

VCCS 2012 - Copyright and Tech Law Issues in Teaching
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▶ Let's Start With Some Common Misconceptions

- ▶ A work is not copyrighted unless it is "officially registered"
- ▶ It is fair use to copy it because the copyright owner didn't respond to my email/letter/phone call, or, "silence equals permission"
- ▶ The appearance of a work on the web means the owner has consented to reuse or republication
- ▶ If I'm not "selling" it, I don't have a problem
- ▶ If I'm "just" teaching with it, there's no problem
- ▶ When I load it onto my computer, I'm not making a copy
- ▶ I'm not "publishing" anything when I put stuff up on the web
- ▶ Fair use protects my students' right to read anything I think they need for my class in the web format they are used to
- ▶ If the publisher is too much of an idiot to sell a digital copy, I can make one for myself

▶ Copyright Over Time

- ▶ In 1790, Congress only protected maps, charts and books
- ▶ In 1865 Congress added protections for photographs
- ▶ In 1912 Congress included motion pictures
- ▶ In 1971 Congress added sound recordings
- ▶ In 1980 Congress added computer programs/software
- ▶ In 1990 Congress added architectural works

▶ Copyright

...protects only "original works of authorship" that are "fixed in a tangible medium of expression."

A "work is fixed...when its embodiment...is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration..."

▶ Copyright Now Extends To:

- ▶ Literary Works (including articles, books, software with written documentation)
- ▶ Musical Works (including score and lyrics)
- ▶ Dramatic Works (including any accompanying music)
- ▶ Choreography and Pantomimes
- ▶ Pictorial, Graphic and Sculptural Works
- ▶ Motion Pictures and other Audiovisual Works
- ▶ Sound Recordings
- ▶ Architectural Works (including plans and drawings)

- ▶ Software
- ▶ Copyright Protection Does Not Cover:
 - ▶ Underlying facts, ideas, concepts, principles, processes, procedures, systems, discoveries (*but watch out for patent law issues*).
 - ▶ Federal Government Works, including works created by federal officers and employees, (*but watch out for contract works, consultants, etc.*)
 - ▶ Titles, names, short phrases and slogans, familiar symbols or designs, lettering (*but watch out for trademark or other legal issues*)
 - ▶ Works consisting of information that is common property (*weight charts, standard calendars, tables or lists taken from public documents*)
- ▶ Copyright Protection
 - ▶ In 1909, the exclusive right to make a derivative work was added
 - ▶ In 1978, authors obtained for the first time copyright to unpublished works
 - ▶ Effective March 1, 1989, authors no longer needed to put a copyright notice on their works
 - ▶ Now, neither copyright registration nor notice is necessary; copyright protection begins automatically when the work is “fixed.”
- ▶ Duration of Copyright: What is a “limited time” consistent with the constitutional purpose of copyright law?”
 - ▶ Original law: 14 years, renewable for another 14 if the creator was still alive (Enough time for creator to reap benefits; allowed for a continual replenishment of works in the public domain)
 - ▶ But, the 1998 Sonny Bono Copyright Term Extension Act (...who owns Mickey?...) extended the term to life of the author plus 70 years.
 - ▶ Sonny Bono
 - ▶ Also allowed owners of old unpublished materials to race to publish by January 1, 2003 and extend copyright to life of author + 70 years, OR Dec 31, 2047, whichever is greater.
 - ▶ For works-for-hire or in the case of anonymous works, protection is 95 years from the date of publication or 120 years from creation, whichever expires first.
 - ▶ Supreme Court upheld Act in face of constitutional challenge (*Eldred v Ashcroft*)
- ▶ Figuring Out Copyright Terms
 - ▶ Is complicated because of the evolution of the law, changes in copyright registration requirements, figuring out if or when publication actually occurred, and more.
 - ▶ One “definite” – print works published before 1923 in the US are in the public domain. (But watch out for different rules abroad.)
 - ▶ Another “definite” is that materials on the web are NOT necessarily or even mostly in the public domain.

