial in the summer of 2011, the judge took nearly a year to craft an almost 350 page opinion painstakingly analyzing 75 alleged violations of fair use. The opinion was released on May 11, 2012. The judge concluded GSU faculty violated the limits of fair use in 5 of the alleged violations that went to trial. In a subsequent ruling issued on August 10, 2012, the judge ruled against the publishers refusing to enter an injunction against GSU. Further, in large part because the court concluded that GSU acted in good faith throughout, she held that GSU is the “prevailing party” and ordered the publishers to pay GSU’s costs and fees associated with the lawsuit. The publishers appealed and on October 17, 2014, the 11th Circuit Court of Appeals issued its ruling agreeing in part, and disagreeing in part with the lower court’s ruling.

KEY RULINGS AT A GLANCE

**Proof of Copyright Ownership**

Publishers must be able to prove ownership of a valid copyright to any allegedly infringed works. If they can’t prove such ownership, they lose on that claim.

**Repeated (Semester-to-Semester) Use of Same Work**

Repeated use of the same work is permitted by copyright law and does not violate fair use.

**1976 Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions With Respect to Books and Periodicals**

These guidelines are not legally binding and are not an appropriate standard for determining what does and does not qualify as a fair use.
**Hits**

Posting a work to e-reserves or a learning management system is not a violation of fair use if, in fact, the work is not accessed and/or used by students. Such copying is de minimis. Examples: work posted but course is cancelled, work posted but the number of recorded hits indicates it wasn’t used by students. (Not all systems track hit counts.) The district court discussed hits in this way and the appeals court did not express any disagreement with that view.

**“Heart of the Work”**

Excerpts that qualify as the “heart of the work” require permission. An excerpt is not automatically “the heart of the work” simply because it was selected by a faculty member to be used in teaching or scholarship. An excerpt is “the heart of the work” if: it is a “critical part of the book;” it bears “an unusually striking relationship to the book as a whole;” or it “essentially sum[s] up the ideas in the book.” Of primary concern here is that “heart of the work” excerpts serve as “market substitutes” which weighs against fair use.

**Page Count**

When determining whether a posted excerpt or excerpts qualifies as a fair use, all the pages in the book are included in the page count. That is, the total page count includes not only the main body of the book, but also includes the title page, forward, table of contents, index, appendices, etc. However, when a posted excerpt contains public domain materials, the length of the posted excerpt is computed by subtracting the length of the public domain materials.

Example: A 25 page excerpt of a book contains 3 ½ pages of material that are in the public domain (e.g. copyright has expired or federal government documents). For the purposes of any required page count, that excerpt is 21 ½ pages long.

**Fair Use Factors**

- **Factor #1** – Purpose or Character of the Use: Because GSU is a non-profit educational institution, the appeals court agreed with the district court in concluding that in each instance of alleged copyright infringement, this factor weighed in favor of fair use. Interestingly, the appeals court indicated that the use (educational) was of greater significance than the fact that GSU is a non-profit.

- **Factor #2** – Nature of the Work Used: Here, the appeals court concluded that this factor was of no particular significance because the materials used were non-fiction and published. However, the court did note that factual material can contain additional “expressive” content and as a result just because the work used is non-fiction does not automatically weigh in favor of fair use.

- **Factor #3** – Portion Used (Quantitatively & Qualitatively): This is the point at which the appeals court most significantly differed with the district court. The district court judge
established 10% or 1 chapter rules for analyzing fair use in non-fiction books. The appeals court overruled that finding and called for a traditional case-by-case evaluation of the portion used.

- **Factor #4 – Impact on the Market**: Agreeing with the district court, the appeals court ruled that if there is no permissions market for a work that weighs in favor of fair use. Beyond that, the court established a standard to be used when evaluating the market impact that asks the question: If “everybody did it,” would that result in “substantial” harm to the market for the work? If yes, that weighs against fair use. If no, it weighs in favor of fair use.

**Fair Use Protection Requires the Following**

The lower court ruled that all of the following are required for fair use to apply. The appeals court expressed no disagreement with that view.

- Access to materials must be limited to enrolled students, in a secure environment, only “for the term of the course.”
- Institutional policies must be in place that prohibits students from further distributing the materials.
- Each time a student accesses such materials, he or she must be “reminded of the limitations of the copyright laws.”
- All materials used “must fill a demonstrated, legitimate purpose in the course curriculum and must be narrowly tailored to accomplish that purpose.”

**Sound Bites Worth Noting**

“…it is consistent with the principles of copyright to apply the fair use doctrine in a way that promotes the dissemination of knowledge, and not simply its creation …”

“Even verbatim copying ‘may be transformative so long as the copy serves a different function than the original work’”

“The legislative history of [the Copyright Act] further demonstrates that Congress singled out educational purposes for special consideration.”

“…it is not determinative that programs exist through which universities may license excerpts … the ability to license does not demand a finding against fair use.”
FACTS

In September of 2011, a number of individual authors along with their trade associations which includes The Authors Guild sued the Hathi Trust and its partner universities for copyright infringement. The Hathi Trust is operated by the University of Michigan. The trust partnered with the University of California, University of Wisconsin, Indiana University and Cornell University to created shared digital repositories of their book collections under two separate projects: the “Mass Digitization Project (MDP) and the “Orphan Works Project” (OWP). The trust entered into an agreement with Google to actually create the digital files. Google was sued in a separate lawsuit that remains pending.

Due to difficulties encountered in correctly identifying orphan works, the OWP was voluntarily suspended by the University of Michigan. Consequently, the court rulings in this case do not address its legality. The rulings are limited to the MDP.

The purpose of the MDP is to create a single digital repository of the works in the collections of participating universities to be accessed only by members of those university communities and only for certain limited purposes. Works in the MDP are to be used in three ways: full text searches, preservation and access for print-disabled persons.

KEY RULINGS AT A GLANCE

Full Text Searches

The Second Circuit Court of Appeals upheld the lower court’s ruling that digitizing books to facilitate full text searches is transformative and therefore qualifies as a fair use. In fact, the Court went so far as to characterize “the creation of a full-text searchable database [as] a quintessentially transformative use.” Like the lower court, the Appeals Court emphasized that as implemented, the full text search capability permits users to search for words and phrases, but does not give them access to the full text. That is, users cannot access the full pages of the book to, for example, read it online. Consequently, it does not represent a market substitute for the original. Interestingly, the Court doesn’t stop there but goes on to point out that “any economic ‘harm’ caused by transformative uses” is irrelevant because such uses “do not serve as substitutes for the original work.”
**Preservation**

While the District Court judge concluded that, in light of the specific facts of the case, digitizing copies of the books for preservation purposes represented a qualifying fair use, the Appeals Court concluded the judge erred in ruling on that aspect of the case. That is, the Second Circuit concluded that an error occurred that needs to be resolved before the District Court can rule on the question of whether or not fair use applies to this aspect of the case. Consequently, the Second Circuit sent this part of the case only back to the District Court to resolve the error and then to proceed accordingly.

**Access for Print-Disabled Persons**

The Second Circuit Court of Appeals agreed with the District Court’s conclusion that digitizing books to provide access to print-disabled persons is lawful. However, while the District Court found such a use to be transformative, the Appeals Court disagreed. Instead, it ruled that providing access to print-disabled persons represents a qualifying fair use even though it is not transformative. In the Circuit Court’s view, it is not transformative because digitizing the books permits print-disabled persons to use the books for the same purpose for which they were written – that is, they can now read them. Nevertheless, in finding such a use to be a permitted fair use, the Second Circuit referred to the legislative history of the law which is replete with references to making copies for the blind to illustrate the application of the fair use doctrine.
FACTS

Two Virginia high school students initiated a copyright infringement lawsuit against iParadigms, LLC, the company that owns and operates the plagiarism detection service known as Turnitin. When a paper is submitted for review, it is both evaluated to detect possible plagiarism and archived by Turnitin. That is, the paper is added to the company’s permanent database which is used to compare papers for the purpose of identifying possible instances of plagiarism. Among other things, Turnitin argued that this practice is a legal exercise of fair use.

