

US Fair Use Defense: Implications and Considerations for Using Video in the Classroom.

By R.T. Williams and Mark D. Harlin

教室でビデオ教材を使用する教師の増加している現在、著作権抵触の可能性については注意をしなければならない。著作権法は知的財産の所持者を金儲けのためにまたは少なくとも著作権保有者の許可を得ずに作品を使用する者から保護するものである。各国政府は著作権の付いたメディアの許可なき利用を一般人に許可する特例を設けてはいるが、それは特別に規定した条件にそう場合に限られる。「教育関係者」は著作権ある作品を自由に利用する特別許可を与えられているがその利用許可の条件も理解しにくいケースが時々見られる。教室でのビデオ使用に関しては公正利用法が明確に適用されるケースも有るが、不明確な場合もある

Abstract

As more and more instructors use video in their classrooms, educators must be aware to avoid infringing on copyrights that apply to the video they are presenting. Copyright laws protect the creators of intellectual property from people who try to make money or otherwise use works without at least the permission of copyright owners. Governments have made some exceptions that allow people to utilize copyrighted media without permission, but only under specially defined conditions. “Educators” are clearly, legally granted special permission to freely use copyrighted works, but the conditions under which educators are allowed to utilize them are sometimes difficult to understand. As for using video in the classroom, fair use laws can be applied with certainty in some situations, while they can be unclear in others.

Introduction

Increasing numbers of educators are using many kinds of media in their classrooms. There has been a remarkable rise in the number of educators who use video that was not produced or marketed specifically for classroom use. In a survey conducted by the authors of 62 instructors from Australia, Canada, England, Japan, New Zealand, and the US, 83.9% responded that they use or have used such video in their classrooms. Of those who responded that they have used video, 86.5% said that thought they it was legal, but only 3.2% of the respondents said that they had ever made any attempt to ascertain the legality of their video use.

Copyright laws have afforded legal protection to the owners of intellectual property for hundreds of years. One of the first documents that gave protection for works that could otherwise be easily copied and distributed was the Licensing Act of 1662 by Act of Parliament, under the authority of Charles the II of England (Patterson, 1968). In 1790, the United States' first copyright laws were established, and those laws have been revised several times since then, with notable major revisions taking place in 1909 and 1976.

When educators plan to use video in the classroom, neglecting to determine if it is legal to use a certain video does not necessarily mean that they are breaking the law. However, the laws and legal precedents that give educators free reign to use video in their classrooms are filled with conditions and exceptions. If these conditions are not met, not only the individual educator, but also the educational a institution that employs that educator can be held legally liable for monies lost by the copyright owner, legal fees, and statutory fines of more than \$150,000 US for each incident of copyright infringement, as determined by a court of law (The Copyright Act of 1976, 2007).

Copyright Act of 1976

In 1978 the Copyright Act of 1976 became a law after it was signed by US President Gerald Ford. The law made very important revisions to earlier copyright legislation and spelled out most of the currently used exclusive rights of copyright owners. Beyond this, it extended the duration of copyright protection, and provided for the renewal of copyrights at the end of specific terms.

The Copyright Act of 1976 also introduced the fair use defense, also referred to as the fair use law, which provides for limitations on the exclusive rights of copyright owners. In other words, it establishes the legal justification for the limited use of copyrighted material by certain individuals, particularly educators, without the permission of an original copyright owner.

The Copyright Act of 1976 is detailed in Title 17 of the US code of law. The particularly significant chapters that are directly related to the use of video in the classroom, with or without the consent of the copyright owner, can be found in chapters

106 and 107. Chapter 106 is *Exclusive Rights in Copyrighted Works* and Chapter 107 is *Limitations on Exclusive Rights: Fair Use*.

Exclusive Rights in Copyrighted Works.

Title 17 United States Code (USC) Chapter 1 Section 106 explains the basic rights of copyright holders. It reads as follows:

Subject to sections 107 through 122, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted works in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonocopies of the copyrighted work by sale or other transfer of ownership, or by rental, lease, or lending.
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of sound recordings, to perform the copyrighted work publicly by means of digital audio transmission.

It is important to note that this is the basic law and the spirit of the law is to give copyright holders the rights that they deserve as the creators of the intellectual property that they have produced. It is important to realize that educators cannot simply assume that exhibiting or reproducing copyrighted materials “for the good of the students” makes the exhibition or reproduction legal with respect to copyright laws.

Barrow and Woods (1993) clarify this in their work *An Introduction to the Philosophy of Education*, which has been used as a textbook used by many schools of education around the world. The authors clearly cite many well-known educational theorists who conclude that instructors must not only teach ethics and morality, but must also teach by example. One can easily draw the conclusion that if educators insist on breaking laws like those pertaining to copyrights, they might be doing society a disservice by teaching their students to do the same.

Educators should be especially aware that they cannot legally copy media

indiscriminately and/or distribute copyrighted materials to students. Educators should also make students aware that absolutely nobody can legally do the same. If there is a need or desire to reproduce or distribute materials that are copyright protected under USC 17, ways and means must be pursued that will allow for copyrighted materials to be obtained and/or distributed legally.