- ▶ Cornell and UNC charts are helpful (see Resources Appendix)
- ▶ Rights of Copyright - 17 U.S.C. section 106:
 - ▶ Reproduce the copyrighted work whether in whole or in part (making a digital copy from an analog work is “reproduction” restricted to the copyright holder)
 - ▶ Prepare derivative works including translations or adaptations
 - ▶ Distribute copies by sale or other transfer of ownership
 - ▶ For works capable of performance, to perform the copyrighted work in a public place or setting
 - ▶ For works capable of display, to display the copyrighted work in a public place or setting
- ▶ Copyright Exceptions
 - ▶ Section 107 - Fair Use
 - ▶ Section 108 - Library Copying
 - ▶ Section 109 (a) - First Sale Doctrine (once Copyright holder allows release or sale of copies, a subsequent owner may sell, rent, transfer, loan or give the copy to another)
 - ▶ Section 109 (c) – Public Displays (helps libraries, museums, galleries, etc.)
 - ▶ Section 110 (1) Displays and Performances in Face-to-Face Teaching (reciting poetry, reading plays, showing videos or films, playing music in traditional classroom settings.)
 - ▶ Section 110 (2) Displays and Performances in Distance Learning (the “TEACH Act”)
 - ▶ Section 117 Computer Software (allows modifications by the owner of a copy of software, as well as making of backup copy)
 - ▶ Section 120 – Architectural Works (allows the making of pictures or photographs of architectural works once they are built and visible to the public without infringing copyright of the architect. Note: images or photographs are themselves a new copyrighted work apart from the architectural design.)
 - ▶ Section 121 – Special Formats for Persons With Disabilities (allows making of special format copies; but note the many restrictions)
- ▶ Summary of Recent Statutory Changes

DMCA was enacted in 1998 to address new technologies unanticipated in original statute and 1978 revisions. Primarily intended to support use of new technologies to allow access and preservation and to bring US law into compliance with international law under the Berne Convention; but, DMCA also made it illegal to circumvent controls even in pursuit of an otherwise lawful purpose. DMCA specifically authorizes copyright infringement warnings under section 512 which have been liberally used (some would say abused) by industry.

SONY BONO enacted 1998 extended copyright protections additional 20 years. Extinguished hopes that a large amount of anticipated work would go into public domain. Upheld by Supreme Court several years ago.

TEACH enacted 2002 allows use of copyrighted material in distance learning, but at the cost of added complexity and strict compliance regulations that are not technically feasible. TEACH explicitly bars streaming whole dramatic works—a key current need.

▶ Specific Copyright Educational Exceptions

▶ § 110 – Face-to-Face Teaching

Section 110 (1): “Notwithstanding the provisions of [section 106](#), the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;”

▶ Section 110 (1)

- ▶ Copy-protected works may be shown or performed in the course of face-to-face teaching of a non-profit institution (including whole films or musical performances)
- ▶ It is possible to display and perform a multimedia work in connection with or in creation of class assignments, curriculum materials
- ▶ Clips, images, digital objects may be used in class examinations; student portfolios; professional symposia

▶ Section 110 (2) (“TEACH” ACT)

Section 110 (2) authorizes significantly less than Section 110 (1)...Remember - there are more freedoms in face-to-face teaching than online or on course reserves.

- ▶ Images: generally ok but watch licensing issues and format conversion issues (slides to digital)
- ▶ Films and audio: clips ok but not whole works unless authorized as a fair use.
- ▶ Institution: has to be compliant with TEACH requirements (copyright policies, downstream technology controls, etc.)
- ▶ Must license works developed specifically for online teaching

▶ A lot depends on § 107 Fair Use

“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”

- ▶ The Fair Use Standards:
 - ▶ Purpose and character of the use including whether the use is for educational vs. commercial purposes
 - ▶ The nature of the copyrighted work – is it a factual or creative work
 - ▶ The amount and substantiality of the portion to be used in relation to the work as a whole
 - ▶ The effect or impact of the use upon the potential market for or value of the work.

- ▶ Fair Use is a Case-by-Case Assessment
 - ▶ Fair Use is a flexible, fact-specific standard, so no single factor is dispositive.
 - ▶ Fair Use involves balancing the input from all four questions.
 - ▶ The fact that a use might itself be commercial, or that it might impair the marketability of a work, does NOT invalidate the use as fair.
 - ▶ That a use is educational does NOT guarantee that it is fair.

