A Primer on Fair Use and the TEACH Act

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Scope of Copyright Protection

- U.S. Constitution – authorized Congress to protect “writings” to increase knowledge.
- The Copyright Act protects “original works of authorship fixed in any tangible medium of expression.”
- Copyright protects the expression of an idea, not the idea itself.

Rights of Copyright Owners

- Make Copies
- Create derivative works
- Distribute the work to the public
- Display and/or perform the work publicly

Fair Use

- Purpose and character of the use
- Nature of the copyrighted work
- Amount and substantiality of the portion used in relation to the copyrighted work as a whole
- Effect of the use upon the potential market for or value of the copyrighted work

Purpose and Character of the Use

Fair Use
- Nonprofit
- Educational
- Personal

Other Considerations
- Criticism
- Commentary
- News Reporting
- Parody
- Otherwise “transformative” use

Purpose and Character of the Use (cont.)

Ask for Permission
- Commercial
The Grateful Dead

- Groupies of the Grateful Dead published a book telling the story of the Grateful Dead. They included thumbnail reproductions of six concert posters and one concert ticket to which plaintiff owned the copyright. Is this a transformative fair use?

Nature of the Work

<table>
<thead>
<tr>
<th>Fair Use</th>
<th>Ask for Permission</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fact</td>
<td>Imaginative</td>
</tr>
<tr>
<td>Published</td>
<td>Unpublished</td>
</tr>
</tbody>
</table>

Other Considerations

- Mixture of Fact and Imaginative

Amount and Substantiality of Portion Used

<table>
<thead>
<tr>
<th>Fair Use</th>
<th>Ask for Permission</th>
</tr>
</thead>
<tbody>
<tr>
<td>Small amount</td>
<td>More than small amount</td>
</tr>
<tr>
<td>Not the heart of a work</td>
<td>Heart of the work</td>
</tr>
<tr>
<td>Appropriate in light of purpose</td>
<td></td>
</tr>
</tbody>
</table>

Effect on the Market

- If this kind of use were widespread, what effect would it have on the market for the original or for permissions?

University Copying of Copyrighted Works Policy PPM 6–5

- Copying of Copyrighted works 6–5
- Performance or display of copyrighted works 6–6

Copying for Classroom Use

1. Multiple copies prepared for class distribution do not exceed one copy per student in the particular course.
2. The copying meets the tests of brevity described in the following guidelines:
   a) With respect to poetry, "brevity" is deemed to mean a complete poem if less than 250 words or if printed on not more than two pages, or if from a longer poem, an excerpt of not more than 250 words.
   b) With respect to prose, "brevity" is deemed to mean a complete article of less than 2,500 words, or an excerpt from a complete article of not more than 1,000 words.
   c) With respect to illustrations, "brevity" is deemed to mean one chart, graph, diagram, picture, or similar graphic.
   d) With respect to "special" works (i.e., certain works that combine language with illustrations, sometimes intended for children, and that fall within the 2,500 words test but not the 1,000 words test), "brevity" is deemed to mean a complete work of not more than 200 words or 10% of the words found in the text itself, whichever is smaller.
Copying for Classroom Use (cont.)

The copying meets the tests of spontaneity as described in the following guidelines:

1. The copying is at the instance and inspiration of the individual who orders the reproductions or phonorecords to be prepared and distributed.
2. The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission from the owner of the copyright.
3. The copying meets the cumulative effect tests described in the following guidelines:
4. The copied material will be used in only one course offered in the college in which the instructor ordering the copies holds an academic appointment.
5. Not more than one short poem, article, story, essay or two excerpts may be copied from works by the same author, nor more than three from the same collective work or periodical volume, during the same semester or session.
6. Not more than nine instances of such multiple copying shall be ordered for any one course during the same semester or session.
7. The limitations stated in b and c do not apply to current new periodicals and newspapers and current new sections of other periodicals.

Effect on the Market (cont.)

Get Permission

Directly competes with sales of the original? Avoids payment for permission in established permissions market?

Hypothetical

- A professor in the music department would like to make a musical CD to raise money for a choir trip. Her class records music composed by musicians outside the University. Should she get permission from the composers?

The TEACH Act

Heidi Alder

Benefits of the TEACH Act

- The old law permitted educators to show or perform only certain types of works and generally allowed transmissions to be received only in classrooms and in similar locations
  - The new law
    - Expands the range of allowed works
    - Expands the receiving locations
    - Allows educational institutions to record and retain copies of the distance-education transmission and allows students access for a brief period of time
    - Permits digitization of some analog works if the work is not already available in digital form

General Information

- Became law in 2002 as an amendment to the Copyright Act of 1976
- Applies to distance education
  - This includes course/faculty websites and any transmission by digital means
- The law is built around a vision that distance education should occur in discrete installments, each within a confined space of time, and with all elements integrated into a cohesive lecture-like package
- The law is not intended to permit scanning or uploading of full or lengthy works, stored on a website, for students to access throughout the semester, even for private study in connection with a formal course
Substance of the TEACH Act

- Only applies to any accredited nonprofit educational institution or governmental body
  - “Accreditation” is determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the U.S. Department of Education
  - Institutions qualify for accreditation for TEACH purposes at the institutional level, not the course level.