KEY RULINGS AT A GLANCE

Archiving as a Transformative (i.e. Fair) Use

Typically, under the rules of copyright and fair use law, when a court finds that a particular use of someone else’s copyright protected work is “transformative,” that use qualifies as a fair use. As the court noted in this case, a use is transformative if it “employ[s] the quoted matter in a different manner or for a different purpose from the original.” The court found that even though Turnitin archived entire papers (not limited excerpts), the papers were used for purposes that are completely different from their original purpose. That is, their original purpose was to satisfy an academic course requirement while Turnitin’s purpose was to prevent plagiarism. Further, the court went on to characterize this purpose as “highly transformative” because it provided a “substantial public benefit” to “educational institutions.”

Turnitin as a For-Profit Enterprise

While the court acknowledged that iParadigms, LLC operates Turnitin as a commercial enterprise, it noted that this alone is not determinative of the outcome. The court went on to say that the commercial use must be evaluated in relation to the other aspects of the case which in this instance means that it must be evaluated in relation to the finding that this practice qualifies as a lawful transformative use. Consequently, even though Turnitin operates on a for-profit basis, archiving papers for the purpose of plagiarism detection is not copyright infringement.
Thinking Through Copyright & Fair Use Mini-Cases

The following mini-cases provide supplementary examples of how to approach thinking through the fair use factors analysis.

The Frustrating Reality of “It Depends”

To non-lawyers, “it depends” is a decidedly frustrating and unsatisfying answer to any legal question; yet, it is often the most accurate answer available. While some laws are prescriptive in that they provide clear dos and don'ts, that is not the typical situation. Laws are written in fairly general terms for a purpose which is to avoid being over or under inclusive. Consequently, in many if not most situations, no one knows exactly what a law means until courts apply it to specific facts. As a result, the best way to approach thinking about the fair use factor analysis is with a mindset of sorting out how strong or weak a case for fair use is in light of the specifics of your situation.

Mini-Case #1
Fair Use Pursuant to the GSU Ruling

NOTE: This mini-case is different from the one analyzed in the seminar in one respect. It assumes there is no system in place to obtain permissions.

A faculty member wants to post three excerpts from a 20 chapter non-fiction book to e-reserves for enrolled students only. None of the excerpts are the “heart of the work.” One excerpt is 15 pages long, a second is 11 pages long, and the third excerpt is 2 pages long. The book is 425 pages long and the average chapter is 20 pages. There is no system in place for prospective users to obtain permissions for the use of excerpts of the book.

Analyze this under the four fair use factors.

Factor #1 – The Character of the Use: If this is at a non-profit educational institution, factor 1 will favor fair use. Even if the institution is a for-profit, it can weigh in favor of fair use. The non-profit or for-profit status of the educational institution is less important than the fact that the use is educational.

Factor #2 – The Nature of the Work Used: The excerpts are non-fiction and published, so even if they include expressive content, this factor is not likely to weigh heavily one way or the other.

Factor #3 – The Portion Used: The fact that none of the excerpts represents the “heart of the work” weighs in favor of fair use. In this instance, the three excerpts totaled 28 pages out of a 425 page which represents .065% of the total book. While the courts have not established percentage cut offs, this is a small enough percentage to likely weigh in favor of fair use.

Factor #4 – The Impact on the Market: Because the portion used is small and there is no permissions system in place, this weighs in favor of fair use.

Conclusion: Strong case for fair use.
Mini-Case #2  
Codes of Best Practices in Fair Use  
Make the Case for a Transformational Use

A university library’s film collection includes a copy of Oliver Stone’s 1987 film “Wall Street,” a fictional portrayal of capitalistic excess and greed. A faculty member wants to stream the entire movie to students enrolled in a business ethics course. After watching the film, students will be required to write an essay responding to the question: Is greed good?


In this hypothetical, the film is being re-purposed from its original release for entertainment purposes to an educational use. The following highlights the ways it use can be defended as lawful under the relevant principles of best practice.

**Different audience**

The audience in this case is limited to enrolled students in a particular course – not the general public.

**Illustrative purposes**

The purpose in this case is to illustrate a point in an ethics course – not to entertain the students.

**Critique or comment**

In addition to illustrating a point about greed, the essay assignment requires students to engage in a focused critique of the film that clearly relates to the subject matter of the course.

**Use of Entire Film**

The law requires that the portion used be "reasonable." It does not require the smallest or most narrowly drawn portion to be used as an excerpt. While it is arguably true that the use of an excerpt makes the case for a transformative or fair use stronger; the nothing in the law or best practices requires the use of excerpts only.

Conclusion: Strong case for fair use.
GSU’s UPDATED POLICY AND CHECKLIST

In response to the May 11, 2012 court ruling, GSU revised its institutional copyright policy and fair use checklist. Both were filed with the court. They are provided here for illustration purposes. Note that both are based on similar documents from the Copyright Advisory Office at Columbia University.

The Fair Use Exception

One may make fair use of a copyrighted work without the copyright holder’s permission. The determination of whether a use of a copyrighted work is within fair use depends upon making a reasoned and balanced application of the four fair use factors set forth in Section 107 of the U.S. Copyright Act. Those factors are

- 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.

All four factors should be evaluated in each case, and no one factor will determine the outcome. While fair use is intended to apply to teaching, research, and other such activities, an educational purpose alone does not make a use fair. The “purpose and character of the use” is only one of four factors that users must analyze in order to conclude whether or not the use is fair, and therefore lawful.

Moreover, each of the factors is subject to interpretation as courts work to apply the law. Working through the four factors is important. Simple rules and solutions may be compelling, but by understanding and applying the factors, users receive the benefits of the law’s application to the many new needs and technologies that continue to arise at member institutions within the University System of Georgia.

Understanding the Four Factors

The following is a brief explanation of the four factors from the fair use statute. Keep in mind that fair use requires weighing and balancing all four factors before reaching a conclusion. Additionally, the four factors are nonexclusive, so other factors may be considered in determining whether a use is fair.

Purpose and Character of the Use

The law explicitly favors nonprofit educational uses over commercial uses. Thus, uses for teaching and scholarship are usually favored. Therefore, activities that are truly confined to the university in
support of nonprofit education are likely to receive favorable treatment. Courts also favor uses that are “transformative,” or that are not mirror image copying. A transformative use has been defined as a use that adds to or changes the original work in such a way as to give it new expression, meaning, or message. Fair use is more likely when the copyrighted work is “transformed” into something new or of new utility, such as quotations incorporated into a paper, and pieces of a work mixed into a multimedia product for teaching. The use of works in the context of criticism or critical analysis may also be given favorable treatment. The statute also notes that “multiple copies for classroom use” are favored.

**Nature of the Copyrighted Work**

This factor examines characteristics of the work being used. Quite simply, courts have tended to apply fair use differently to different types of works. For example, courts have concluded that the unpublished nature of a work is a fact weighing against fair use. Courts more readily favor, as a fair use, the use of excerpts that are informational and educational in nature and not fictional, as opposed to fiction and other highly creative works, including novels, short stories, poetry, and modern art images. Only those portions of the work which are relevant to a purpose favoring fair use should be used. Instructors should carefully review uses of “consumable” materials, such as test forms and workbook pages that are meant to be used and repurchased, as their use is less likely to qualify as fair use.

**Amount of the Work Used**

Amount is measured both quantitatively and qualitatively. No exact measures of allowable quantity exist in the law. Quantity must be evaluated relative to the length of the entire work and in light of the amount needed to serve a proper objective. The amount taken from the work should be narrowly tailored to serve these purposes. Any copying of an entire work usually weighs heavily against fair use. Images generate serious controversies because a user nearly always wants the full image, or the full “amount.” A “thumbnail,” or low-resolution version of the image, might be an acceptable “amount.” Motion pictures are also problematic because even short clips may borrow the most extraordinary or creative elements of the work. One may also reproduce only a small portion of any work, but still take “the heart of the work.” This concept is a qualitative measure that weighs against fair use.