- ▶ Campbell v. Acuff-Rose Music., Inc. (U.S. 1994)

Factor # 1

The indisputably commercial nature of 2 Live Crew’s parody did not doom their defense. While this factor might weigh against them, it is but one part of a 4-part test. Further, parody and other “transformative” uses are highly protected under Fair Use, whether the use is educational or commercial: *“in truth, in literature, in science and in art, there are, and can be, few, if any things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use, much which was well known and used before.”*

Factor #2:

Although Orbison’s song was clearly highly creative: *“This fact...is not much help in this case, or ever likely to help much, in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.”*

Factor #3:

Amount as a portion of the whole: *“2 Live Crew ...copied the first line of the original, but thereafter departed markedly from the Orbison lyrics....They also copied “the bass riff and repeated it...but also produced solos in different keys, and alter[ed] the drum beat. This is not a*

case, then, where ‘a substantial portion’ of the parody itself is composed of a ‘verbatim’ copying of the original.

Factor #4:

Fair use is an “affirmative defense” requiring specific evidence provided by the proponent of the defense of the lack of market harm. *“We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because ‘parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically’...the role of the courts is to distinguish between ‘[b]iting criticism that...suppresses demand [and] copyright infringement which usurps it.’”*

▶ Hello, Transformative Fair Uses

- ▶ We are seeing case after case in which courts are upholding fair use, especially when the use is deemed transformative.

“[t]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright.... and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use” Campbell v Acuff Rose Music (U.S.1994)

▶ Rogers v Koons 1989

- ▶ Full copying
- ▶ Insufficient parody of underlying work itself (social commentary not adequate justification)
- ▶ Koons’ profit motive too clear; harm suffered to plaintiff’s potential market for derivative or adaptation rights (“Here there is simply nothing in the record to support a view that Koons produced "String of Puppies" for anything other than sale as high-priced art. Hence, the likelihood of future harm to Rogers' photograph is presumed, and plaintiff's market for his work has been prejudiced.”)

▶ Blanch v. Koons 2006

“Copyright law thus must address the inevitable tension between the property rights it establishes in creative works, which must be protected up to a point, and the ability of authors, artists, and the rest of us to express them- or ourselves by reference to the works of others, which must be protected up to a point. The fair-use doctrine mediates between the two sets of interests, determining where each set of interests ceases to control.”

- ▶ Not Every Creative “Appropriation” will meet the test: *“The question is whether Koons had a genuine creative rationale for borrowing Blanch’s image, rather than using it merely to “get attention or to avoid the drudgery in working up something fresh.”*

- ▶ Not a free pass to take what you want because you're too lazy to create it yourself!
 - ▶ Did cause the court to look specifically at Koons' justifications.
 - ▶ Raises some interesting questions about the role of judicial exploration of artistic motivations.
 - ▶ Context will matter!
- ▶ Internet Functionality
 - ▶ Courts understand that internet functionality requires copying of whole works, necessary to accomplishment of socially useful transformative functions. *Arriba Soft (9th Cir. 2003)*, *Perfect 10 (9th Cir. 2007)*
 - ▶ Size matters; technology is our friend. Thumbnails and reduced quality formats are a significant factor. Delivery of images or content in a different, non-competing format, often supports a finding of transformative use, and undercuts claims of market infringement. *Arriba Soft (9th Cir. 2003)*, *Perfect 10 (9th Cir. 2007)*
 - ▶ Sedgwick Claims Mgmt v Delsman - Federal District Court, 2009
 - ▶ Defendant is sued for copyright infringement and various state law causes of action (defamation, etc) over blog and mailing of "wanted" style postcards criticizing corporate management.
 - ▶ Court finds defendants use "transformative" and protected, despite fact he copied entire images.
 - ▶ Sedgwick's corporate use of the images was for promotional purposes; defendant used them to attack the company; he wins!
 - ▶ But Not Every Fair Use Case is a "win": E.g. Gaylord v. United States (Fed Cir 2/25/10)
 - ▶ US Government commissioned memorial
 - ▶ US Government stamp from duly licensed photograph
 - ▶ Some Key Practical Fair Use Questions for Faculty
 - ▶ How much of the work are you using?
 - ▶ Is the work scientific or creative?
 - ▶ Images, text, audio, video, software?
 - ▶ Is the work available for purchase or licensing for the use you require?
 - ▶ Is your use "scholarly" or "commercial?"
 - ▶ How wide is your intended audience (e.g. class, colleagues, world-at-large)?
 - ▶ Do you have effective access controls so that the work is not being distributed widely? (e.g. IP or password protection)? (Hint: the wider your intended distribution = the more copies being made and the more the owner will be losing all control over the work, the less likely is it that your use will be fair)