Otherwise, there are exceptions to the rights of copyright owners which are expressed in Chapter 106 of Title 17 USC. Many of these rights are directly applicable to educators and can be more clearly understood in terms of how they affect the use of video in the classroom than how they might affect cases using other types of copyrighted media.

Limitations on Exclusive Rights: Fair Use

Title 17 USC Chapter 1 Section 107 explains some important exceptions to the exclusive rights held by copyright owners. While the exceptions do not exclusively apply to the use of video, they might be more easily understood when used to decide whether certain types of video can be used in the classroom, compared with some other types of media. The section reads as follows:

Notwithstanding the provisions of sections 106 and 106a, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the

copyrighted work.

The fact that the work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Title 17 was created in 1947, mostly for the purpose of codifying the major revisions that took place in 1909. However, until 1976 when the act was completely amended, cases of fair use were based on legal precedents only, rather than the stipulations one can read in Title 17 USC Chapter 1 Section 107. Still, the spirit of the fair use defense as codified here has been used throughout American history, even before Title 17 USC existed (Joyce, Leaffer, Jaszi & Ochoa, 2006).

Such precedents can be seen in various rulings, such as the one made by the Massachusetts Circuit Court D in 1841. In this case, an author attempted to use the fair use defense to explain why he copied large sections of a previously published manuscript in order to author and publish another manuscript based on the first. The following is an excerpt from the judge's multi-page ruling:

A reviewer may fairly cite largely from the work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy...In short, we must... look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work. (Folsom v. Marsh, 1841)

Even though this ruling precedes the Copyright Act of 1976 by over 100 years, an analysis of the considerations that the judge used to make his ruling can be seen to match the 4 factors to be considered in determining if fair use exists, as outlined in Title 17 USC Chapter 1 Section 107. This is important because it shows a certain amount of consistency over time about what is thought to be fair use of copyrighted materials.

Difficulties in Establishing Fair Use

The Copyright Act of 1976 on one hand attempted to clarify what fair use is. It was the first time that the guidelines had been written out as legislation instead of being solely based on legal precedents established by judges in court decisions. On the other hand, the US Congress intentionally made the act vague in order to allow courts to judge cases of possible copyright infringement on a case-by-case basis.

Title 17 USC Chapter 1 Section 107 History and Revision Notes House Report No. 94-1476 reads:

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.

In courts of law, legal precedence is of great importance for deciding how judges rule in future court cases. However, this statement, which is part of the supporting comments written within the actual document that is the law, tells us in no uncertain terms that nothing is certain or decided about the fair use defense, even when previous court rulings are taken into account.

George Pike, a professor of law at the University of Pittsburg points out that it is difficult to establish what is fair and what is not under the principles outlined in the section 107 or through previous court decisions. Moreover, educators need to be aware that not all academic uses are fair use. (Pike, 2008)

Implications for Using Video in the Classroom

Many American universities offer guidelines and references for using audiovisual materials. Almost invariably, they repeat warnings to educators that they could expose themselves and/or their respective institution to litigation if they are not careful to take steps to observe and uphold the law. The Tennessee State Board of Regents (n.d.) directs its faculty by stating, “You need to know that improper use of copyrighted materials – even in an educational setting – may render you liable to federal prosecution....”

The California State University, Office of General Counsel (2007) provides a

checklist for educators at all of its 23 campuses (see appendix 1). The checklist is a representative tool used by many educational institutions to help their faculty determine if the use of a copyrighted work falls within the fair use exception to said copyright. This checklist is a part of their *Fundamentals of Copyright and Fair Use* document that is made available to all California State University faculty members.

Beyond making a determination of whether the material itself is suitable, the Tennessee Board of Regents (n.d.) developed guidelines to help faculty members determine if the use of any particular video and the circumstances surrounding its presentation in the classroom were consistent with the principles of “fair use” in copyright law. This is based upon their interpretation of the law, and is representative of the guidelines used by several educational institutions. The board asks educators to make sure that video is presented under the following conditions:

1. The video is part of the instructional Program.
2. The video is presented by the students or instructors.
3. The video is presented in a classroom or other school location devoted to instruction.
4. The video is presented in a face-to-face setting or where students and teacher(s) are in the same building or general area.
5. The video is presented only to students and educators.
6. The video is a legitimate copy with a copyright notice included.

These guidelines seem very clear, but can be further clarified by understanding which conditions video may not be performed publicly without permission the copyright owner, even in non-profit educational institutions:

1. Copyrighted video may not be shown if the purpose is entertainment, recreation, or even cultural or intellectual value that is unrelated to teaching activities.
2. Copyrighted video cannot be broadcast on open or closed circuit radio or television networks from an outside location.
3. Copyrighted video cannot be show to an audience other than students engaged instructional activities. This means that video cannot be shown at graduation ceremonies, cultural festivals, community lectures, or art series.

4. The copyrighted video must have been legally obtained. It can be a rented or purchased, but cannot be a copy of an original.