An excerpt of a copyrighted work may be made and/or distributed according to the following guidelines:

1. The excerpt is made and/or distributed by the faculty, without charge, for teaching (including multiple copies for classroom use) or scholarship; and
2. The excerpt is to be used for a non-commercial, nonprofit educational use; and
3. The excerpt fulfills a demonstrated legitimate purpose in the course curriculum and is narrowly-tailored to accomplish that purpose; and
4. The excerpt does not constitute the “heart of the work”; and
5. The excerpt constitutes a decidedly small portion of the work in accordance with the following criteria:
If the excerpt is from a work that is not divided into chapters or contains fewer than ten chapters, the excerpt does not exceed ten (10) percent of the pages in the work as a whole; or
- If the excerpt is from a work that contains ten or more chapters, the excerpt does not exceed one (1) chapter; or
- If, after consulting the copyright owner (often the publisher) or its authorized agent (such as the Copyright Clearance Center), it is determined that the excerpt is not readily available for digital academic use at a reasonable price; and

6. The excerpt is not from works intended to be “consumable” in the course of study or of teaching, including workbooks, exercises, standardized tests and test booklets and answer sheets; and

7. The excerpt may be accessed only by students currently enrolled in the relevant course only during the academic term in which the course is offered; and

8. A notice is provided with the excerpt to remind students of the limitations of the copyright laws and to prohibit the distribution of the excerpt to others.

**Effect on the Value of or Market for the Work**

This factor assesses the extent to which a given use affects the potential market for or value of a copyrighted work. The “effect on the market” factor is closely linked to the “purpose of the use” factor. For example, if the purpose of the use is commercial, any adverse market effect resulting from that commercial use weighs against fair use. While the use of a decidedly small excerpt (as defined above) may not cause harm to the potential market for the copyrighted work because that excerpt would probably not be a substitute for the work, if a digital excerpt license is readily available from Copyright Clearance Center or the publisher to copy an excerpt from the copyrighted work, at a reasonable price for digital academic use, the existence of such a digital excerpt license would weigh against fair use.

**All four factors must be considered in determining whether a use of a work is a fair use.**

Revised for use by the University System of Georgia, based upon the fair use resources provided by the Copyright Advisory Office at Columbia University, [http://www.copyright.columbia.edu/copyright/?q=four-factors/](http://www.copyright.columbia.edu/copyright/?q=four-factors/)

**GSU Fair Use Checklist**

Like the fair use policy, the checklist is based on checklist from the Copyright Advisory Office at Columbia University.

Revised for use by the University System of Georgia, based upon the Copyright Advisory Office at Columbia University's "Fair Use Checklist" – [http://www.copyright.columbia.edu/copyright/fair-use/fair-use-checklist](http://www.copyright.columbia.edu/copyright/fair-use/fair-use-checklist)
Fair Use Checklist

Name: ________________________________________  Date: ___________________________

Class or Project: ___________________________________________________________________

Course and Term: __________________________________________________________________

Title of Copyrighted Work: __________________________________________________________

Author and Publisher: ______________________________________________________________

Portion(s) to be used (e.g. pages, timer counts): _______________________________________

Instructions: Where the factors favoring fair use outnumber those against it, reliance on fair use is justified. Where fewer than half the factors favor fair use, instructors should seek permission from the rights holder. Where the factors are evenly split, instructors should consider the total facts weighing in favor of fair use as opposed to the total facts weighing against fair use in deciding whether fair use is justified. Not all of the facts will be present in any given situation. Check only those facts that apply to your use. No single item or factor is determinative of fair use. Instructors should consult the Legal Affairs office at their institution or at the Office of the Board of Regents if they have questions regarding analysis of the four factors.

For more information regarding the fair use factors, please see the fair use sections of the Policy on the Use of Copyrighted Works in Education and Research for the University System of Georgia, which can be found on the web at [http://www.usg.edu/copyright/](http://www.usg.edu/copyright/).

Complete and retain a copy of this checklist for each "fair use" of a copyrighted work in order to establish a "reasonable and good faith" attempt at applying fair use should any dispute regarding such use arise.

**Factor 1: Purpose and Character of the Use**

<table>
<thead>
<tr>
<th>Weighs in Favor of Fair Use</th>
<th>Weighs Against Fair Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>□ Nonprofit Educational Institution</td>
<td>□ Commercial activity, profit from use</td>
</tr>
<tr>
<td>□ Used for Purpose of Teaching (including multiple copies for classroom use) and/or Scholarship or Criticism, Comment, News Reporting, or Parody</td>
<td>□ For public distribution</td>
</tr>
<tr>
<td>□ Used for noncommercial, nonprofit educational use</td>
<td>□ Used for entertainment</td>
</tr>
<tr>
<td>□ Transformative (use changes work for new utility or purpose)</td>
<td>Mirror image copying</td>
</tr>
<tr>
<td>□ Use is necessary to achieve your intended educational purpose</td>
<td>□ Use exceeds that which is necessary to achieve your intended educational purpose</td>
</tr>
</tbody>
</table>

| □ Factor Weighs in Favor of Fair Use | □ Factor Weighs Against Fair Use |


Factor 2: Nature of Copyrighted Work

**Weighs in Favor of Fair Use**
- Published work
- Factual/informational and educational in nature or nonfiction work
- Non-consumable work

**Factor Weighs in Favor of Fair Use**

**Weighs Against Fair Use**
- Unpublished work
- Fiction or highly creative work (art, music, novels, films, plays, poetry)
- Consumable work (workbook, test)

Factor 3: Amount and Substantiality of Portion Used

**Weighs in Favor of Fair Use**
- Decidedly small portion of work used (no more than 10% of work not divided into chapters or having less than 10 chapters or no more than 1 chapter of a 10 or more chapter work)
- Portion used is not central or significant to entire work as a whole
- Amount taken is narrowly tailored to accomplish a demonstrated, legitimate purpose in the course curriculum and must be narrowly tailored to accomplish that purpose
- Access limited to students enrolled in course for only the term of the course

**Factor Weighs in Favor of Fair Use**

**Weighs Against Fair Use**
- Large portion or entire work used (more than 10% of work not divided into chapters or having less than 10 chapters or more than 1 chapter of a 10 or more chapter work)
- Portion used is central to work or "heart of the work"
- Amount taken is more than necessary to accomplish a demonstrated, legitimate purpose in the course curriculum or is not narrowly tailored to accomplish a demonstrated legitimate purpose in the course curriculum
- Access not limited

**Factor Weighs Against Fair Use**

Factor 4: Effect on Market for Original

**Weighs in Favor of Fair Use**
- Permission for digital excerpt is not readily available from publisher or Copyright Clearance Center at a reasonable price
- Decidedly small portion used
- User owns lawfully acquired or purchased copy of original work
- Use stimulates market for original work

**Factor Weighs in Favor of Fair Use**

**Weighs Against Fair Use**
- Permission for digital excerpt is readily available from publisher or Copyright Clearance Center at a reasonable price
- Large portion or entire work used
- User does not own lawfully acquired or purchased copy of original work
- Use impairs the market or potential market for original work

**Factor Weighs Against Fair Use**
Frequently Asked Questions

As a faculty member, I receive many complimentary textbooks from publishing companies. Can I use the teaching supplements from textbooks I don’t require for my courses?

Maybe. This sorts out as follows. When you require a textbook for a class and receive supplementary materials from the publisher, you’re allowed to use them. If any of the supplements are designed for student purchase, you must have your students purchase them; copying is not allowed. Supplementary materials from a textbook you don’t require are another story. Presumably, the supplementary materials are not in the public domain. Consequently, your avenues for lawfully using them are: an express or implied license, fair use, or obtaining permission. To the extent any of these apply, you’re protected. If you have the time to do so, there is one other option. Copyright law protects the expression of ideas, not the underlying ideas. As long as you give appropriate credit to avoid any allegations of plagiarism, you can always create your own materials. They then become your expression of that idea which you are free to use as you wish.