- ▶ Does the “spontaneity” factor favor your use?
 - ▶ Have you sought permission without timely response?
 - ▶ Is there no discernible copyright owner?
 - ▶ Have students purchased course materials? (Is the additional content educationally supplemental?)
 - ▶ Is the use likely to be one-time only or will the materials be incorporated into routine teaching materials?
 - ▶ Is delivery of a digital copy essential to the teaching and learning mission of a class, presentation, or project?
 - ▶ Is your use transformative? (Are you making something different and new with the work?)
 - ▶ Would imposition of a permitting requirement for your type of use prevent research, criticism, commentary—core aspects of free intellectual inquiry, scholarship, art?
 - ▶ *Regardless of the “technicalities,” does a good faith assessment support the use?*
- ▶ Some Questions That Are Not About Fair Use
 - ▶ Can I make a copy of the book since buying it is prohibitively expensive?
 - ▶ Can I distribute copies of the article/book without buying pdf’s because the publisher had me over a barrel?
 - ▶ I don’t have a copy of the agreement I signed but can I use that article in my next book?
 - ▶ Everyone else is doing it, why not me?
- ▶ Video and Film... Online
 - ▶ So how much will be considered “fair?”
 - ▶ Keep in mind film and music industries are the most litigious copyright enforcers today.
 - ▶ In finding against CBS, which prepared a retrospective about the life of Charlie Chaplin using film excerpts without permission, a court upheld a jury finding against fair use where “CBS used copyrighted material from five different works: 105 seconds of an 89 minute film; 225 seconds of a 60 minute film; 85 seconds of a 72 minute film; 55 seconds an 89 minute film; and 75 seconds of a 72 minute film. [Roy Export Co. Establishment etc. v Columbia Broadcasting System Inc., 503 F Supp 1137, 1145](#) [SD NY 1980]
 - ▶ **Fair use.** The makers of a movie biography of Muhammad Ali used 41 seconds from a boxing match film in their biography. **Important factors:** A small portion of film was taken and the purpose was informational. (*Monster Communications, Inc. v. Turner Broadcasting Sys. Inc.*, 935 F. Supp. 490 (S.D. N.Y. 1996).)
 - ▶ **Not a fair use.** A television station's news broadcast used 30 seconds from a four minute copyrighted videotape of the 1992 Los Angeles beating of Reginald Denny. **Important factors:** The use was commercial, took the heart of the work and affected the copyright

owner's ability to market the video. (*Los Angeles News Service v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997).)

- ▶ **Not a fair use.** A nonprofit foundation presented a program called Classic Arts Showcase, for broadcast principally to public television and cable channels. The foundation used an 85 second portion (of a five-minute performance) by an opera singer from a two-hour movie, "Carnegie Hall." **Important factors:** Although the court considered the use to be educational, noncommercial and to consist of an extremely small portion of the work, those factors were outweighed by the potential loss of licensing revenue. The copyright owners had previously licensed portions of the work for broadcast and the court determined that the foundation's use affected the potential market. (*Video-Cinema Films, Inc. v. Lloyd E. Rigler-Lawrence E. Deutsch Found.*, 2005 U.S. Dist. LEXIS 26302 (S.D. N.Y. 2005)).

