

10-1-2008

## Intellectual property, copyright, and fair use in education

Shaheen Lakhan

Meenakshi Khurana

Follow this and additional works at: <https://scholars.fhsu.edu/alj>



Part of the [Educational Leadership Commons](#), [Higher Education Commons](#), and the [Teacher Education and Professional Development Commons](#)

---

### Recommended Citation

Lakhan, Shaheen and Khurana, Meenakshi (2008) "Intellectual property, copyright, and fair use in education," *Academic Leadership: The Online Journal*: Vol. 6: Iss. 4, Article 7.

DOI: 10.58809/BXYD1155

Available at: <https://scholars.fhsu.edu/alj/vol6/iss4/7>

This Article is brought to you for free and open access by the Peer-Reviewed Journals at FHSU Scholars Repository. It has been accepted for inclusion in Academic Leadership: The Online Journal by an authorized editor of FHSU Scholars Repository. For more information, please contact [ScholarsRepository@fhsu.edu](mailto:ScholarsRepository@fhsu.edu).

---

# Academic Leadership Journal

## Introduction and History

As with other rights, such as liberty and organization, intellectual property (IP) rights are often overlooked or disregarded simply because they are intangible. Yet, IP rights are essential to the workings of our society, and upholding them means greater freedom to invent, create, and advance. IP is an emerging issue within the education arena. While many people think of it as a new concept, its origins date back to the sixteenth century. In 1557, Great Britain began to awaken to the idea of copyright, and the idea took firm root. The creators of the American Constitution included it in Article I, with the purpose of giving an author exclusive rights to his or her own work and preventing others from profiting from it. Very soon after, the United States Copyright Act was enacted in 1790, closely modeled on a pre-existing British statute. Several changes and amendments were made to the Act — most important, the 1976 Copyright Act, the one we effectively use today.

Until 1976, courts and states in the U.S. considered cases of copyright infringement in the light of common law copyright, which established protection for the rights of the creator from the time of the work's creation until publication. This implied that once the work was published, copyright protection ceased. The 1976 Copyright Act changed this stipulation by attaching federal protection to the work from the time it is first fixed in tangible form. However, this change was in itself limited, because it provided protection to only those works created in a “tangible medium of expression.” This excluded a host of forms of expression of original ideas, especially considering the major advances in science, technology, and communication systems in the recent years. It is not surprising then that the Act has seen at least another 30 amendments and still has room for more. Globalization is another force for change in the area of IP rights, and a number of treaties have affected the way the law is enacted. The most important acts relating to copyright law are the Copyright Term Extension Act (Sonny Bono Act), the Berne Convention, the Digital Millennium Copyright Act (DMCA), and the Technology, Education and Copyright Harmonization (TEACH) Act (Alexander and Baird, 2003). From 1989, legislators and inventors have made committed efforts to increase copyright protection to an adequate and all encompassing level, and it remains an ongoing program, with all indications pointing toward further changes. In March of 1989, the U.S. became a member of the Berne Convention, which protects any literary, scientific, or artistic works produced by a member country in any of the other member countries. This implies a good deal of international copyright protection. Under the terms of the Convention, a written notice or registration of copyright need not accompany any work first published after the commencement of membership (March 1, 1989 in the case of the U.S.). This infers that protection is granted on the work's conversion to tangible form. Every member country must offer a minimum level of protection and uphold the moral rights protection clause (to be discussed).

The UN created the World Intellectual Property Organization (WIPO) through the WIPO Convention in 1967 and the US became a member in 1996 by signing the WIPO Copyright Treaty Act. The Act adds to the Berne Convention by extending copyright protection to digital work, technology, and software. It requires every signatory of the Treaty to enact a law that protects works in a digital format; the U.S. amended its laws by passing the DMCA in 1998. The TEACH Act enables nonprofit, accredited academic institutions to use copyright-protected material for the purpose of distance education, without the need to pay royalties or obtain permission from the owner. However, clearly demarcated guidelines

for limitations and procedures to which the institution must adhere in order to avoid infringing the copyright exist (Russel, 2002). It is essential for educators to understand well the provisions of the TEACH Act. While availing themselves of the material, they must ensure they do not abuse the rights of the creator. Limited and reasonable quantities or portions of the work can be used for limited periods of time.