Substance of Act, cont.

- Allows the following to be transmitted digitally to distance learners:
  - Performances of all of a non-dramatic literary or musical works
    - Non-dramatic literary works include includes textbooks, novels, and poetry. Dramatic works would be stageplays. Movies are audiovisual and are not literary works.
    - Non-dramatic musical works include all music other than opera, music videos (because they are audiovisual) and musicals
  - Performances of reasonable portions of any other work
  - Displays of any work in amounts comparable to typical face-to-face displays

Substance of Act, cont.

Definitions

- Performances: to recite, render, play, dance, or act it, either directly or by means of any device or process, or in the case of a motion picture or other audiovisual work, to show its image in any sequence or to make the sounds accompanying it audible.
- Reasonable portions: no definition, but one should take into account the nature of the market for that type of work and the pedagogical purposes of the performance
- Display: to show a copy of a work, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially

The Act also allows copying of digital works and digitizing analog works in order to make authorized displays and performances so long as

1. Such copies are retained only by the institution and used only for the activities authorized by section 110; and
2. For digitizing analog works, no digital version of the work is available free from technological protections that would prevent the uses authorized in section 110

Exclusions from Coverage

- Digital educational works
  - Works produced or marketed primarily for performance/display as part of mediated instructional activities transmitted via digital networks
  - For example...
- Unlawful copies
  - Copies you know or reasonably should know were not lawfully made or acquired
- TEACH does not grant rights to digitize and transmit textbooks, coursepacks, and other materials typically purchased by students individually
- TEACH does not cover reserve and e-reserve materials

Limitations and Conditions

- The transmission must be by, at the direction of, or under the actual supervision of an instructor;
  - Does not mean that the instructor is the only one who can post the materials to be performed or displayed. Someone enrolled in the class can also post as long as there is actual supervision by the instructor.
Limitations and Conditions, cont.

- Must be an integral part of a class session:
  - Class session is generally that period during which a student is logged on to the server and is analogous to the “live” class session where the displays and performances would normally occur.
  - A class session cannot last an entire semester, but the materials can remain on the institution’s server for the duration of its use.
  - A clip of a copyrighted work used in one “class session” of an online course, student may continue to access that session if repeated access is necessary to meet teaching objectives.
  - A clip of a copyrighted work may be used again in a later class session.

- Must be part of systematic mediated instructional activities:
  - This means the transmission must be an integral part of the class experience, under the supervision of the instruction, in a manner similar to performances or displays in live classroom settings.
  - In other words, TEACH does not include ancillary materials, such as supplemental readings, coursepack materials and e-reserves.

- Must be directly related and of material assistance to the teaching content; AND
- Must be made solely for and reception limited to students enrolled in the course.
  - WebCT is a satisfactory authentication tool which is designed to allow only students registered in a specific class into the web content of the class.

Requirements by the University

- The University must have policies and provide information about and give notice that the materials used may be protected by copyright.
- The University must apply technological measures that reasonably prevent recipients from retaining the works beyond the class session and further distributing them; and
- The University must not interfere with technological measure taken by copyright owners that prevent retention and distribution.

Faculty wishing to incorporate works into digital transmissions for instruction purposes pursuant to TEACH must:

- Avoid use of commercial works that are sold or licensed for purposes of digital distance education.
- Avoid use of pirated works, or works where you otherwise have reason to know the copy was not lawfully made.
- Limit use of works to an amount and duration comparable to what would be displayed or performed in a live physical classroom setting. In other words, TEACH does not authorize the digital transmission of textbooks or coursepacks to students.

- Supervise the digital performance or display, make it an integral part of a class session, and make it a part of a systematic mediated instructional activity. In other words, the works should be part of a class assignment and not entertainment or passive background/optional reading.
- Use software tools provided by the university to limit access to the works to students enrolled in the course, to prevent downstream copying by those students, and to prevent the students from retaining the works for longer than a “class session.”
- Notify students that the works may be subject to copyright protection and that they may not violate the legal rights of the copyright holder.
Checklist
(as taken from the University of Texas Office of General Counsel website: http://www.utsystem.edu/OGC/intellectualProperty/teachact.htm)

- My institution is a nonprofit accredited educational institution or a governmental agency
- It has a policy on the use of copyrighted materials (See University PPM 6-5)
- It provides accurate information to faculty, students and staff about copyright
- Its systems will not interfere with technological controls within the materials I want to use
- The materials I want to use are specifically for students in my class
- Only those students will have access to the materials
- The materials will be provided at my direction during the relevant lesson

Checklist, cont.