- ▶ 2012 Copyright fights that could affect your life
 - ▶ Course Reserves (*Cambridge University Press v Beckler*)
 - Full trial held last year
 - Could shut down campus course reserves
 - ▶ UCLA
 - Streaming whole films
 - ▶ Hathitrust
 - Holding and delivering scanned books from the Google Books project

- ▶ Non- "Copyright" Constraints
 - ▶ Property rights, licenses, contracts & grants
 - ▶ Licensed Journals and Databases
 - ▶ Contract terms govern
 - ▶ Articles freely available to the College or University community cannot be uploaded to the web.
 - ▶ Graphs, charts, images contained in such articles cannot be uploaded without a painstaking fair use analysis.

- ▶ ASCAP and BMI Licenses
 - ▶ Authorize use of music/scores for campus performances
 - ▶ Authorize recording of same
 - ▶ Authorize "*performances presented under the auspices of Licensee, including but not limited to, performances by faculty, staff, students or alumni of licensee while performing under the auspices of Licensee and shall include performances by means of Internet transmissions, including webcasts of Licensee owned and operated Radio Stations, Intranet Transmissions and Licensee's cable TV system.* ""
 - ▶ Typically DO NOT authorize uploading to iTunesU, YouTube, Facebook, or other 3d party site.

- ▶ New Media and Software Click-Through Licenses
 - ▶ Interactive sites such as YouTube & Wikipedia, or “freeware” such as Google Analytics, require click-through agreements before submittal of content or receipt of software.
 - ▶ Such licenses will typically require a statement of copyright compliance and also impose indemnification requirements on the individual posting the work.
 - ▶ They require you to agree to be sued in the company’s preferred jurisdiction.
 - ▶ Some sites require the poster to grant a non-exclusive copyright to the website for all work submitted.

- ▶ State and Institutional Issues in Online Licenses/EULAs
 - ▶ Hold harmless and Indemnity clauses
 - ▶ Jurisdiction, choice of law, venue
 - ▶ Mandatory Arbitration
 - ▶ Liquidated damages
 - ▶ Disclaimers of all warranties and liabilities
 - ▶ Claims to IP/content rights
 - ▶ Data mining rights, access to sensitive data
 - ▶ Use of names, trademarks, logos
 - ▶ Unilateral online terms changes
 - ▶ Data preservation/security
 - ▶ Employee signature authority

- ▶ Students, New Media & You
 - ▶ Students ubiquitously use new media and they probably don’t read the license terms.
 - ▶ We aren’t responsible for their personal choices.
 - ▶ But when you require them to engage with such media as part of a course, you must help them to understand the copyright, legal, and license issues that are part of the media mechanisms you want them to use.
 - ▶ Students typically own the intellectual property rights in their papers and projects unless their work is created with “significant University resources” (labs, high tech equipment, special funding, grants, etc.).

- ▶ Students and Their I.P.
 - ▶ You must obtain permission prior to uploading student essays or other work to a publicly-accessible website.
 - ▶ Typically, it should be clear that students retain the copyrights to their work, and are merely granting permission for web posting.
 - ▶ Consider using a Creative Commons License to protect their (and your) work from misuse or misappropriation: For more information, see <http://creativecommons.org/>.

- ▶ Students and Privacy
 - ▶ The Family Education Rights and Policy Act (“FERPA”) prohibits sharing certain personally identifiable student information and records without permission from the student.
 - ▶ For this reason, students should give permission before you post their names, images, or coursework in a public web environment. You should document that permission and keep a record of it.
 - ▶ If you are capturing **personally identifiable student participation** in a class through audio or video recording, you should obtain and document consent before posting that material to the web.

- ▶ Blogging and Comment Posting
 - ▶ Make the rules first. (Taking “bad” stuff down after the fact and without clear advance rules, makes it easy to claim you are censoring expression.)
 - ▶ Can third parties add comment or just University community members?
 - ▶ Who receives the comments?
 - ▶ Can you edit or revise them?
 - ▶ Can you remove them? Do you want to?
 - ▶ What will you do when your student is hurt or belittled?
 - ▶ What will you do when someone uploads a lot of copyright infringing material?

- ▶ Back to Twain... “Only one thing is impossible for God: To find any sense in any copyright law on the planet.”