In educational institutions, who is responsible for ensuring that courses are copyright compliant?

This sounds like a perfectly sensible question that should have a direct answer. But, it doesn’t. Copyright law does not impose this kind of affirmative obligation on educational institutions. The Digital Millennium Copyright Act creates certain affirmative obligations, but that is in relation to the institution’s role as an Internet Service Provider. So, those rules don’t apply to copyright compliance for courses. As a practical matter, it goes something like this. If an institution has copyright use policies, the policies might address who is responsible for what. However, regardless of whether such policies exist, the plaintiff in a copyright infringement lawsuit is entitled to sue the faculty member, the institution or both. Some institutions, as a matter of policy, practice, or union contract, defend faculty members who are sued in relation to the performance of their professional duties. Others don’t. So, the short answer is that faculty members, instructional designers and others involved in the development of courses are susceptible to copyright infringement lawsuits as are the institutions as their employers.

Does fair use apply to non-credit courses?

Yes with a “but…..” The fair use doctrine does not disappear because a course is offered on a not-for-credit basis. However, noncredit courses are more in the direction of a commercial activity and less in the direction of an academic activity. Consequently, you have to re-evaluate the application of fair use. So, you may need permission for materials used in a non-credit course even though you didn’t need permission when using the same materials in a course offered on a for-credit basis.
Reviving the Primary Purpose of Copyright Law: "Don't Stifle Creativity!"

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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; - U. S. Constitution, Article 1, Section 8, Clause 8

Last spring, the 9th Circuit Court of Appeals handed down a decision in the case of Perfect 10, Inc. v. Amazon.com, Inc., A9.com Inc. & Google Inc. breathing new air into the gasping lungs of copyright law's fair use defense. In a well-reasoned decision, the court rejected formulaic applications of the fair use factors reminding everyone that they are not to be "treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright."

Perfect 10 is in the business of selling copyright protected photos of nude models. It offers access to these photos in a number of ways including a members only subscription-based website and thumbnail (reduced size) images intended for downloading to cell phones. The 9th Circuit opinion focused on Perfect 10's claims against Google, Inc. Google's search engine is designed in such a way that when it generates responses to search requests, the responses include not only relevant text but thumbnail versions of images associated with such text. Like the thumbnail images Perfect 10 markets to cell phone users, the thumbnail images generated in a Google Image Search can be downloaded by cell phone users. In its lawsuit, Perfect 10 contended that Google's incorporation into search results of the copied images constituted direct copyright infringement. Google countered that the copying and distribution of such images via search engine responses is protected by the fair use defense. In the end, Google prevailed.

The court's reasoning was fairly straightforward. The 9th Circuit agreed with Perfect 10 that Google engaged in copyright infringement. Google's search engine functioned in a way that it both reproduced and distributed copyright protected works. These are violations of the rights of the copyright owner. Indeed, Google didn't argue that point. Instead, Google asserted the defense of fair use.

While a bit of an oversimplification, the fair use defense serves as an exception to the general rules of copyright law. Generally, copyright law reserves to copyright owners the right to reproduce and distribute their works. In contrast, fair use preserves the rights of users of copyright protected works. If fair use applies, a user does not need permission from the copyright owner and the copyright owner cannot require payment of a royalty or licensing fee. In this sense, fair use is free use.

In its argument against Google, Perfect 10 focused on the fact that it offered thumbnail images of its photos for sale to cell phone users. Because of the nature of the format used by Google's thumbnail images of the same photos, Google's images could be downloaded too, and at no cost. Perfect 10 contended this reality defeated Google's fair use claim because one of the fair use factors is the impact of the use on the market for the copyright protected work. The 9th Circuit
disagreed. In its rejection of Perfect 10's argument, the court primarily relied on two points. First, it concluded that any financial loss experienced by Perfect 10 as a result of Google's use of the thumbnail images in its search engine responses was purely speculative. Second and more importantly, the court reminded everyone that the rules of copyright law are not to be applied with a rigid adherence to the statute when to do so "would stifle the very creativity which that law is designed to foster." In what is likely to become often repeated language from the decision, the 9th Circuit explicitly revives the viability of fair use when it says:

We must be flexible in applying a fair use analysis; it 'is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis...Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright law.'...The purpose of copyright law is '[t]o promote the Progress of Science and useful Arts,' and to serve 'the welfare of the public.'

While it is impossible to predict with precision where this line of analysis might lead, it clearly represents a welcome adjustment in the thinking about fair use. For those of us in educational environments who rely on fair use when using copyright protected works for teaching and research, it is a hopeful sign. Consider what it might mean relative to the market for permissions when developing teaching materials like course packets. Some have feared that the existence of a market for permissions means that permission must be sought and requested royalties paid, that the existence of the market was the end of the discussion. If the 9th Circuit has its way, it becomes clear that the market for permissions is neither irrelevant nor controlling. It is simply one of the facts to be considered, weighed and balanced within the larger contest of the overriding purpose of copyright law.

Sloan-C View Volume 6 Issue 12: posted: December 2007
Fair Use: Derivative Works and Transformative Works

Linda K. Enghagen, J.D., Professor
Isenberg School of Management
University of Massachusetts at Amherst

Anyone with a basic working knowledge of copyright and fair use law is familiar with the balancing act represented by, on the one hand, the rights of copyright owners and, on the other, the rights of users of copyright protected works. Copyright owners possess exclusive though not absolute rights. Those exclusive rights are: the right to reproduce the work, distribute the work, create derivative works, display the work, and perform the work. Consistent with the Constitutional mandate to “promote the progress of science and the useful arts,” users have rights too and these rights include the right to use works in a manner that is consistent with the rules of fair use. Generally, copyright owners retain control over the creation of derivative works while users possess the right to create transformative works under the rules of fair use.

Derivative works are defined under the Copyright Act of 1976 as follows:

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work” (17 U.S.C. § 101).

In other words, a derivative work doesn’t add anything new- it doesn’t build on the original but merely recasts it. The owner of the underlying original copyright protected work controls the creation of such works. A copyright owner may personally undertake the creation of a derivative work or authorize someone else to do so. Similarly, a copyright owner may just say no. There is no legal obligation to allow others, even for a fee, to create derivatives of the original. Of course, this changes once the copyright expires on the underlying work. When a copyright expires, the work goes into the public domain and the right of the original owner to prevent the creation of the derivative works expires as well.

Transformative works are different. They are not defined by the Copyright Act of 1976; instead, they are discussed as part of fair use analysis. The fair use rules allow the use of copyright protected works owned by others as long as the use is for one of the fair use purposes (e.g. news reporting, criticism, comment, research, teaching and scholarship) and satisfies the fair use factors. The factors are: 1. The purpose of the character of use; 2. The nature of the work used; 3. The portion used; and 4. The impact of the use on the market for and value of the work. Whether a new work qualifies as transformative is considered when analyzing the first factor-the purpose or character of the use. In educational environments, analyzing the purpose and character of the use is typically approached by evaluating whether the use is commercial or noncommercial. Because educational uses are usually noncommercial and therefore weigh in favor or fair use, transformative uses are rarely discussed. Nevertheless, it bears noting that the U.S. Supreme Court is on record in declaring the significance of concluding a use is transformative.
Although a finding of transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use. *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569 (1994).

Transformative uses that result in the creation of a transformative work are similar to derivative works in that they are based on the original. However, they are different in that they satisfy the underlying purpose of copyright law by building on the original and thereby “promoting the progress of science and the useful arts.” Simply put, transformative works create something new. Again, as noted in *Campbell v. Acuff-Rose Music, Inc.*, “The central purpose of this investigation is to see…whether the new work merely [supersedes] the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message; it asks, in other words, whether and to what extent the new work is transformative.” Consequently, copyright owners do not control transformative uses that result in the creation of transformative works. Anyone can lawfully undertake a transformative use of another’s copyright protected work even before the copyright expires. No permission is required from the copyright owner.

