

Annotated Bibliography

Copyright and Fair Use

Paul Ross

Cedarville University

EDU 6700 Technology in Education

Dr. Runyan

August 14, 2011

Barton, S. K. (1994). Felony copyright infringement in schools. *Brigham Young University Education & Law Journal*, (1), 143-167.

Barton undertakes a comprehensive examination of US Copyright statutes and how it applies in a civil and criminal context with an emphasis on the criminality of copyright infringement. In 1992 the criminal penalties for copyright were upgraded from a misdemeanor to a felony.

Barton examines the changes in the law, for example previous provisions for criminality were dependent on the volume of infringement for example "fines of up to \$250,000, were provided for a first offense of willful copyright infringement involving producing or distributing: (a) more than one hundred copies of sound recordings, or (b) more than seven copies of motion pictures or audiovisual works" (prior law section, para. 1) The change in law now focuses on the quantity and value of the copyright works, for a felony to be attached 10 or more copies must have been made with a retail value of 2500 or more. Barton (1994) notes that under the 11th Amendment "Public (but not private) school districts might be immune from suit" (introduction section, para. 3) due to sovereign immunity unless immunity is waived, but this immunity does not extend to individuals, teachers, employees or students. There is a caveat to sovereign immunity that "In some states school districts are local subdivisions which may be liable" (11th amendment immunity section, para. 3), this will potentially impact the majority of local school districts in Ohio who are mostly local political subdivisions. For an infringement to rise as a felony there are multiple parts, one important aspect is was the act willful? Barton states that "Willfulness is easier to prove where the law is definite, as with infringers who buy one copy of software and install it for simultaneous use on multiple machines in a business or an educational setting" (meaning of willful copyright infringement section, para. 7). Although

Barton concentrates on the criminal aspect of copyright, virtually all criminal actions lead to civil actions for infringement.

Barton draws attention to an interesting historical aspect in reference to children “that the quantity test was adopted with an intent to exempt the incidental copying of games by children” (number of copies, and works infringed section, para. 3) which makes it highly unlikely that children will be impacted from incidental or accidental copying of materials. Barton outlines steps that an institution may implement to avoid felony liability, it is important to note that the steps outlined are not designed for the protection of an individual. Educators need to be aware of the criminal provisions, even though as Barton discusses it would take many instances to rise to the level of criminality with traditional resources, with modern software and technology it does not take many infringements to leave the individual criminally responsible.

Nenych, L. A. (2011). Managing the legal risks of high-tech classrooms. *Contemporary Issues in Education Research*, 4(3), 1-7.

Nenych in “Managing The Legal Risks of High-Tech Classrooms” is drawing from the view point of operating in Canada under a Canadian legislative environment. Then a much needed question needs to be asked, why examine an environment outside of the United States? Online environments now extend classrooms beyond state and international borders, if you have a student in another country it could be argued you then have a business presence in another country even if you do not have physical facilities in the country, you may be required to comply with their copyright and education laws. In the event that the laws do not apply,

there is a professional responsibility for each educator to provide a context aware experience that is relevant and customized to the individual. Nenyich (2011) provides a detailed examination of the Canadian environment with “A blend of case law and legislation governs the use of online materials and how technology can be used in the classroom and in school-related activities, often creating confusion for content users.” (p. 1) There are many instances where US methodologies do not apply for example Nenyich (2011) states that “Material that was produced by the US government is freely available for the public to use. However, there is no such provision for materials produced by Canadian governments” (p. 3) and “Fair use is an American copyright concept and it does not apply to Canada. The Canadian “Fair dealing” exception is much more limited in scope” (p. 3). Nenyich provides a similar examination that you would find in a US legislative examination, legal frameworks, online environments, fair use conditions and impacts on classroom educators. Nenyich illustrates that operating in Canada is to work in a very limited environment in comparison to the US.

Wyatt, N., & Schlosser, M. (2006). Fair Use in the Digital Environment. *Reference & User Services Quarterly*, 46(1), 11-17. Retrieved from EBSCOhost.

The Schlosser research guide is an extensive list of resources broken down into categories with a brief accompanying description summarizing the category. The article is written from the view point of a professional librarian and does not draw any conclusions on the state of the copyright debate or provides procedures to facilitate the educator’s use of copyright in the classroom. Schlosser does however present an aggregated list of many of the resources that are commonly used in research and journal articles on copyright, usefully for the new

researcher or new teacher who wants to dive deep into the material. Schlosser provides a view point that is rarely discussed; the historical aspect of copyright and clearly explains why copyright is a complex issue in the 21st century when compared to the 18th century. Schlosser states that the Internet “has created a new avenue for copyright infringement on a global scale” (p. 12). There is a brief examination of the recent changes in the copyright legislation with a focus on the Digital Millennium Copyright Act of 1998, where the historical fair use provisions are at odds with the anti-circumvention provisions, “imposes stiff penalties for circumventing technological protections such as encryption chief concern of many of these critics is that the statute erodes the ability of parties to make fair use of copyrighted works and that it may ultimately shrink the public domain” (p. 12). Schlosser lists over 70 resources that can be used to explore the topic of copyright categorized through the lens of a librarian. The categories are the Law, bibliographies and review articles, guidelines, encyclopedia articles, handbooks, books, current awareness, internet resources, and periodical databases.

