

## **Putting Academic Fair Use to the Test**

### **By George H. Pike\***

The Fair Use Doctrine is one of the most important, complex and misunderstood elements of copyright law. It was born out of the principle that copyright law needs to balance the rights of authors and creators to reap a benefit from their creations with the public's right to continue to develop new knowledge on the foundation of these creations. It is intended to function by allowing the use of existing creative works without the need to obtain permission or pay royalties, but only for certain purposes that have been identified as serving the public good.

The complexity of the Fair Use Doctrine is that it is both very broad and quite narrow. The doctrine itself can be found at Title 17, Section 107 of the United States Code. The statute has two major elements. First is a broad list of purposes to which fair use may apply. These include "criticism, comment, news reporting, teaching (including copies for classroom use), scholarship, or research."

### **Four factors**

However, just because a proposed use fits one (or more) of these purposes does not necessarily mean it is a fair use. The second element of the Fair Use statute is the "four factors test" which determines if a "work in a particular case is a fair use" and serves to narrow down which uses are fair and which are not. The four factors are: the purpose and character of the proposed use, the nature of the copyrighted work being used, the amount of the work being used, and the effect of the use on the market for the copyrighted work. In applying the factors, a proposed use does not need to meet all of the four factors. A proposed use is measured against each factor, which is then weighted for or against fair use. It is the total weight among the factors that will finally determine if a use is fair or not.

This exercise in measuring and weighing can be done between the parties in a fair use case. However, if the parties can't agree as to whether a use is fair, lawsuits may be filed and it becomes up to the court to decide. While no one wants to be sued, there is some benefit in that the court decisions which the four factors help to further narrow the scope of the fair use test and help subsequent users determine if fair use *may* apply to their proposed use.

### **Publishers sue Georgia State University**

Unfortunately, in spite of all of the court decisions on the fair use doctrine and the four factors, there remain enough gaps in the law that it is difficult to determine whether some uses are fair or not. One of the largest gaps is in the academic use of copies for classroom uses, particularly electronic copies. This gap may soon be filled as a result of a lawsuit filed against Georgia State University (GSU) by Cambridge and Oxford University Presses, and Sage Publications.

The lawsuit, which is available online at <http://www.publishers.org/main/PressCenter/documents/GSULawsuitcomplaint.pdf>, charges that Georgia State engaged in "systematic, widespread and unauthorized" copying of books and journals. More significantly, they also charge that the copies were illegally distributed through

GSU's BlackBoard course management software, individual faculty Web pages, and the GSU Library's e-Reserve system.

The lawsuit claims that GSU distributed over 6700 works during the Spring 2008 semester alone through digital means. They also claim that the works are often compiled into "digital coursebacks" that duplicate materials they themselves sell, and are used semester after semester. Finally, they complain that many of the digital distribution mechanisms do not restrict access to only registered students.

### **Establishing academic fair use is difficult**

The academic community has long relied on the fair use doctrine to facilitate the learning process. As noted, the doctrine specifically identifies "teaching (including copies for classroom use)" as one of the purposes to which fair use applies. Because of that broad language, however, there has often been a significant misunderstanding about teaching and fair use. Not all academic uses are fair uses. But establishing what is fair and what is not has been difficult.

When it enacted the fair use doctrine in 1976, Congress attempted to clarify fair use in teaching with the Classroom Guidelines. These Guidelines established boundaries for what was considered fair use for teachers. They include allowing single copies of a book chapter, article, short story or illustration for classroom use. They also allow using multiple copies of materials, but under more limited circumstances. The use must meet a "brevity" test—generally 1,000 to 2,500 words depending on the circumstances—and a "spontaneity" test that requires the "decision to use the work and the moment of its use" to be so close as to be unreasonable to request permission. The Guidelines also prohibit copying as a substitute for anthologies, compilations or collective works.

While these Guidelines have helped teachers and scholars, they do not resolve all fair use questions. Even the scope of the Guidelines have been questioned: Are the Guidelines a "floor", meaning that all uses within the Guidelines are fair, but that uses beyond the Guidelines may also be fair, depending on the circumstances. Or, are they a ceiling, meaning that *only* those uses within the Guidelines are fair, any other uses are not.

### **The "coursepack" decisions**

Previous court decisions have not necessarily clarified the question. Two major court decisions involving print coursepacks are mentioned in the GSU lawsuit. Coursepacks are collections of assigned readings that a faculty member will put together from a variety of sources. A faculty member may develop and assign a coursepack instead of a text book or in addition to a textbook. In a 1991 case involving coursepacks done for Columbia University but with actual copying done by Kinko's, a court found the use to not be fair, in large part because Kinko's was a commercial business. A 1996 case involving a commercial copyshop near the University of Michigan came to a similar conclusion.

Neither case, however, addressed copying done by a university (or its library or employees) itself. In the Kinko's case, the court said that "Classroom and library copying are viewed more

sympathetically ‘since they generally involve no commercial exploitation and (have) socially useful objectives.’” In the Michigan case, the court was more cautious, indicating that the question of whether professors making their own copies was fair use was not “free from doubt”, but the court did not go further to clear up the doubt. And neither case, of course, addressed the modern trend of electronic distribution of course materials.

### **Electronic distribution**

While the use of electronic distribution methods is a central element of the GSU lawsuit, the case primarily focuses on the copying and distribution of material within a university environment. Electronic distribution, however, allows faculty members to distribute content without going to commercial providers like FedEx Kinkos. It also allows faculty members to make more effective, possibly more spontaneous decisions about what materials to distribute, as required by the guidelines. By using e-reserves, course-management platforms, or course Web pages, faculty members can teach more effectively and efficiently. All of which support fair use.

On the other hand, distribution of digital classroom materials raises the same red flags as other digital media. Once created in or converted to digital format, content can be readily used, reused and redistributed beyond the original recipient. The digital marketplace has also led to a more robust permissions marketplace and permissions mechanisms. All of the publishers in the GSU suit have online permissions request forms, or make their permissions available through the Copyright Clearance Center. This available market is central to the fourth factor of the fair use test and argues against a fair use finding.

### **Blogging on the case**

Bloggers and other commentators have already weighed in on the case. Some have noted the irony of non-profit publishers who get much of their content from academics, suing a non-profit academic institution for their use of their content. Conversely, others have commented that perhaps the suit is about not-for-profit universities are “free-riding” on the backs of the non-for-profit academic presses. Finally, others have advocated the open source movement as a solution to the problem. (It might, for content that was created under open source licensing, but not for content with an existing copyright.)

As of mid-May, GSU has not formally answered the lawsuit and a decision would not be expected for several months. Interestingly, the lawsuit does not request GSU to pay money damages for infringement (except for the publishers’ attorneys fees.). Instead, they ask the court to declare that GSU’s practices are not fair use, and to order GSU to stop what it is doing. This may make a decision more likely, in that GSU does not need to settle to avoid a large judgment. While GSU may not be thrilled about the lawsuit, a decision—in either direction—could add some much needed clarity to the fair use doctrine.

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