Being aware of the rules governing transformative uses provides fertile ground for those with the creativity and time to transform existing works into something new.

Sloan-C View: posted February 1, 2011
Additional Resources

(Disclaimer: As we all know, links change. If the link doesn’t work, use the identifying information to determine whether the materials remain available in another location.)

Books


Codes of Best Practices in Fair Use

Center for Media & Social Impact
http://cmsimpact.org/fair-use

• The Code of Best Practices for Academic & Research Libraries
• Code of Best Practices in Fair Use for Poetry
• Society for Cinema and Media Studies’ Statement of Fair Use Best Practices for Media Studies Publishing
• Code of Best Practices in Fair Use for OpenCourseWare
• The Code of Best Practices in Fair Use for Media Literacy Education
• Code of Best Practices in Fair Use for Online Video
• Documentary Filmmakers’ Statement of Best Practices in Fair Use
• Society for Cinema and Media Studies’ Statement of Best Practices in Fair Use in Teaching for Film & Media Teachers
• Code of Best Practices in Fair Use for Scholarly Research in Communication
• Best Practices in Fair Use of Dance-related Materials

Fair Use Resources

Columbia University Libraries/Information Services: Copyright Advisory Office
http://www.columbia.edu/cu/lweb/copyright/

Fair Use & TEACH Act Checklist
http://www.kcc.edu/FacultyStaff/copyright/Documents/copyrightchecklist.pdf

Know Your Copy Rights from the Association of Research Libraries
http://www.knowyourcopyrights.org/

Maricopa Community College: Fair Use Principles
http://www.maricopa.edu/legal/ip/guidelines/fairuse.htm
Stanford Copyright & Fair Use – Summaries of Fair Use Cases
http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-c.html

The Fair Use Network
http://www.fairusenetwork.com

UCCopyright: A Resource for the University of California Community
http://www.universityofcalifornia.edu/copyright/usingcopyrightedworks.html

Visual Resources Association – Intellectual Property Rights Resources
http://www.vraweb.org/resources.html
An academic and research library’s mission is to enable teaching, learning, and research. Increasingly this requires copying (especially digitizing), distributing, and displaying library materials. Library materials are mostly under copyright.

Fair use is the broad, flexible doctrine that will allow libraries to meet mission in the digital age.

**Libraries Need Fair Use**

**The Good News About Library Fair Use**

**Current duration of copyright**

Life+70

**Average number of volumes in ARL library collection**

4.8 million

**Academic librarians who expect online use of library materials to increase over next five years**

85%

70-80% of a typical research library collection is likely under copyright.

50% of in-copyright materials in library collections will be “orphan works” (i.e. author/owner is unknown or unlocatable).

Without fair use, much of this material would be off-limits for next-generation library uses.

**The Code of Best Practices in Fair Use for Academic & Research Libraries**

**How it was Made**

1. Team interviewed 65 academic and research librarians in confidential phone conversations to learn how copyright was affecting their work.
2. Team spoke with 90 librarians, from 64 libraries, in nine sessions, 4 hours each, to deliberate about best practices.
3. Legal experts reviewed the draft and gave it a thumbs up as representing a reasonable application of fair use to library practice.

**Principles**

1. Providing course content to students digitally (e.g., course sites and e-reserves)
2. Creating physical and digital exhibits
3. Digitizing for preservation/form at migration (e.g. VHS tapes)
4. Digitizing archives and special collections
5. Making library collections accessible for disabled users (e.g. hathitrust.org)
6. Managing institutional repositories
7. Next generation data-mining and “non-consumptive” research (e.g. digital humanities research)
8. Collecting and preserving material from the Internet

**What’s In It**

Principles, limitations, and enhancements describe a reasonable consensus about what’s fair in these eight common situations.

**BEST PRACTICES RULE!**

BECAUSE THEY

- purport to describe ‘minimum safe harbors’ but are inevitably treated as ‘outer limits’ by practitioners and rightsholders
- were negotiated with rightsholders from a position of fear and intimidation
- take no account of legitimate library practice or mission
- have no legal force, despite appearances and pretense to the contrary
- do not reflect current legal or scholarly understandings of fair use
- include arbitrary numeric limitations
- are promoted and distributed by groups hostile to libraries and our rights
- are based on solid research into how courts decide fair use cases
- are informed by the latest scholarly and judicial opinions about fair use
- do not impose arbitrary and absurd limitations
- are endorsed by leading library and educational groups: ALA, ACRL, ARLIS/NA, CAA, CCUMC, MLA, VRA

**THE OLD GUIDELINES HAVE FAILED**

BECAUSE THEY

- describe centrist, moderate practices that are neither the bare minimum nor the absolute maximum of fair use, but a comfortable middle
- are developed by practice communities themselves, without intimidation from hostile outside groups
- are grounded in library mission and practice
- are based on solid research into how courts decide fair use cases
- are informed by the latest scholarly and judicial opinions about fair use
- do not impose arbitrary and absurd limitations
- are endorsed by leading library and educational groups: ALA, ACRL, ARLIS/NA, CAA, CCUMC, MLA, VRA

**How You Can Use It**

- Share it with your boss, your general counsel, your colleagues, and patrons so they know the good news
- Replace old guidelines as a go-to resource for basic information

Commissioned by

Free to share and reuse

1

2

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8
COPYRIGHT COMPLIANCE MADE SIMPLE:
SIX RULES FOR COURSE DESIGN

Linda K. Enghagen, J.D.
Professor
University of Massachusetts at Amherst

Rule #1

If you own the copyright to the materials, you can use them in whatever manner you wish.

Rule #2

Copyright law does not protect some materials. You can use them in your courses (face-to-face and distance based) in whatever manner you wish. You may use:

- Blank forms;
- Works placed in the public domain by the creator;
- Works for which the copyright has expired;
- Works created by the federal government;
- Facts, formulas, theories, research methodologies and statistical techniques.

Rule #3

You are not allowed to use materials you acquired or accessed unlawfully.

Rule #4

You are not allowed to use materials you acquired or were given access to by someone else if you know or have reason to know that person obtained the materials or access to them in an unlawful manner.

Rule #5

If you own a copy of the materials, but not the copyright or you lawfully accessed (e.g. went to a website) materials to which someone else owns the copyright, you may use them in your courses (face-to-face and distance based) if you use them:

- If the use is consistent with the rules governing fair use;
- In a manner that is consistent with their intended purpose (i.e. implied license);
- In a manner that is consistent with permission explicitly granted (i.e. express license);
- If you obtained permission and paid required royalties.

Rule #6

If the requirements of the TEACH Act are met, you may do the following in distance based courses:

- Transmit entire performances of nondramatic literary and musical works (e.g. everything but operas, musicals and music videos)
- Transmit any other performance as long as the portions transmitted are limited and reasonable
- Transmit the display of any work as long as it is comparable to that typically used in face-to-face instruction
Deepen your knowledge. Expand your comfort zone.

Linda K. Enghagen, J.D., Professor
University of Massachusetts at Amherst
Isenberg School of Management

Linda Enghagen is an attorney and Professor in the Isenberg School of Management. She also serves as a Copyright Law Research Specialist for Sloan-C and regularly offers live and online workshops in relation to copyright compliance in educational settings. Her scholarly contributions related to intellectual property are directed to the needs of faculty members. They include two books, *Technology and Higher Education: Approaching the 21st Century and Fair Use Guidelines for Educators*, as well as numerous articles (e.g. *Fair Use in an Electronic World* and *Copyright Law and Fair Use—Why Ignorance Isn’t Bliss*) as well as pamphlets and brochures such as *Copyright Compliance Made Simple: Six Rules for Course Design*, *Educators, Technology and the Law: Common Questions/Direct Answers* and *Legal Literacy in the Information Age: Ten (easy to understand) Rules of Thumb*. In addition, she has been a guest commentator on NPR where she discussed copyright piracy in *Napster Worries Me*.