In 1998, the Sonny Bono Act was also added to the growing list of amendments and laws addressing IP. The effect of this Act was to extend the copyright protection of most works by an additional 20 years. This increases the difficulty of finding works in the public domain, but an important caveat to the Act is that it exempts nonprofit educational institutions and libraries. Basically, it permits such institutions to use any copyrighted work that is in its last twenty years of protection, as if it were in the public domain. However, limitations and restrictions to the use of the material exist. The work must be used for noncommercial or archival purposes only, it must not be “subject to normal commercial exploitation,” and all use of the work must cease if the owner issues a notice demanding it.

As we move into the twenty-first century, the issues surrounding IP and ownership become even more important in every aspect of our lives.

Defining IP rights and copyright: creativity and reward

While many people tend to use the term “intellectual property” and “copyright” interchangeably these are, in fact, two separate concepts. IP law is best thought of as a collection of various rights: copyright, patents, designs, trademarks, other types of confidential information, trade secrets, expertise or know-how, reputation, assets that are not necessarily intellectual but have commercial value, chip topography, and other sector-specific rights. Copyright is a subset of IP law.

As covered earlier, copyright is the law intended to protect a creator’s original ideas, theories, and concepts that are fixed in tangible form. Patent law deals with the protection of original methods, concepts, processes, and machinery, as well as inventions that are useful, unique, and hard to pinpoint. Trademark laws protect drawings, symbols, logos, words, and names a business uses to distinguish itself from others. An important aspect is that these IP laws are federal: all state courts must follow a consistent approach. In a dispute, the U.S. Supreme Court has the final decision. Due to the changing nature of IP and copyright, the courts are often involved in establishing the protocol for infringement. Clearly, IP is an area encompassing a wide variety of rights pertaining to ownership of creative work. While IP rights are endowed by our Constitution, they have always been marginalized and are only now taking center stage in different areas of our lives. IP rights are meant to give individuals the ability to create and invent, as well as reap the benefits of their creative genius. The rights aim to provide freedom to express the original idea and impart it to the public, without fear it will be distorted, misused, or exploited by others. If an author of an original work cannot have control or gain monetarily and in other ways from his work, the incentive to create and be original will be diminished. Further, the impulse to copy receives impetus. Society benefits greatly from new advances in technology, science, medicine, and art. Take away the reward from creativity, and new advances will slow down. Progress will begin to slow down and ultimately, society will suffer.

For instance, take a technologist with an ingenious idea for a chip to make computers faster than ever. If the technologist knows his idea can bring in money and fame, he will work toward getting funding, completing his research, and engineering the product as soon as possible. If he believes reverse-engineers will copy the product and flood the market with exact copies at a tenth the price, funding will be difficult to come by because the design and topography of the chip will be hard to protect, and there will be no reward; chances are he will keep his day job and not pursue his idea.

Who is the owner and for how long? Who decides?

Due to a major proliferation in the modes of publishing creative works and the access the average individual has to them, protection has become more difficult. The Internet and globalization have played a major part in the distribution of copyrighted and other intellectual material worldwide. The effect of the World Wide Web has been to allow people from countries around the world to access intellectual content that may be copyright protected. Many of these countries do not have strictly enforced IP laws, and it may be difficult for the work's owner to find out when someone across the world is using the work. Contrary to popularly held belief, a lot of the material on the Internet is not in the public domain. A subtle distinction exists here: material is available for the public to view, but should not be copied or used in any manner. Similarly to buying a book, you can read it, but you cannot copy it or control the rights to its content.

As with many laws, IP laws are open to multiple interpretations, which can lead to debate on various statutes. Understanding IP laws can be complicated not only for lay people, but even for lawyers and those charged with upholding them. Many questions surround the ownership of copyright and whether it has been infringed.