Dow, M. (2008). Teaching Ethical Behavior in the Global World of Information and the New AASL Standards. *School Library Media Activities Monthly*, 25(4), 49-52.

Dow briefly examines teaching ethical behavior from the perspective of the American Association of School Librarians and their content standards. The periodical article is short and does not go into great detail, reflecting the viewpoint of a librarian for an audience of school librarians. Dow (2008) lists that the AASL standards examine 1) respect for intellectual property; 2) respect for privacy; 3) fair representation; and, 4) nonmaleficence. The approach outlined by Dow is informed by the works of Severson in *The Principles of Information Ethics*.

The topic of ethical behavior can be aligned copyright, in respecting the intellectual property of others and the use of materials and resources in the classroom and for student projects. If a teacher is blatantly ripping content from protected sources because it is easy technically and does not cite resources used in their teaching then ethical behavior is not being model for students. Dow (2008) supports that “Teaching ethical behavior is an invaluable opportunity for library media specialists to collaborate with content teachers and connect to the school’s learning targets” (p. 52). Whether it is the ISTE NETS standards for teachers, students and administrators or the AASL standards there is an ethical component to respect the law and the works of others. Dow states that “One of the most complex legal and ethical issues facing users of information is the matter of copyright and intellectual property” (p. 51). Dow (2008) lists learning activities aligned to the AASL standards for teaching ethical behavior and states that school librarians “can encourage students to commit to developing strong ethical behavior just as they would develop strong muscles for running a marathon” (p. 52) The ethical lens can assist the discussion of copyright and place students in the place of copyright owner, respecting their future creative innovations.

Johnson, D. (2009). Creative commons and why it should be more commonly understood.

Library Media Connection, 27(6), 56-57.

Johnson examines an aspect of copyright beyond the traditional legislative framework discussed by many authors. Johnson reviews the copyright system called Creative Commons and how it can be applied by educators in the classroom. Creative Commons is a system of copyright notices that when used makes it clear to potential users of materials under what

conditions materials be used, it also enable copyright owners a clear way to mark their works and provide access for use. Johnson (2009) recalls telling students on many occasions "Assume everything on the Internet is copyrighted!" (p. 56). Although this is true in the vast majority of cases (excluding works in the Public Domain), Creative Commons is the copyright caveat. As Johnson states Creative Commons 'provides free tool that let authors, scientists, artists, and educators easily mark their creative work with the freedoms they want it to carry . . . from "All Rights Reserved" to "Some Rights Reserved"' (Johnson, 2008, p. 57). The resources Johnson lists at the end of the article provide general information on how to implement the CC licensing system along with a couple of informative videos. When CC is paired with copyright legislative discussion, students will be exposed to a system that makes copyright work for content creators and users of information alike dispelling many of the myths making copyright seem like a complex and unworkable subject.

Hilton, J., & Wiley, D. A. (2010). The creation and use of open educational resources in christian higher education. *Christian Higher Education*, 9(1), 49-59.

doi:10.1080/15363750903181906

Hilton and Wiley examine how Open Educational Resources (OER) are impacted by copyright and some of the issues with enabling further use and creation of OER materials. The authors present a viewpoint focused on religious resources (their field of context) however the principles outlined and the discussion can easily be applied to any discipline. OER are not restricted to a few institutions or is US centric, the initiative is international involving many institutions large and small. The authors mention OER efforts at MIT OpenCourseWare,

Carnegie Mellon's Open Learning Initiative, Yale's Open Courses, Stanford's Engineering Everywhere courses and initiatives by Curriki and Rice University's Connexions. Hilton and Wiley (2010) then ask several questions to inform the discussion; "What does it mean to be "open"? Why would teachers want to share their educational resources? What are obstacles to creating OERs, and how does copyright affect openness?" (p. 50). As teachers create materials the desire to share can have copyright implications, who owns the material the teacher or the institution? The OER movement is represented by four Rs, reuse, redistribute, revise and remix. Each element has copyright implications; the authors address each element in detail and provide examples. In the case of James Boyle, who sold 3000 copies of a book while at the same time 25000 copies were downloaded for free! When applying the lens of a publisher, the downloaded book reduced the potential sales, while under OER it was a huge success. The Hilton and Wiley (2010) indicate that everyone rated the book successful as those who downloaded the book were not likely to have purchased it. This is a different perspective on copyright in favor of making available works in part to the public domain while retaining limited rights, the Creative Commons system offers a similar perspective.

Tushnet, R. (2010). I Put You There: User-Generated Content and Anticircumvention. *Vanderbilt Journal of Entertainment & Technology Law*, 12(4), 889-946.