Professor Enghagen is available to deliver workshops, keynote addresses, and presentations.

Titles include:

- *Copyright Compliance Made Simple: Six Rules for Course Design*
- *Fair Use: A Closer Look*
- *Fair Use in the Crosshairs: Whose Been Sued? What’s at Stake?*
- *The Case Against Georgia State University: Copyright Infringement or Fair Use?*
- *Personal Liability for Copyright Infringement: They Can Sue You and Your Employer*
- *Open Access, Creative Commons Licensing & Plagiarism: Clearing Up Some Copyright Confusion*
- *Legal Literacy in the Information Age: Ten (easy to understand) Rules of Thumb*
- *Copyright Law & Higher Education: Creating a Culture of Compliance*
- *Copyright Law and Research Presentations: What You Don’t Know Can Hurt You*

CopyrightCompliance.net

http://www.copyrightcompliance.net

info@copyrightcompliance.net
Creating an Effective Cyber-Bullying Policy

Jennifer Patterson Lorenzetti

A great deal of research and discussion has surrounded cyber-bullying in the online classroom, particularly as it relates to student bullying of other students. “Most recently, however, faculty members have become surprising targets of online bullying. For many, there are no established policies nor is training provided on how to react,” write the authors of “Cyber-bullying in the Online Classroom: Instructor Perceptions of Aggressive Student Behavior” in the Online Journal of Distance Learning Administration. The authors are Michael T. Eskey and Cathy L. Taylor of Park University, and Michael T. Eskey, Jr. of Valdosta State University.

Their current research looks at a cyber-bullying survey and gives “recommendations for addressing cyber-bullying through policies, training, and professional development.”

The study

Cyber-bullying has become increasingly important to understand and address as the opportunities for it to occur have multiplied. Citing research by Allen and Seaman, the authors point out that, “in the fall of 2011, of the 17.7 million college students, only 16 percent were attending traditional 4-year colleges and living on campus.” This leaves a large population that may be subject to cyber-bullying, which the authors define to include “cyber-assaults, libel, misappropriation of likeness, defamation, and false light invasion of privacy.”

Nearly two-thirds of those surveyed thought that a report of being bullied might be held against them.

The authors’ survey included the responses from 202 online faculty members at a Midwestern university who have taught an online course in the past two years. The survey included questions to measure:

(1) “What is the extent of online faculty cyber-bullying by students?”
(2) “How have online faculty addressed the issue of cyber-bullying?”
(3) “Are online instructors aware of the policies and processes in place to handle issues of cyber-bullying at the institution?”
(4) “Based on the results, what preventive measures, policies, and training are needed to reduce and discourage cyber bullying in online education settings?”

The size of the problem

The first area studied was instructor experience of cyber-bullying by students. Some of the most interesting findings include:

• “46 percent of the respondents reported some type of student complaints.”
• “15 percent involved attacks on their personal qualifications.”
• “31 percent include student use of university e-mails to personally attack the instructor.”
• “33 percent of the respondents reported being bullied more than once.”
• “21 percent did not feel that their problem had been handled effectively by their superiors or administration.”

Faculty members reported students enlisting the help of other students online to exert pressure to force the professor to ease grading standards or to change the nature of the final exam. In another example, the faculty member reported feeling “flamed” by an online “rate your professor” rating and comments made in an online blog.

How to address it

The second issue addressed was how faculty members can address the issue of
Cover...from page 1

being bullied. Of those faculty members surveyed who reported being the object of bullying,
• “55 percent stated they addressed the issue themselves.”
• “23 percent contacted the academic director.”
• “45 percent contacted either their chair or program coordinator.”

The authors conclude that “limited e-mail communication between online instructors and key individuals in the institutional academic process contributed to the problem.”

The third area under consideration “addressed whether online instructors were aware of the policies and procedures that are in place to handle issues of the cyber-bullying at the institution.” In this case, “only 30 percent of respondents affirmed that they were aware of the university having a process in place to handle cyber-bullying.”

On a disturbing note, 20 percent of respondents felt that reporting bullying would be held against them. 44 percent were unsure whether it would or wouldn’t be held against them. Taken together, this means that nearly two-thirds of those surveyed thought that a report of being bullied might be held against them. Only about a third of respondents felt sure it would not.

Six recommendations

The survey then asked what preventative measures and policies would be effective in managing cyber-bullying. (Some 85 percent of faculty members surveyed said they had not received any training in responding to or reporting cyber-bullying.)

The authors conclude that the university needs to have a response plan to deal with reports of cyber-bullying from the faculty. They highlight the following points:
• Promptly responding to all complaints is priority number one.

• Periodic consultation with an attorney may be necessary to determine the legal responsibilities of the university to students and faculty involved in such incidents.
• Victims and investigators of cyber-bullying should keep documentation of all correspondence. It is essential to keep this information; nothing [should] be deleted or erased unless absolutely necessary. A copy must be made prior to deleting bullying material such as postings in the discussion forum. Printing out the copy and also making a digital copy would be a best practice.
• Providing training to instructors and creating an anti-bullying policy would be very helpful.

They also include the following six specific recommendations:

1. “First, policies and resources should be created and routinely shared with faculty and students. Policies could include the institutional definition of cyber-bullying, how to identify cyber-bullying, instructions for faculty on how to react appropriately and professionally to being the victim of cyber-bullying, who in the administration to go to when cyber-bullying is experienced, and the consequences to students and faculty who are found to be cyber-bullying.”

2. “Second, administrators should add cyber-bullying training to new faculty orientation or training for online faculty so that faculty will be aware of what to look for, how to address it, and how to report it. Emphasize and assure the instructors that this will have no negative repercussions on them; in fact, they are encouraged to report all cyber-bullying.”

3. “Third, if the institution has a resource internet repository for instructors, place detailed information on addressing and reporting bullying.”

4. “Fourth, the administration could continued on page 8
Has your online program done keyword or other paid advertising on Facebook in the past year?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
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<tbody>
<tr>
<td>Entire sample</td>
<td>23.33%</td>
<td>76.67%</td>
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Broken out by the type of college

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<th>No (%)</th>
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<td>Community college</td>
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<td>100.00%</td>
</tr>
<tr>
<td>BA granting college</td>
<td>50.00%</td>
<td>50.00%</td>
</tr>
<tr>
<td>Advanced degree</td>
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Broken out by public or private status

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<td>20.00%</td>
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<tr>
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<td>60.00%</td>
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<td>100.00%</td>
</tr>
<tr>
<td>$3000-$10,000</td>
<td>30.77%</td>
<td>69.23%</td>
</tr>
<tr>
<td>&gt;$10,000</td>
<td>50.00%</td>
<td>50.00%</td>
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</table>

Broken out by enrollment in distance learning courses

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<td>20.00%</td>
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<td>500-2500</td>
<td>44.44%</td>
<td>55.56%</td>
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<tr>
<td>&gt;2500</td>
<td>9.09%</td>
<td>90.91%</td>
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Surveying the Higher Ed Technology Landscape

Jennifer Patterson Lorenzetti

Institutions of higher education now have some 300 technology providers that could become institutional partners, says Max Woolf, senior analyst for online and continuing education for Eduventures. To help institutions sort through this wealth of options, Eduventures has released a new report, “The Next-Generation Higher Education Technology Landscape.” The report “expands on the market map” and categorizes the companies that provide “products and services across the lifecycle,” Woolf says.

According to the report, colleges spent more than $40 billion on technology and services in 2014, and they estimate that the market will grow seven percent annually over the next five years. “Colleges and universities should prepare for a technology-driven transformation that will impact how they engage, recruit, enroll, and instruct students at all stages of the lifecycle, from prospect to alumnus,” the report notes.

The report divides providers into different categories, including:

**Enrollment management**

Enrollment management encompasses several different functions, the report notes, including “lead portals, inquiry management tools, predictive analytics, financial aid modeling, digital marketing agencies, customer relationship management (CRM), and international recruiting and web hosting services.”