The creator of the original work is generally regarded as the owner, but this may not be true in cases where the authorship of the work was undertaken as part of employment. In this case, the employer retains the rights to the IP. In the case of work for hire, which means the employee works under contract specifically for the creation of the work, rights of authorship and ownership usually go to the employer. If the work is created outside the scope of employment, the employee retains all rights. Since all protected work is typically meant for publication in some form — for example, the Internet, books, research databases, or magazines — most of these publishers demand some rights over the work in exchange. The author of the work can trade in the rights of the IP via licensing or selling and typically reach some sort of settlement with the publishing party. Thus, a work may have more than a single owner, and different parties can have different rights over it. It follows from this statement that the concept of owner and author are distinct.

One important difference is that, while an owner may claim economic right over the work, the author retains moral right. Economic rights imply that all commercial proceeds from the use of the work accrue to the owner in the form of royalties. Moral right is intrinsic; it accrues to the author by virtue of creation, acknowledges the author, and protects the integrity of the work. Moral right prevents unauthorized distortion of the work in ways not intended by the author at the time of creation. These rights are treated differently in every country, however, making jurisdiction extremely difficult at times.

The main organizations that monitor, control, manage, license, and promote the organized sharing of IP rights are the U.S. Copyright Office, the WIPO, the U.S. Patent and Trademark Office, and the Copyright Clearance Center. Due to the slightly ambiguous nature of many of the IP laws and the frequent changes in technology and science, establishing clear boundaries can sometimes prove problematic. The issue is two pronged: (1) who owns the copyright (or disputes regarding ownership) and (2) has it been infringed by an outside party using the work? The letter of the law is at times unclear or lacking in complete definition, and to compound this issue, progress in technology opens up new viewpoints and loopholes that cause the area of IP to be murky.

The Supreme Court has ruled that pure facts are not subject to copyrighting attempts and that work has to be completely original to be protected by copyright (Moal-Grey, 2000). Courts are frequently used to decide IP-related disputes, due to different interpretations by legal counsel. The court has the job of balancing the rights of the owner or author along with the interests of the public. The public has a "right to know" and must not be denied the right to knowledge for too long a period. For instance, if an author publishes a work at the age of thirty and dies at sixty, the law indicates the copyright protection over the

work will continue for the next seventy years after the author's death, effectively keeping the work out of the public domain for a hundred years. A question arises: is this fair to the public and does the public need access to this knowledge for important reasons?

One of the main arguments against the long period of protection is that new authors need access to older research work to create new works and encourage the progress of science, technology, and the human condition. So how vital is the protected content and how much is the new researcher willing or able to pay for it? If a new author does not have funds to pay for the materials or to file and win a court case, does this limit the amount of research in that field of study? We must encourage and reward creativity, but how much reward is enough? These are issues thrown up in the debate.

Resorting to the courts is a retrospective remedy, and the legislative system seeks to ensure that the issues are adequately addressed in order to reduce the amount of litigation. Copyright infringement is a serious crime, carrying a fine from \$200 to over \$150,000, and it can include prison time. So it is essential to take measures to ensure that one's work does not challenge the rights of another party. Generally, when work is copied or used by individuals for personal use, the owner is likely to take a lenient view and not pursue legal recourse. Economic benefit is an entire other matter, however. While many educators feel they do not personally benefit from the use of copyrighted material, if it is used in a paid program of any type, it is enriching the course curriculum for which the student is ultimately paying. Therefore, it is of economic benefit to the university and may be counted as infringement of the copyright.

What is fair use?

While the right to frame laws protecting the creative works of inventors is endowed to Congress by an authority no less than the Constitution, the same national document qualifies that right by ensuring that these rights are meant "to promote the progress of science and useful arts." This clearly indicates that IP laws must work for the ultimate good of society and the American people. Lawmakers have been striving to reach a balance between the interests of the two parties — the creator and the public — and from this effort was born the fair use doctrine.

It is absolutely critical to understand the concept of fair use, especially in the context of education. Far too many educators view almost any material as fair game, simply because it is being used in an educational setting. Yet, this is clearly not the meaning of fair use.

In 1851, a well-known magazine, *The Economist*, echoed this widely held public view: "The granting [of] patents 'inflames cupidity,' excites fraud, stimulates men to run after schemes that may enable them to levy a tax on the public, begets disputes and quarrels betwixt inventors, provokes endless lawsuits...

