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MULTIMEDIA AND FAIR USE: THE PRACTICAL SIDE OF A PHILOSOPHICAL DEBATE

Paul A. Soderdahl and Carol Ann Hughes

Imagine a state-of-the-art electronic classroom, with a computer on every student's desk - each with access to the local network and to the Internet, each with a CD-ROM drive and the ability to play audio and video, each with the capability of creating multimedia presentations and interactive web sites. Students from political science are meeting in the classroom and studying campaigning trends by examining presidential campaign ads from the 1960s through the present. They are working together in small groups viewing a collection of television ads pressed to CD-ROM by their instructor.

Elsewhere, in a similarly equipped facility, music history students are analyzing Baroque dance suites by creating multimedia term papers that include portions of digitized audio from recent recordings played with period instruments. Their instructor is giving them space to mount their papers on the school of music's web site. And across campus, a special topics seminar in mass communication is being taught in conjunction with a similar course at another university, where the students are working in teams with students from the other campus. The students are constantly sending e-mail back and forth, swapping URLs. But when they need to work with materials that are only in print form, students on one campus scan them in and put them up on the network for students on the other campus to use.

This isn't science fiction. This isn't the technology of tomorrow. These scenarios are based on real classes taking place now in the University of Iowa Libraries' Information Arcade and in similar electronic classrooms available today on university campuses across the country. All of these courses truly show an attempt to integrate

technology into the classroom and to realize the promise of multimedia and the web. However, according to an interpretation of fair use for educational multimedia, none of these classes could take place as described without faculty first acquiring permission from each and every copyright holder before they or their students can use those materials in their work.

Balancing the Interests of Copyright Holders and Educators

Fair use of digital resources is a concern throughout the higher education community. The Association of Research Libraries, in a statement adopted by its membership of 119 research libraries in the U.S. and Canada, has asserted that "[f]air use and other relevant provisions are the essential means by which teachers teach, students learn, and researchers advance knowledge/"¹ The National Humanities Alliance has developed a particularly eloquent statement of 10 principles that are intended to "provide standards against which coalitions and individual institutions can evaluate legislative proposals. Faced with the strong interests of the infotainment industry to maintain tight control of intellectual property in a global marketplace, the educational community may strengthen its more balanced position by speaking as one voice guided by the principles."²

Of what practical import are these principles in guiding faculty and administrators in the daily routine of developing course materials, creating scholarly publications, and guiding students toward mastery of discipline-related content? Approximately 60 groups tried to bridge the gap between philosophy and local operations by engaging in the Conference on Fair Use (CONFU) discussions from 1994-

¹ Intellectual Property: An Association of Research Libraries Statement of Principles. Washington: Association of Research Libraries, 1994. Available: <http://www.arl.org/scomm/copyright/principles.html>.

² National Humanities Alliance. Basic Principles for Managing Intellectual Property in the Digital Environment. Washington: Association of Research Libraries, 1997. Available: http://www-ninch.cni.org/ISSUES/COPYRIGHT/PRINCIPLES/NHA_Complete.html.

1997. CONFU was an effort to develop guidelines based on current copyright law that could be widely disseminated on campus and applied in the "digital trenches." Four separate proposals for guidelines on digital images, distance learning, educational multimedia, and electronic reserves were debated. Unfortunately, little agreement emerged between participants drawn from the commercial sector and those from the educational sector on what actions could be considered fair in the digital environment. Educational organizations were also divided among themselves as to the merits of the various guideline proposals.

"Fair Use Guidelines for Educational Multimedia" were particularly hotly debated. The Consortium of College and University Media Centers (CCUMC) developed and agreed upon a set of guidelines over a two-year period with the input of many educational organizations.³ These guidelines were then forwarded to CONFU and proposed for addition to the CONFU report. Several organizations who actively participated in the process, however, refused to endorse CCUMC's guidelines, including the National Association of State University and Land Grant Colleges and the American Library Association. However, other educational organizations did endorse them, including the Association of American Colleges and Universities and the Association for Educational Communications and Technology.

Faced with such a lack of consensus, university administrators and their legal counsel may consider the most responsible course of action to be that of following the guidelines proposed by the CCUMC. They are clear, precise, and in many cases simple to apply. To avoid risking a court case, university counsel may suggest that the CCUMC guidelines detail a defensible "safe harbor" and that any assertion of fair use beyond these guidelines may not be prudent. This approach, however, cannot be taken

³ Educational Multimedia Fair Use Guidelines Development Committee. Fair Use Guidelines for Educational Multimedia. Consortium of College and University Media Centers, 1996. Available: <http://www.libraries.psu.edu/avs/fairuse/guidelinedoc.html>.

lightly, because it results in a self-imposed and fairly limited interpretation of fair use that, if followed widely, could become a de facto standard.

The Letter and Spirit of the Law

The U.S. Copyright Act of 1976 states that "the fair use of a copyrighted work ... 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."⁴

This is the only statutory basis for fair use — guidelines created collaboratively and endorsed by national organizations, whether or not they are contained in legislative history, are likely to carry considerable weight in various jurisdictions, but do not have the force of law. Case law remains inconclusive, especially with respect to fair use in the digital multimedia environment.