“Most market buzz centers around predictive enrollment analytics and social recruiting services,” the report further says. “This market is driven by admissions and enrollment teams seeking to combine traditional indicators with new social engagement behavior data to gain deeper insight into prospective students’ search processes.”

The report divides enrollment management providers into these categories:

- lead aggregator solutions
- campaign and inquiry management solutions
- marketing, communication, and digital services
- international recruiting and pathway solutions
- international recruiting tour management solutions
- integrated recruiting and enrollment management solutions
- enrollment analytics platforms
- social recruitment and engagement platforms
- website hosting and analytics solutions
- financial aid processing solutions
- financial aid advising and modeling solutions
- application hosting.

**Student success and instruction**

With a focus on learning outcomes, retention rates, and graduation rates, Eduventures suggests that institutions of higher education need to do five things:

- “Innovate with compelling new pedagogies and instructional tools that support learning in online, blended, and face-to-face environments.”
- “Adopt new approaches to personalized learning that are scalable, flexible, and impactful.”
- “Leverage learning analytics and data to track, assess, and advise learners in real time.”
- “Offer students consumer-grade learning experiences.”
- “Incorporate technologies and services that extend the learning experience to support career readiness and foster lifelong learning.”

The report divides student success and instruction providers into these areas:

- student success and retention solutions
- learning analytics platforms
- e-portfolio solutions
- social retention networks
- social engagement apps and platforms
- one-stop solutions
- textbooks, digital course materials, and courseware solutions
- adaptive learning platforms
- adaptive content publishers
- social learning management platforms
- e-learning content authoring tools
- lecture capture solutions
- video platforms
- online courses
- online assessment and security management
- learning management systems

**Advancement**

“Advancement leaders require powerful tools that enable their teams to manage the highly individualized work of securing major gifts and meet the immediate funding needs of the college, while also conducting broad engagement efforts to build a pipeline for future donations,” the report explains.

The report divides advancement providers into these categories:

- crowdsourcing and social media platforms
- donor management and CRM solutions
- advancement analytics.

**Collegewide IT/enterprise backbone**

The report finds that spending in this category makes up “70 percent of overall college IT spending.” It is no wonder, then, that so many providers are in this space, which the report divides into these categories:

- tuition management solutions
- commerce solutions
- web content management solutions

continued on page 6
Recalibrating Fair Use—Again! The 11th Circuit Weighs in On GSU Copyright Infringement Case

By Linda K. Enghagen, J.D.

As those tuned into issues of copyright and fair use in educational settings are well aware, copyright infringement lawsuits against colleges and universities are neither hypothetical nor theoretical. Over the last several years, a number of colleges and universities (including university systems) around the country have experienced being named defendants in such lawsuits. UCLA was sued for digitizing and streaming dvds. San Diego State University was sued over an employee’s copying of extensive portions of an economic impact report. Cornell University, Indiana University, the University of Michigan, the University of California system, and the University of Wisconsin system along with their partner, Hathi Trust, were named co-defendants in a lawsuit alleging copyright infringement over their collaboration to create and share digitized repositories of their book collections. Perhaps the most well-known copyright infringement lawsuit against a university is the one brought by Cambridge University Press, Oxford University Press, and Sage Publications against Georgia State University.

The lawsuit against GSU focused primarily on materials posted to its library e-reserves and, to a lesser extent, on materials posted to its learning management system. The publishers claimed this violated their copyrights. GSU argued it was permitted under fair use. In addition to getting the more ink in the press than the other lawsuits against colleges and universities, the court opinions generated nearly 500 pages of analysis between the decisions written by the federal district court (≈350 pages) in its opinion following the trial and that issued by the 11th Circuit Court of Appeals (≈129 pages) last October in response to the publishers’ appeal. One might expect that nearly 500 pages of analysis would bring a long awaited certainty to fair use analysis. While the trial court opinion did provide that – by some measure – the 11th Circuit Court of Appeals took a somewhat different view. As a result, anyone relying on the district court ruling must once again recalibrate their thinking about fair use.

The lawsuit against GSU began nearly seven years ago when the publishers filed suit in the spring of 2008. The original allegations contended that GSU engaged in “…systematic, widespread, and unauthorized copying and distribution of a vast amount of copyrighted works … through a variety of online systems and outlets utilized … for the digital distribution of course reading material … without the requisite authorization and appropriate compensation to the copyright owners of such materials.” At the outset, the publishers claimed to have identified over 6,700 such violations. For trial, that number was whittled down to 99. In the end, 75 claims involving the posting of 74 different works (one work was used twice) were litigated.

The trial court’s 2012 ruling was widely hailed as a victory for educational fair use. The judge found only 5 violations and even then concluded that these were essentially honest mistakes. For all intents and purposes, GSU won and everyone else benefitted because the judge went on to establish somewhat formulaic criteria for the fair use of non-fiction book chapters (the materials at issue in the GSU trial). While the judge’s ruling evaluated each of the four fair use factors in relation to each alleged infringement, her rulings in regard to the third factor (portion of the work used) received the most attention. The judge ruled that if a book has 10 or more chapters, fair use permits the use of one chapter or its equivalent. For books of fewer chapters, fair use allows the use of up to ten percent of the total pagination of the book. While this ruling (as is true of all court rulings) was limited to the facts of the case, it brought the most concrete standards ever established by a court of law in regard to the parameters of fair use in educational settings. It provided the long awaited reference point that minimized the vagaries of the judgment calls inherent in evaluating the four factors individually and then attempting to balance out the totality of their weight as tending more heavily toward or against fair use. Unfortunately, the 11th Circuit Court of Appeals took exception to this formulaic approach and returned everyone to the imprecision of weighing and balancing the factors in their totality. In short, the 11th Circuit Court of Appeals laid out the four fair use factors as follows.

- **Factor 1: The Purpose or Character of the Use**

continued on page 6
Georgia State University is a non-profit educational institution. In each instance of an alleged copyright infringement in this case, the materials being copied and distributed were being used for teaching — clearly an educational purpose. Here, the appeals court agreed with the trial court that this favors fair use.

**Factor 2: Nature of Work Used**

In this case, all of the copied works were chapters or excerpts of non-fiction books. Under fair use generally, the use of non-fiction leans toward fair use while the use of fiction or creative works leans against fair use. Here the appeals court found that while the chapters and excerpts were non-fiction, they were not mere compilations of facts but also contained “expressive” content. As a result, the 11th Circuit concluded that their use did not automatically lean toward fair use though in the end, they went on to say that it really didn’t matter that much to the outcome of the case.

**Factor 3: Portion of the Work Used**

This is the factor the trial court evaluated and concluded that 10% or 1 chapter were appropriate fair use standards. The appeals court disagreed and threw out the 10% or 1 chapter tests. Instead, the 11th Circuit returned everyone to making a judgment call after looking at the portion used both in relation to its quantity and significance. However, it is important to note that the appeals court did agree with the trial court that if the portion used is the “heart of the work,” it always requires permission.

**Factor 4: Impact on the Market**

For the first time ever, the 11th Circuit Court laid out more concrete standards for evaluating market impact. First, they noted that the primary concern is whether the use in question serves as a market substitute for the work. Second, to determine that, they ruled that the right question to consider is not whether “some” revenue is lost — but is whether “substantial” harm would result if “everybody did it.”

Despite the fact that the 11th Circuit Court of Appeals disagreed with the lower court in certain respects, the court went on to note that “…it is consistent with the principles of copyright to apply the fair use doctrine in a way that promotes the dissemination of knowledge, and not simply its creation…” While the 11th Circuit opinion returns everyone to the uncertainty of fair use factor analysis, it is clear that the rules of fair use are there to support educational pursuits — both in the classroom as well as in the lab.

Linda K. Engbansen, J.D., is a professor in the Isenberg School of Management at the University of Massachusetts at Amherst.