Tushnet examines the practice of viding from analog and digital sources. Tushnet (2010) explains that Vidders "remix the source material in such a way as to provide a *new* narrative, usually commenting on or critiquing that source" (p. 696). The article is lengthy at 60 pages and details every aspect of viding and effectively discusses the opposing viewpoints to positions

presented while providing practical steps in applying copyright law. The footnotes in the article are extensive, an appropriate reference style linking complex content with the thoughtful references creating a pleasurable reading experience. At the heart of viding is the issue of anti-circumvention and the implications presented by the Digital Millennium Copyright Act. Tushnet discusses at length the potential copyright restrictions on artists using existing material to create digital critiques as a legitimate art form and the options and opinions presented by the policy makers at the US Copyright Office. Tushnet draws upon the works of Rogoyski and Kenneth Basin who found that remixes in China “serves powerful political and social functions. . . allows average citizens who lack political power under China’s authoritarian regime to —appropriate and democratize their own cultural benchmarks . . . to engage in effective criticism and comment” (as cited in Rogoyski & Basin, 2009, 258-59). If remixes in China serve a important cultural comment, Tuishnet points out that produces of remixes in the US are caught with conflicting copyright sections, namely fair use and the use of circumvention tools. Fair use for the purposes of criticism is permitted but the tools vidders use are not permitted forcing the use of antiquated low quality resources to avoid the anti-circumvention section of the statue. Tushnet outlines the process in detail to appeal to the US Copyright Office for exemptions with the successful case study enabling an exemption for Film Study Professors.

Maddox, J. W. (1995). Copyright violation and personal liability in education: A current look at 'fair use'. Brigham Young University Education & Law Journal, (1), 97.

Maddox is examining personal liability as a *current look* in the context of 1995 although it is now 2011; many of the aspects Maddox presents are still relevant and can be contrasted

against the article by Barton. Maddox (1995) points out that the “New technology makes copying cheaper and the public display of copyrighted media easier than ever before. But the ease of reproducing copyrighted works is also setting public educators up for prosecution in civil litigation for copyright violation” (Introduction section, para. 1) The statement made by Maddox is still applicable today, 16 years later. Educators are unaware of the potential personal liability; Maddox describes several scenarios in which educators inaccurately asserted their fair use privilege, feeling safe that their use is for educational purposes. The article examines; the copyright statute in general terms focusing on the general principles and what is covered by copyright, for a detailed examination view the Barton (1994) article; the reports behind the law and the objectives of Congress; court cases that inform what constitutes copyright infringement; strategies for schools defining what they can and cannot do; and offers suggestions how schools and individuals can protect themselves. Maddox indicates that schools and individuals need to have policies in place and procedures to follow for protection against copyright infringements.

Kozumplik, C., & Kreutziger, J. (2010). Copyright Compliance: Conducting a Fair Use Training

Session. Community & Junior College Libraries, 16(1), 21-36.

doi:10.1080/02763910903472432

Kozumplik and Kreutziger (2010) outline what aspects should be covered when hosting a class on copyright compliance concerning fair use for faculty, staff and administrators. The article does not go into depth with an analysis of the copyright statute or the provisions concerning anti-circumvention. The lack of analysis or discussion around 21st century technologies and

their fair use implications renders this article designed for someone with limited or no knowledge of copyright fair use. Kozumplik and Kreutziger provide their course outline and support materials; limited details displayed but the outline could form the basis for additional work to create a full presentation with a focus on current technologies. The training session as defined is not of sufficient quality or sophistication for the intended audience. The references listed are limited, and does not address sufficiently case law or the most recent changes in the copyright statute which have significant impact on copyright fair use provisions and application in classrooms. Maddox (1995) and Tushnet (2010) can be used as reference articles to fill-in the knowledge gaps, as it stands the course outline is reminiscent of copyright practices in the mid 1990's.

References

- Barton, S. K. (1994). Felony copyright infringement in schools. *Brigham Young University Education & Law Journal*, (1), 143-167.
- Dow, M. (2008). Teaching Ethical Behavior in the Global World of Information and the New AASL Standards. *School Library Media Activities Monthly*, 25(4), 49-52.
- Hilton, J., & Wiley, D. A. (2010). The creation and use of open educational resources in christian higher education. *Christian Higher Education*, 9(1), 49-59.
doi:10.1080/15363750903181906
- Johnson, D. (2009). Creative commons and why it should be more commonly understood. *Library Media Connection*, 27(6), 56-57.
- Kozumplik, C., & Kreutziger, J. (2010). Copyright Compliance: Conducting a Fair Use Training Session. *Community & Junior College Libraries*, 16(1), 21-36.
doi:10.1080/02763910903472432
- Maddox, J. W. (1995). Copyright violation and personal liability in education: A current look at 'fair use'. *Brigham Young University Education & Law Journal*, (1), 97.
- Nenych, L. A. (2011). Managing the legal risks of high-tech classrooms. *Contemporary Issues in Education Research*, 4(3), 1-7.
- Tushnet, R. (2010). I Put You There: User-Generated Content and Anticircumvention. *Vanderbilt Journal of Entertainment & Technology Law*, 12(4), 889-946.
- Wyatt, N., & Schlosser, M. (2006). Fair Use in the Digital Environment. *Reference & User Services Quarterly*, 46(1), 11-17.