The principle of the law from which such consequences flow cannot be just" (*Economist* 2005). About a hundred years before this time, Adam Smith is said to have referred to patents as necessary evils and claimed they should be handed out cautiously and scarcely. Economists of the time and many educators and detractors since have argued against protection of IP as providing a temporary monopoly to the creator or owner of the work.

The Legislature struggles to define what is fair for both sides, and the judicial doctrine of fair use, codified under Section 107 of the U.S. Copyright Act, is the source for all interpretation. The doctrine is worded fairly loosely, but allows for limited uses of material that is protected by IP laws, without obtaining the permission of the owner. Fair use attempts to establish certain uses that, in specified and limited ways, are justifiable in order to achieve a greater good. One of the problems is that fair use has not been defined in the Section, but the determining factors of whether the doctrine applies have been codified. The four factors of determining fair use are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education 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 (Nemire, 2007).

Although educators rejoice in the fair use doctrine and frequently misunderstand or misinterpret it, the factors above clarify that it gives restricted and limited access only to certain works. Fair use has continued to be the best defense in IP-rights infringement battles since it was first used successfully in *Foison v. Marsh* in the Supreme Court in 1841. But an educator should never look at the doctrine of fair use as a loophole, because that is not its intention. It is instead an allowance given by the law to use material in ways that would otherwise be considered infringement, and it is intended to be used only in conjunction with a clearly defined educational objective. The objective and the need to use the material need to be identified and outlined in the curriculum in order for the use to be fair.

Reproducing and using copyrighted content is regarded as fair use if it is used for “criticism, comment, news reporting, teaching, scholarship, and research.” Additionally, work cannot be used in its whole form; only limited portions and restricted numbers of copies or uses can be made. While these uses and conditions are defined, it demonstrates the unique understanding the original creators of the Constitution had of the need to disseminate information, as well as the value of leveraging knowledge for its use in science, technology, and promoting the good of society. At the same time, the effect of not defining fair use leaves it open to dispute and allows for the rule to be applied on a case-by-case basis. While this enables greater subjectivity, it opens the field to litigation. All infringement must be determined subject to a court ruling in legal action. But this should not be an impetus to ignore IP laws; protected material must be used in compliance with the law.

Here are some general guidelines to get a clearer picture and ensure that a researcher or educator does not become vulnerable to legal action. Up to 10 percent of a copyrighted text may be used to a limit of 1,000 words, whichever is less. Up to 250 words of a poem may be used, unless the poem is shorter than 250 words, in which case the whole poem may be used. A photograph, graphic or illustration may be used in its entirety, but the use is limited to 5 illustrations per artist or, for a collective work, 15 images or up to 10 percent. Up to 10 percent of a musical composition is allowable, but for each individual composition the limit is 30 seconds. Up to 10 percent of a film is reproducible — to a limit of 3 minutes.

Let us take an example: a teacher who does not have funds to purchase 25 copies of a musical piece for the band makes 20 copies from the five that have been purchased. This reduces the number of copies sold by the owner of the work by 20 and thus amounts to an infringement of the owner’s copyright. While the teacher may argue that the intention was educational, it is not indicated by the music syllabus that the students had to practice this particular piece, and it is therefore not considered a vital educational purpose. A more common instance is a teacher who allows her class to watch a movie on videotape from the library in order to entertain them and make them easier to manage on a rainy day or the day before vacation. While she may think this harmless, it amounts to public performance of the contents of the tape, which is a copyright infringement. Fair use does not apply, because a clear academic objective is not indicated. The fair use doctrine is not meant to protect arbitrary uses of copyrighted material that do not advance specific educational goals. Education is not to be used as an excuse for misusing or exploiting the owner’s rights.

Indeed, educators may often lose litigation involving the fair use doctrine. In the 1914 case, *Macmillan Co. v. King*, a Harvard tutor (King) copied multiple works for students from different books, and the court ruled against him. *Withol v. Crow*, 1962, saw the court rule against a music teacher who made 48 copies for the band because he was short of music sheets for them.

Allowing students or others to make copies for themselves does not circumvent the issue; it has also been widely discredited as a practice that was once used by libraries and educational institutions. Justice Joseph Story of the Supreme Court stated in 1841 that factors to consider would be “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” (Nemire, 2007).