An analysis of the stipulations for use of video in these guidelines and checklists shows some important characteristics that are unique to video media. Mainly, as opposed to other types of media, what is acceptable in terms of fair use for video can be more clearly defined. Moreover, the established guidelines set forth by academic institutions give another type of defense that can be used in possible copyright infringement. That defense is called The Good Faith Defense. As long as educational institutions take steps to make sure that they are following the law, and can show documented proof that they took steps toward that end, it can be a factor that can limit their liability if a copyright infringement case is taken to court. (Leaffer, 2005)

Conclusion

Lawmakers have afforded protection for copyright owners of intellectual property. They have also allowed fair use of that property without permission under certain conditions. While the law does not clearly spell out what is fair and what is not fair under all conditions, the use of video in the educational classrooms can be reasonably clear in many cases when the laws are analyzed carefully.

Many educational institutions in the US have drawn up guidelines that help educators make decisions about what is acceptable as fair use and what is not acceptable when using copyrighted video in the classroom. Educators can generally assume that rules of fair use are met when they follow these guidelines.

Still, each situation will be evaluated on a case by case basis if brought to court. This means that even though educators can feel a level of assurance that they are working within the bounds of fair use, there is always the possibility that courts can decide otherwise and hold individuals and educational institutions liable for tremendous sums of money.

References

- Barrow, R. & Woods, R. (1993). *An introduction to the philosophy of education*. London: Routledge.
- California State University, Office of General Counsel (July 2007). *Fundamentals of copyright use and fair use*. [Brochure]. Long Beach, CA: Author.
- The Copyright Act of 1976 § 106-107, 17 U.S.C. (2007).
- Folsom v. Marsh, 9 F. Cas. 342 (Cir. Ct. Mass. 1841)
- Joyce, C., Leaffer, M., Jaszi, P. & Ochoa, T. (2006). *Copyright Law* (7th.ed.). New York: LexisNexis
- Leaffer, M. (2005). *Understanding copyright law*. New York: LexisNexis.
- Patterson, L. (1968). *Copyright in historical perspective*. Nashville: Vanderbilt University Press.
- Pike G. Putting Academic Fair Use to the Test. (Cover story). *Information Today*. June 2008; 25 (6) :1-56.
- Tennessee State Board of Regents (n.d.). *Video copyright and the college professor: Quick reference guide for faculty of Tennessee state board of regents institutions*. [Brochure]. Nashville, TN: Author.

FAIR USE FACTORS CHECKLIST

This checklist can be used to help determine if your use of a copyrighted work falls within the fair use exception to copyright.

<i>Purpose of Use</i>	
<i>Favoring Fair Use</i>	<i>Opposing Fair Use</i>
<input type="checkbox"/> Teaching (including classroom use copies) <input type="checkbox"/> Research <input type="checkbox"/> Scholarship <input type="checkbox"/> Nonprofit Educational Institution <input type="checkbox"/> Criticism <input type="checkbox"/> Changing the work for a new utility <input type="checkbox"/> Parody	<input type="checkbox"/> Commercial activity <input type="checkbox"/> Profiting from the use <input type="checkbox"/> Entertainment <input type="checkbox"/> Denying credit to original author
<i>Nature of work</i>	
<i>Favoring Fair Use</i>	<i>Opposing Fair Use</i>
<input type="checkbox"/> Published work <input type="checkbox"/> Factual or Nonfiction based <input type="checkbox"/> Important to favored educational objectives	<input type="checkbox"/> Unpublished work <input type="checkbox"/> Highly creative work (art, music, plays, etc.) <input type="checkbox"/> Fiction
<i>Amount Used</i>	
<i>Favoring Fair Use</i>	<i>Opposing Fair Use</i>
<input type="checkbox"/> Small Quantity <input type="checkbox"/> Portion used is not central to entire work <input type="checkbox"/> Appropriate portions for educational purpose	<input type="checkbox"/> Large portion or whole work used <input type="checkbox"/> Portion used is central to work
<i>Market Effect</i>	
<i>Favoring Fair Use</i>	<i>Opposing Fair Use</i>
<input type="checkbox"/> User lawfully acquired or purchased copy of original work <input type="checkbox"/> One or few copies made <input type="checkbox"/> No significant effect on the market or potential market for copyrighted work <input type="checkbox"/> Lack of licensing mechanism	<input type="checkbox"/> Avoids payment of royalties/permission <input type="checkbox"/> Significantly impairs market or potential market for copyrighted work or derivatives <input type="checkbox"/> Licensing mechanism is reasonably available <input type="checkbox"/> Permission is available <input type="checkbox"/> Numerous copies made <input type="checkbox"/> Placed it on Web or other public forum <input type="checkbox"/> Repeated or long term use

高松大学紀要
第 50 号

平成20年 9 月25日 印刷

平成20年 9 月28日 発行

編集発行 高 松 大 学
高 松 短 期 大 学
〒761-0194 高松市春日町960番地
TEL (087) 841 - 3255
FAX (087) 841 - 3064

印 刷 株式会社 美巧社
高松市多賀町 1 - 8 - 10
TEL (087) 833 - 5811