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**Using the report**

“We try to describe and define” the different categories of provider, Woolf says. Woolf hopes that institutions will use this report to help them understand the overall landscape of higher education technology. For example, the report helps to differentiate between a lead aggregation system and an enrollment management system. Woolf suggests that the report will help institutions in doing their research on various providers and help them understand how to describe their needs in an RFP so that stage of the investigation will go more smoothly.

**Recommendations**

The report concludes with five recommendations to institutions of higher education:

- “Create a vision for your college’s future that reflects success in the next 20 years, not the last 20 years.”
- “Establish a chief digital officer and office.”
- “Launch a strong ‘going digital’ strategy to initiate a broader conversation.”
- “Understand where and how your products, solutions, and services fit.”
- “Anticipate the consolidation of technology platforms within higher education.”

These IT solutions are “a big budget line item” as Woolf says, and selecting the right one is important. “These providers facilitate you to do your job, so there’s value in choosing the right provider.”
The Best Online Programs In 2015

January 15th, 2015
By Michael Scharnoff, eCampus News

East coast and Midwest public universities dominate in best online bachelor programs rankings. Online education is appealing for its approach to teaching, flexibility, and cost. This phenomenon can be expected to grow. In 2013, the number of students taking at least one online course increased by over 411,000 to a new total of 7.1 million, according to a study by Babson Survey Research Group. Interested in capitalizing on all the benefits online learning has to offer, but unsure which program is best? You’re in luck, because U.S. News & World Report has released the Best Online Program Rankings in 2015. These rankings, accessible on both USNews.com and USNewsUniversityDirectory.com, includes more than 1,000 programs—an increase of more than 20 percent from last year, according to a USNewsUniversityDirectory.com press release.

Read the rest at: http://www.ecampus-news.com/top-news/online-program-rankings-245/.

2015: The Year of On Demand
January 13th, 2015
By Shelly Palmer

Technological advancements always empower people to behave differently — what makes today different is that the rate of technological advancement is accelerating beyond our capacity, perhaps even our ability, to react — and this...is new. On demand is not new...ask anyone who has ever cared for an infant. What is new is the speed with which the technological infrastructure to deliver almost everything you could ask for on demand is evolving — albeit heterogeneously. The white space is obvious and the trend is clear: What’s next?


What Do Higher Ed CIOs Predict For Campus Tech In 2015?
January 10th, 2015
By Roger Riddell, Education Dive

Those working in higher ed are familiar with the impact new tech developments have on an institution. For those who have attended multiple Educause conferences, the way tech can shape the space at large is even more evident. So what will 2015 hold for higher ed when it comes to tech? With 2015 now a week under way and higher ed set to begin its winter/spring semesters, we reached out to four CIOs to get their opinions on data security and the cloud, new classroom tech, and the trends and promising tech that could shake up campuses this year.


Obama Proposes Free Community College for Everyone
January 14th, 2015
By Christi Parsons, Tribune

President Barack Obama rolled out a new plan on Jan. 8 to make two years of community college free, or nearly so, for millions of students across the country, a major investment that the White House cast as changing the face of higher education. The program, inspired by new initiatives in Tennessee and Chicago, could benefit up to 9 million students, advisers said. At its heart is dedicated federal funding to cover 75 percent of tuition, with the states picking up the rest of the tab.


Using Online Learning to Support At-Risk Students
January 12th, 2015
By Leila Meyer, THE Journal

The school implemented computer-assisted learning for the Learning Lab several years ago, and last year the school's graduation rate increased 11 percentage points. “The reason for the increase is because this class from last year was the first year that we had the Learning Lab all four years,” said Sills. But despite the success of the Learning Lab, Sills and Lavallee were no longer satisfied with the software they were using for computer-assisted learning. “At the time they were good, four or five years ago, but as anything evolves, they did not evolve in the way that we needed it to,” said Lavallee. In particular, the school's curriculum supervisors said they weren't satisfied with the academic rigor of the program.

Read the rest at: http://thejournal.com/articles/2015/01/07/using-online-learning-to-support-at-risk-students.aspx.

Online Instruction, E-Learning, and Student Satisfaction: A Three Year Study
January 10th, 2015
By Michele T. Cole, Daniel J. Shelley, and Louis B. Swartz; IRRODL

This article presents the results of a three-year study of graduate and undergraduate students’ level of satisfaction with online instruction at one university. The study expands on earlier research with online instruction at one university. Researchers conducted a series of surveys over eight academic terms. Five hundred and fifty-three students participated in the study. Responses were consistent throughout, although there were no statistically significant differences in the level of satisfaction based on gender, age, or level of study. Overall, students rated their online instruction as moderately
create a professional development course, webinar, or informative e-mail that discusses cyber-bullying resources and will be provided to all instructors.

5. “Fifth, administrators could require definitions of cyber-bullying and descriptions of the consequences for doing so in the syllabi for all classes as a method of early deterrence.”

6. “Sixth, require that students and instructors keep all documentation of cyber-bullying events.”

The complete article can be found at: [http://www.westga.edu/~distance/ojlda/winter174/eskey_taylor_eskey174.html](http://www.westga.edu/~distance/ojlda/winter174/eskey_taylor_eskey174.html).

### In The News …from page 7

**A Breadth of Learning: Online Gateway Offers Harvard Teaching On the Web**

January 12th, 2015  
*By Harvard Gazette*

If your New Year's resolution involves learning more about Einstein or the history of the blues, you're in luck! Harvard's Online Learning gateway houses all of the University's open online learning opportunities under one roof for the first time, and anyone can access the breadth and depth of Harvard's learning content. Featuring both free courses and courses for credit, the platform also offers museum collections, lectures, podcasts, and popular programs such as “CopyrightX” and Michael Sandel's “Justice.” “With the site, we have created a path for Harvard faculty to showcase their incredible teaching, for schools to highlight a single course or a full degree program, and for learners, in particular alumni, to dive deep into any subject imaginable,” said Peter Bol, vice provost for advances in learning and Charles H. Carswell Professor of East Asian Languages and Civilizations.  

Read the rest at: [http://news.harvard.edu/gazette/story/2015/01/a-breadth-of-learning/](http://news.harvard.edu/gazette/story/2015/01/a-breadth-of-learning/)

**WSU Brings Classroom to Students with Online Certification in American Indian Studies**

January 14th, 2015  
*By Jack McNeel, Indian Country*

Washington State University is now offering an online program in American Indian Studies that leads to certification. This will provide an opportunity for those living away from campus to expand their education and enhance their opportunities for future employment. Michael Holloman, Colville/Coeur d'Alene, heads up the American Indian Studies program at WSU. He talked of the advantages in having an online certification program, not only for Native people but also for others who work with reservations and tribes in a variety of ways.  

Read the rest at: [http://indiancountrytodaymedianetwork.com/2015/01/09/wsu-brings-classroom-students-online-certification-american-indian-studies-158617](http://indiancountrytodaymedianetwork.com/2015/01/09/wsu-brings-classroom-students-online-certification-american-indian-studies-158617)

### The Hype is Dead, but MOOCs Are Marching On

January 11th, 2015  
*By Knowledge@Wharton*

Just two years ago, massive open online courses (MOOCs) were all the rage. They were garnering lots of media attention and The New York Times called 2012 “the year of the MOOC.” Today, though the hype has died down, the world's largest provider of MOOCs – Coursera – keeps on innovating and developing its online platform to serve millions of learners. Coursera co-founder Daphne Koller, whom Knowledge@Wharton interviewed in November 2012, returned to campus recently to speak about her progress since launching her company 2.5 years ago, and she gives her predictions for what the MOOC landscape will look like in the future. In her interview, Koller also provides an update on how Coursera is staying afloat even though the vast majority of students don't pay a penny for their education.  

Read the rest at: [http://knowledge.wharton.upenn.edu/article/moocs-making-progress-hype-died/](http://knowledge.wharton.upenn.edu/article/moocs-making-progress-hype-died/)

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