#### Copyright, IP, and distance learning

Distance learning refers to the use of digital and electronic formats and multimedia to provide education to students at locations geographically remote from the point where the instruction is imparted. Distance learning breaks away from the traditional classroom setting by using the newest technologies in the field of communication. It allows students from all over the world to gain access to instruction that would ordinarily not be available to them. The delivery of the instruction is no longer contingent on time and place, a major breakthrough in spreading education across these barriers. Earlier, distance education implied study via correspondence, which meant hardly any interactive instruction and very little use of multimedia. Increasingly, distance learning depends on the latest modes of interactive communication, such as video and audio conferencing, interactive software, satellite transmission, and the use of the Internet, such as live chat and e-mail. Offered by a growing number of educational institutions, the degrees are called online degrees.

As far back as 1995, a third of all institutions offered some form of distance education (Marchese, 1998), and now a number of completely virtual institutions are achieving accreditation. For students, it opens doors to education and, for schools, it is a valuable and growing part of their business. With sources of funding becoming scarcer and tools for instruction becoming costlier, distance education promises to be a profit center that will support at least itself, if not other cost centers. Due to the ease and flexibility of their use, these new pedagogical methods are even replacing the older classroom-environment methods. With the new techniques, however, come new challenges. Issues have emerged in the area of copyright and IP rights: who owns them and what constitutes infringement? Another problem that follows from these issues is how to control IP remotely.

A videotaped lecture can be used many times over, instead of only once, as in the case of traditional teaching methods. If the topic has the potential to become outdated, the number of times it can be shown before it becomes obsolete is limited, but in the case of subject matter like a lecture on Emily Dickenson’s work, the video can be used endlessly without editing. While it may serve the purpose of advancing education, it is being used by an institution for its own profit, because students are paying for the course. This clearly indicates the school should be paying royalties for the use of the tape and, following the terms laid down by the owner, the professor delivering the lecture or the school from where it originated should also pay. While most schools and educators who offer lectures in this manner to other educational institutions do stipulate the number of uses that can be made of the material, these are often ignored by schools eager to increase their bottom line profitability.

The saved lectures or other teaching material can be viewed and used by unrestricted audiences, and unlimited copies can be made and distributed. The remote-site concept also blunts the conscience of many students and faculty members managing the distance learning courses. In many cases, individuals simply do not know it is illegal, and schools overlook the matter as well. The question that troubles legislators, IP law attorneys, administrators, educators, and others is how to balance the interests of both the creator or owner and the learning audience.

The answer is the protection of IP laws and the adoption of responsibility when using protected material. The TEACH Act of 2001 strives to clarify what materials can be used — and in what ways —

to satisfy educational objectives. It states that works in digital or electronic format, including websites, can be used in parts, but it stipulates that work can be used only in mediated environments. Described by Senate Report 2001, “mediated instructional activities” comprise “activities that use copyrighted materials...integral to the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance and display that would take place in a live classroom.” The TEACH Act further clarifies that work meant for sale for educational purposes, such as educational CDs or textbooks, may not be used or copied in any form without purchase.

#### Copyright, IP, and new technologies

The question of copyright and IP in a digital world clearly follows from a discussion on distance learning. Libraries face obstacles in the form of students taking unfair advantage of material in digital format, such as CDs and online databases. The ease of copying from these formats and the difficulty of tracking and controlling misuse has led to debate on the wisdom of allowing libraries to stock and distribute information in electronic format. At the same time, it is essential for libraries to contain adequate information for students and faculty to be able to research their subject matter deeply. Copyright infringement can bring even library administrators into litigation, especially if evidence shows they may have freely distributed or inadequately protected certain materials. This can be expensive, and libraries are rapidly becoming aware of the dichotomy.

Widespread use of information on the Internet raises questions on the level of protection offered by the law. Who owns the information? What is protected online? These questions are easily answered. The U.S. Copyright Act addresses these questions by stating the author or owner has rights to a work “fixed in any medium or expression, now known or later developed.” This provides protection for work going forward without the need to amend or rewrite the law. Ownership of online material also clearly resides with the creator or the commissioning party.