Concerns with the CCUMC Guidelines

Several educational organizations and library associations have issued statements opposing the CCUMC guidelines interpreting fair use for educational multimedia. The Association of Research Libraries' summary of concerns⁵ highlights the following common themes:

- The guidelines define fair use by imposing strict and narrow portion limitations.

⁴ US Copyright Act of 1976, Sec. 107.

⁵ Educational Fair Use Guidelines for Multimedia: A Summary of Concerns. Washington: Association of Research Libraries, 1997. Available: <http://www.arl.org/info/frn/copy/mmedia.html>.

- Recognizing that user rights are not unlimited, these portion limitations still unduly restrict instructional creativity and the development of in-depth multimedia applications for distance education initiatives.
- These strictly articulated quantitative limitations may establish untenable precedents that may narrow the interpretation of fair use, and thus will not fully protect the public's fair use rights.
- The guidelines appear to make teachers and administrators legally responsible for the activities of students.

Furthermore, the CCUMC guidelines suggest that the determination of fair use is limited by a finite period by imposing a strict time limitation of two years after the first instructional use. Are these concerns only a matter of principle? Will the process of educating students be materially affected by adhering to the safe harbor of strict guidelines?

Practical Applications

The practical ramifications of adhering to CCUMC guidelines can best be exemplified by looking at a few real-life scenarios that faculty face today.

Case 1. Imagine a faculty member in English literature creating an instructional unit on contemporary adaptations of Shakespeare's plays. She has access to videotapes that she can lawfully obtain and clearly may use in face-to-face teaching. In order to facilitate a thoughtful class discussion, however, she would like to contrast the way various directors have portrayed the same scene. A useful and technologically appropriate way to do this would be to digitize segments of various scenes and press them to CD-ROM, both for convenience in the classroom and the ability to have random access to each clip in order to quickly demonstrate a point that arises during class discussion.

According to the CCUMC guidelines, she cannot assert fair use if she digitizes more than three minutes from any one motion picture. She cannot use the CD-ROM for more than two years without obtaining permission from the publisher. And she cannot make any additional copies to store in a centralized computer facility for students to be

able to access outside of class time. Yet, her use of these materials without permission or compensation to the copyright holders might be deemed fair in a court, notwithstanding the fact that it goes well beyond the limitations set forth in the CCUMC guidelines.

The faculty member's alternative is to avoid the multimedia environment altogether and restrict herself to the analog world. She might require the students to view the selected videotapes outside of class time, resulting in a class discussion of "remember whens." Or she could arm herself with a VCR and a box full of videotapes queued to the beginnings of scenes that she thought might arise during a lively class discussion and play "swap the tapes." Or she might decide that neither alternative is particularly appealing, so she resorts to limiting her coverage of the topic to a set of lectures and assigned readings, leaving students to learn about the subject only through second-hand reports. None of these alternatives are pedagogically appealing. None of them give her students the opportunity to engage and to interact with the primary source materials in a real-time class discussion. None of them reap the benefits of the technology and the promise that it holds for radically changing the nature of face-to-face teaching.

Case 2. Beyond her use of these materials in the classroom, the faculty member may also wish to cite these original works, either through visual representations of stills or brief clips of motion media, in her own scholarship and research. Her ability to quote from a printed literary work and include that quote in her own published literary criticism, is clearly protected by the statutory provision for fair use. However, the proposed CCUMC guidelines would suggest that the analogous scholarly activity is not permitted in the digital environment. She may assert that her use of only a few seconds of media from a motion picture is no different than a quotation from a piece of print literature, and is necessary to support her scholarly criticism. She may then decide that the most effective means for her to "publish" this work is to mount it on her faculty web

site. Again, applying each of the four factors of fair use, it may be difficult for a copyright holder to argue that fair use does not apply, yet proposed guidelines suggest that fair use can never be asserted for a work on an electronic network without access controls in place.

Case 3. In an attempt to allow her students, too, to interact with other primary source materials in their own scholarship, the faculty member assigns a multimedia term paper, encouraging them to incorporate scanned images and text, as well as digitized audio and video, to support their arguments. She would like to allow them to work collaboratively and to review each others' papers, a pedagogically effective method. In order to facilitate this, she provides them space in a shared course folder on a file server, or a shared course web site. Even with name and password access restrictions in place on a secure network, the CCUMC guidelines suggest that these materials cannot be made available for a group of students to share and to develop throughout an entire semester. They artificially impose access and time limitations that interfere with students' abilities to work collaboratively and to take advantage of a networked campus environment.

Conclusion

Thus, a university's decision, implicit or explicit, to conform to proposed fair use guidelines, should receive the serious consideration it deserves. While legal counsel may suggest that such an interpretation is the most prudent and defensible, faculty and administrators should be aware of its consequences on teaching, scholarship, and research, and the potential for self-imposing new restrictions on fair use doctrine.

The spirit of the copyright law, which is realized in balancing the protection of exclusive rights for creators with the justifiable use by others for criticism, comment, teaching, scholarship, or research, is precisely to foster creativity in order to "promote

the progress of science and useful arts."⁶ Faculty need to be provided with clear advice on how to work within the spirit of the law while promoting effective pedagogy. The higher education community needs to work together to find guidelines that are clear and easily applied, but also philosophically and pragmatically sound.

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⁶ US Const. Art. 1, sec. 8.