- The materials are directly related and of material assistance to my teaching content
- My class is part of the regular offerings of my institution
- I will include a notice that the materials are protected by copyright
- I will use technology that reasonably limits the students' ability to retain or further distribute the materials
- I will make the materials available to the students only for a period of time that is relevant to the context of a class session
- I will store the materials on a secure server and transmit them only as permitted by this law

Checklist, cont.

- I will not make any copies other than the one I need to make the transmission
- The materials are of the proper type and amount the law authorize (entire performances of non-dramatic literary and musical works; reasonable and limited parts of a dramatic literary, musical, or audiovisual work; displays of other works, such as images, in amounts similar to typical displays in face-to-face teaching

Checklist, cont.

- The materials are not among those the law specifically excludes from its coverage (materials specifically marketed from classroom use for digital distance education; copies I know or should know are illegal; textbooks, coursepacks, electronic reserves and similar materials typically purchased individually by the students for independent review outside the classroom or class session)
- If I am using an analog original, I checked before digitizing it to be sure:
  - I copied only the amount that I am authorized to transmit
  - There is no digital copy of the work available except with technological protections that prevent my using it

Resources

- http://www.lib.ncsu.edu/scc.legislative/teachkit
- http://www.utsystem.edu/OGC/intellectualProperty/teachact.htm
- http://www.ala.org/ala/washoff/WOissues/copyrightb/copyright.htm

Obtaining Permission to Use Others’ Works in Academic Settings

Alice Whitacre
Selecting a Work

Consider comparable alternatives when selecting a work – Securing permission for the work you want may not be possible

- Owner may be hard to identify or locate
- Licensing fee may be higher than you want to pay

Start the process early

Identifying the Copyright Owner

Possible Methods

- Examine the work
- Search the Internet
- Contact collective rights organizations

Contacting the Copyright Owner

Collective rights organizations specialize in rights to:

- Text
- Images
- Music
- Movies
- Authors

List of organizations on the last slides.

Obtaining Permission

Is the person giving permission authorized to do so?

- Always ask the question
- If putting together a commercial product, get assurances in writing

Obtaining Permission

Ideally, permission should be in writing

- Some owners furnish their own form to you
- If oral permission, document conversation and confirm in writing
Obtaining Permission

Describe in detail what you want to do & alternatives (who, what, where & how, when, why)

- **Who**
  - Fees may vary based on how many will view or number of copies
  - Include: number of copies, number of uses, expected website “hits”, how access will be controlled (password, use only in lectures, etc.)

Obtaining Permission

- **What**
  - Fees may be less if use only part of work
  - If using less than entire work, include page numbers, sections, chapters, etc.
  - For recordings, include start times and end times

Obtaining Permission

- **Where and How**
  - Include details on where and how work will be used, such as:
    - reproduction of the work (classroom copies, reserves, password protected on-line displays, websites, overheads)
    - creation of a derivative work
    - format/media
  - Include magic words: “use”, “reproduce”, “distribute”, “modify”, “adapt”

Obtaining Permission

- **When**
  - Be specific about duration, e.g., one-time use, one-year use, use in perpetuity

- **Why**
  - Purpose of use may affect whether permission granted and fees
  - Include details of use, such as public higher education classroom, research, non-profit, distance education

Obtaining Permission

- **Make life easy for the person granting permission**
  - Include extra copy of request
  - Include preaddressed envelope with sufficient postage

Obtaining Permission

- **Document your efforts and summarize your results**
  - Log of phone calls
  - Name of work
  - Type of work
  - Creator
  - Owner & Contact Info
  - Date Permission Requested
  - Date Permission Granted
  - Fees
  - Due Date for Fees
  - Date Permission Expires
Obtaining Permission
What if owner is hard to find or is not responding?
- Even if owner appears not to care, still protected
- Keep a file documenting your efforts to contact owner
- Balancing risk – generally best not to use works when permission not obtained.

Additional Resources
For permission to use text, contact:
- Copyright Clearance Center
For permission to use images, contact:
- Artists Rights Society
- American Society of Media Photographers
- Media Image Resource Alliance

Additional Resources
For permission to use music, contact:
- If seeking to perform work in public: ASCAP; BMI; SESAC
- If seeking to record & distribute music already recorded/synchronize music with visual images: Evan M. Greenspan, Inc. Music Clearance
- For links to publishers, labels & agencies: Music Research Consultants, All-Music Guide

For permission to use movies, contact:
- Motion Picture Licensing Corporation
For permission from authors, contact:
- Ingenta (handles copyright permission for the Publications Rights Clearinghouse)