There is no limit to the uses of new technologies in committing copyright infringement. In a time of scanners, copiers, and easy upload tools, it is possible to find almost anything on the Internet, including on peer-to-peer sites. A paper copy of a protected book can be easily scanned and uploaded on a public site, where others can download it free of charge. Print it out again and you can even hand it out to your friends. With high resolution digital video cameras sneaked into movie theaters or other performances, digital pirates create illegal copies of performances on DVD and CD that can be sold or distributed free of charge to an online community. No one ever need pay for anything again.

While this would be true in a perfect world, what then about the rights of the owner? The laws are meant to preserve a precarious equilibrium. A creator who has worked hard and put genius and creativity into his or her work deserves the reward, which is not possible in an unprotected environment. The focus of the discussion then shifts to another viewpoint, discussed later under the section “The real debate: fair or unfair?”

#### Educators and copyright

Since the copyright-protected material can be lucrative for the owner, clarity on ownership is necessary. An employee generally needs to have a contract that specifically stipulates that the copyrightable IP created during employment belongs to the employee. Typically, if no such contract exists, the employer owns rights to the work. In some cases, faculties at educational institutions have collectively negotiated contracts that allow for ownership to be split or to reside with the author of the work. If not explicated in a contract, however, the copyright belongs to the school, as per the statutes in the Copyright Act regarding employee-employer contracts.

An exception to this rule is the “textbook exception.” Until the Copyright Act of 1976, the syllabus and textbook material created by a faculty member were the IP of the instructor and not the employing



authority. When the Act was passed, however, no such rule was added. While this may not have been a deliberate omission on the part of the legislators, it has thrown into doubt a tenet that was sacred to the teaching community: the syllabus and textbook belong to the professor. Interestingly, the textbook exception (an exception to the assumption of ownership rights by the institution) is still honored by most publishers and schools. Some attorneys interpret the current law as meaning to bestow the same rights as before, but in different words. Others claim the law intends to endow the employer-school with the copyright to all instructional material, including matter in textbook form.

Institutions of higher learning tend to have clearer contracts regarding products of research. Well-defined terms and conditions generally accompany IP that may come to patenting at some point. Many universities have established patent regulations that have been codified and disseminated to research staff to ensure demarcation of the financial rewards of ownership. The terms set in these regulations provide a legal framework for a university to manage its intellectual assets and allow for the administration of copyright of newly created work. In many cases, the policies offer the creator-faculty or research department some portion of the royalties from the income generated by the patented product. Organizations such as the American Association of University Professors (AAUP) assist higher education faculty in developing contracts and understanding policy.

For grade school educators, it is important to understand how to handle copyright in the classroom. For distance educators, care must be taken in formulating syllabi and teaching material in order to amply protect your copyrights over the material, from handouts to digital media.

The existence of the fair use principle is under attack. Several large companies are trying to move the Supreme Court to disallow the use of copyright-protected material in any way, including fair use. In this case, an integral and essential freedom will be lost to the education community. Educators and students alike should work toward the protection of the copyrighted material and live up to their responsibilities in order to ensure that repeated infringement does not occur, perhaps damaging the fair use doctrine for future generations.

#### Libraries and copyright

Librarians are in a unique position as the link between the producers of copyrighted material and consumers. The days when librarians could sit back and ignore the manner in which material was being used and downloaded are long gone. Some years ago, the band Metallica sued Indiana University-Purdue University, the University of Southern California, and Yale for allowing free music downloads from Napster.com (Bay, 2001). The universities blocked access to the site and Metallica dropped the lawsuit. With so much IP on their hands, it falls to libraries to try to educate their patrons about the need for responsibility. Producers, publishers, and database creators are facing hits from piracy and plagiarism, costing them a chunk of the profits. The financial squeeze is making them fight against perpetrators of the infringement by retaliating at the channels used by the perpetrators.

The effect of the struggle is being felt in all areas of academia, but as direct mediators of content, libraries are first on the hit list. Since neither students nor faculty seem to have a clear idea about IP laws and the limited character of fair use, libraries must provide guidance to both groups. Additionally, librarians must be educated so they do not encourage patrons to infringe IP rights in any way.

#### Students and copyright

Teachers tend to use the term “plagiarism” rather than “copyright infringement” but in a legal sense, it is the same thing. A student may find encouragement in the fact that so much information is easily available for copying from the Internet, school libraries, and reference lists provided by faculty. A distinction must be made in the use of these materials, however, and it must be clearly indicated the material is intended for reference only. The meaning and importance of referencing must be made

known in order to reduce the risk of plagiarism and ensure that the school, library, and educators are not implicated in infringement cases.

In a world where a great deal of digital and electronic learning, such as computer programming and hardware configuration, is self-taught, it can be difficult for a student to differentiate between rightful usage and infringement. Often video games are constructed in a way to allow the gamer to hack into the system and change the rules by which the game is played. Computer geeks nowadays know a great deal about breaking codes and security barriers to get to protected information. In this environment, freely available and published copyrighted material may seem like fair game to a young person.

Distance education is susceptible to misuse because students may feel no one can watch their activities, since they are not on campus or the information made available through the course is unprotected. These students may, in fact, not be at a distance at all; they may simply live in the same geographical area, but are unable to take time to attend school on campus. If the distance learning is actually occurring at a distance, the university must take into account a number of laws before establishing a program.

It is essential for schools to take action to change this mind-set by providing education on copyright and infringement (see our article [Lakhan and Khurana, 2007] for further information on the global state of IP education). This must be done with a view not only to protect the interests of the school, but also to inculcate knowledge in the student body and preserve the integrity of the education system. Awareness is key here, not only of the potential penalty for infringement, but also of the rights and responsibilities associated with IP.

The real debate: fair or unfair?

While much ignorance about IP laws, their limits, and restrictions exists, so does a great deal of awareness of the truth. This means that, on one hand, people may know they are plagiarizing work, but may not be certain about some types of work and the extent of their culpability. With the amount of media attention focused on copyright infringement cases in the film and music worlds, no doubt the average college-educated person is aware that downloading music for free or copying an author's original work without permission is illegal. So clearly, the issue is not necessarily a lack of knowledge of the law, but the fact that the infringer disagrees with the law.

In the recent past, a number of individuals, including high school and college students, have been charged with piracy of books, music, movies, and other media. While many of those charged admitted they did commit to copying the work, they claimed that their actions were not wrong. The detractors of IP laws state that the copyright laws create a monopoly for, say, the music producers and that these producers then grossly overcharge customers for listening to the music. A music CD costs about \$15, and this is significantly higher than the amount needed to produce and distribute the music, which means it is making the producers — who have done nothing to create the work — extremely wealthy. The same logic works for any medium of publication of IP.

Students sometimes claim their actions level the playing field. But how does this affect the education system? Clearly, some part of the education system is responsible for producing a healthy respect for the law and integrity in the student body. While the schools cannot be expected to be solely answerable for the actions of their students, they can attempt to convey to them right ways to change laws they consider unfair. Additionally, schools need to (1) explain the creativity and reward theory and (2) bring an understanding to students and faculty that the creator should be entitled to control the copyright to work.

Finally, the entire education system must learn about and respect the laws of the country and of

creators in all parts of the world, simply because, agree with them or not, these are the laws of society and breaking them can bring severe repercussions and chaos. Protest must be organized and lawful. In order to accomplish this, many universities have formed university or educator-led organizations that work toward more allowances for education institutions and faculty.

Writers and copyright: *Stanford v. Estate of James Joyce*

A landmark case in the area of fair use in education was decided on March 22, 2007. A Stanford University acting professor of English, Carol Shloss, supported by Stanford Law School's Fair Use Project, the Center for Internet and Society, and the Cyberlaw Clinic, filed a case on June 12, 2006 against the estate of James Joyce, controlled by the grandson of Joyce, Stephen James Joyce. Shloss, an eminent Joycean scholar, asked the court for the right to use quotations from Joyce's published and unpublished work on her scholarly website about him.

She had filed the case because, while authoring a book about the daughter of Joyce, Lucia Joyce, and the impact she had on her father's work, Schloss ran into repeated conflict with the Joyce estate over the right to use copyrighted material belonging to the estate. The estate refused the right to use any of the material or quote from it in any way and threatened Shloss with an infringement suit if she used it. Finally, in 2003, Shloss was forced to publish her book, *Lucia Joyce: To Dance at the Wake*, without many evidentiary passages and quotes she originally intended to include. Dissatisfied with this, Shloss created a website to supplement her book and included on it the deleted material. She made this site available only to IP addresses in the U.S. and password protected it, because the Joyce estate threatened legal action if it were made public.

At the time the case was filed, attorney Lawrence Lessig, Director of the Stanford Center for Information and Society, said, "Shloss's book and website are not copies of, nor substitutes for, Joyce's works. Accordingly, her work is not the kind that copyright law seeks to prohibit. Instead it is the kind of scholarly, critical work that is protected, and that should always be protected, by fair use" (Stanford Law School News Center 2006). Shloss claimed the copyrighted material was used in a transformative manner, which is allowed by the U.S. Copyright Law and comes under the fair use doctrine. 'Transformative' use implies that value has been added to the copyrighted material and it has been transformed by the addition of new meanings, insights and information. When the Joyce estate settled the case, the scholar and her supporters won the right to use the material. Shloss now has permission to use the literary work online and in print in a court-enforceable agreement.

After the settlement, Shloss commented, "I fought...for the freedom to consider what happened to them [Lucia and James Joyce] and for the freedom of others to respond to my ideas. 'Fair use' exists to foster this liveliness of mind; its measure is in transformation not in a restrictive counting of words" (Stanford Law School News Center 2007).

Lessig said, "This is just the first of a series of cases that will be necessary to establish the reality of creative freedom that the 'fair use' doctrine is intended to protect in theory. We will continue to defend academics threatened by overly aggressive copyright holders, as well as other creators for whom the intended protections of 'fair use' do not work in practice" (Stanford Law School News Center 2007).

Conclusion

It is clear a deeper understanding of the laws associated with IP is essential in the education community. While some may disagree with the laws or pursue their rights through enforcement, no one can afford to ignore the issues surrounding copyright and intellectual content. Through knowledge will come power, and spreading awareness will lead to lawful and fuller usage of allowances such as fair use and the responsibility users have toward their source material and the creators or owners of that material.

## Acknowledgements

The authors extend special thanks to Nancy Norland from New World Editing and the GNIF academic support staff for their invaluable input and services.

## References

- Alexander, S., Baird, D. 2003. The wrinkle in your research and teaching: Copyright, DCMA, guidelines, and public domain. Paper presented at the eighth annual Mid-South Instructional Technology Conference, Murfreesboro, TN. March.
- Bay, M.T. 2001. Copyright and the need for academic libraries to educate patrons. Indiana University-Purdue University Indianapolis University Library. ED455840.
- Convention Establishing the World Intellectual Property Organization.  
[http://www.wipo.int/treaties/en/convention/trtdocs\\_wo029.html](http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html) (accessed May 12, 2007).
- Economist. 2005. A market for ideas. October 22.
- Lakhan, S.E., Khurana, M.K. 2007. The State of Intellectual Property Education Worldwide. *Journal of Academic Leadership*. 5 (2).  
[http://www.academicleadership.org/emprical\\_research/The\\_State\\_of\\_Intellectual\\_Property\\_Education\\_](http://www.academicleadership.org/emprical_research/The_State_of_Intellectual_Property_Education_) (accessed August 1, 2007).
- Marchese, T. 1998. Not so distant competitors: How new providers are remaking the postsecondary marketplace. *AAHE Bulletin*. May 1998.
- Moal-Grey, M.J. 2000. Distance education and intellectual property: the realities of copyright law and the culture of higher education. *Touro Law Review*. 16 (3).
- Nemire, R.E. 2007. Intellectual property development and use for distance education courses: A review of law, organizations and resources for faculty. *College Teaching*. January 2007.
- Russell, C. 2002. New Copyright Exemptions for Distance Educators: The Technology, Education and Copyright Harmonization (TEACH) Act. *ERIC Digest*. ED470984.
- Senate Report No. 31. 2001. 107th Congress. 1st Session.
- Stanford Law School News Center. 2006. *Shloss v. The Estate of James Joyce*. June 12.
- Stanford Law School News Center. 2007. Stanford Scholar Wins Right to Publish Joyce Material in Copyright Suit James Joyce Estate Agrees to Settle. March 22.

VN:R\_U [1.9.11\_1134]