

THE INCENTIVE TO CREATE

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The incentive to create

The founding fathers considered protection for the creation of artistic and scientific works into the Constitution because the English system provided a provision for copyright. British copyright differed greatly from the American system because its primary purpose was to censor the material that was being disseminated. The Monarchy determined that for a work to be published, a special license would have to be obtained through the Stationers' Company and, working in conjunction with the government, determine the appropriateness of the work being published. The American system, even from its inception, differed drastically from this way of thinking. Article I, Section 8 of the United States Constitution outlines the powers of Congress, and states that "Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." American copyright law was not intended to monitor or censor specific content or uses of text, but instead it was meant to grant authors the rights to monitor the reproduction of their own work.

The American system also differs from the Canadian system. The Canadian law considers the moral and ethical rights of protecting author's works. "The Canadian Copyright Act does not contain the special consideration for library and educational use in the U.S. Copyright Act of 1976, nor does it place federal or provincial government works in the public domain." This is a noteworthy distinction. While their work is not

protected as long as works are in America, an important similarity in the system is the idea of fixation and originality, two factors which will be discussed briefly.

Today, Copyright law has digressed from its intended purposes. This move was gradual and this paper will present evidence depicting the regression of copyright law, ending in the digital era where the laws are counterproductive to meeting the needs of those who rely on access to digital materials. This work will focus on copyright law in the world of education, as it applies to educators, librarians and students. After providing a detailed definition of copyright and identifying the qualifications for copyrighting a particular work, this essay will then probe the concept of fair use. Fair use is meant to serve the public good. It is discussed here as a legal defense that those who work in education have relied on in order to design effective scholarly texts, lectures and preservation of materials.

In the discussion of fair use, the public domain is mentioned in an effort to present the materials classified as such, as viable and valuable to researchers. The Copyright Term Extension Act (CTEA) of 1998 is considered in relation to the public domain because this specific extension of copyright law prevented a large body of work from entering into the public domain. Here, an argument is made that Congress misused its power to protect the exclusive rights of authors by this subsequent extension. While the Constitution does grant Congress the power to secure these rights, it does not require that they use act on them and it specifically denotes that these rights must be for a limited time.

This paper then shifts to a discussion of two controversial professional

conferences that created non-binding guidelines, but failed to win the support of major professional organizations. The 1996 Conference on Fair Use (CONFU) resulted in the isolation of the disparate user groups who attended their conference. The Consortium of College and University Media Centers (CCUMC) produced a set of guidelines that were more restrictive than the U.S. Copyright Law they intended to explain.

Two Congressional Acts that deal directly with the complications of the digital classroom as well as the use of digital technologies in traditional classrooms, the Digital Millennium Copyright Act (DMCA) of 1998 and the Technology, Education and Copyright Act (TEACH) of 2002 represent Congress' attempts to deal with the complexities of distance education, but expose a lack of foresight and understanding on their part of the intricacies of the digital environment. Further to the presentation of case law, this body of this research closes with the exploration of two cases involving the use of fair use, course packs and their effect on the educators.

What is Copyright?

Copyright is defined as “a set of exclusive rights awarded to a copyright holder for an original and creative work of authorship fixed in a tangible medium of expression...it is a limited statutory monopoly that gives a copyright holder the sole right to market a work for a limited period of time.” President George Washington, speaking at a joint session of the First Congress, was insistent on the promotion of science and literature. The Congress responded to these requests, by stating that “...the promotion of science and literature will contribute to the security of a free Government; in the progress of our deliberations we shall not lose sight of objects so worthy of our regard.” This

became the foundation on which the first U.S. national copyright act was created, the 1790 Copyright Law.

From the first copyright law on record, the objective was clear--the primary focus should be to facilitate the copying and dissemination of information to the public for the purpose of access to information. Also implicit in this policy is that these rights should be limited, in terms of length of times and generations of people deprived of free access of their use in the public domain. The duration of copyright protection has continuously been extended by the United States courts. This will also be addressed at a later point in this paper.

Copyright protection is extended to books, drama, dance, music, sound recordings, pictures, photographs, sculpture, architecture, movies and computer programs. There are two key concepts of copyright: originality and fixation. Originality is the more subjective of the two, and simply stated, it is a measure of the unique and personal expression of a work. Fixation refers to the fact that a work must be recorded on some medium so that at least one copy of the work exists. The specific medium of documentation of the work does not matter. Both originality and fixation must exist in order for a work to be protected under federal copyright statute. While written, audio and audiovisual texts are obvious records of work, dance is less obvious. In order for a dance to be protected, it either has to be filmed or documented through some type of movement notation, like a labanotation, which records the direction of movement as it corresponds to the bars of music.

Labanotation and the copyright of dance is complicated because dance is best

preserved through actual performance, while copyright requires that a work be fixated in order to be eligible for protection. Therefore, only the fixed version is copyrighted, and not the actual performance itself. Video is therefore the method most used to document a performance because labanotation is more time consuming than video and is also more expensive to learn or hire someone to create. This reveals a factor of copyright law that will be explored at a later point in this paper--it can oftentimes put some at an economic disadvantage.

The Fair Use Doctrine:

Fair use is a legal term that allows a person accused of copyright infringement to claim a fair use defense in court. Fair use encourages “socially beneficial uses of copyrighted works such as teaching, learning and scholarship. It is a means of ensuring a robust and vigorous exchange of copyrighted information.” Appropriation of art and parody cases are often fought with fair use defenses. It is an incredibly flexible defense, first developed through case law, and later included in the Copyright Act of 1976, section 107, limitations on exclusive rights: fair use. The following four statutory factors are used by courts to determine fair use:

- The purpose and character of the use, specifically whether it is for commercial nature of nonprofit educational purposes
- The nature of the copyrighted work
- The amount and substantiality of the portion used in relation to the whole
- The effect of the use upon the potential market for/value of the copyrighted work

Public good is often grounds for a fair use defense if infringement on protected rights serves the greater good. While fair use is determined by a court’s ruling, one need not be completely aloof as to how this subjective decision is reached

The many Acts, appending rules and corresponding reports from these Acts may make approaching use of copy-protected materials daunting. There is publically-owned information available in the public domain that includes text, documents and pictures. This work is easily accessible without permission. A common misconception is that work found in the public domain is not as desirable as protected work, but there are several reasons that work can be elevated into the public domain, including the author failed to take the necessary steps to protect his or her work, the terms of copyright have lapsed or the monopoly of control over this material has been returned to the public. However the free and unrestricted use of work that exists in the public domain represents only a small sample of the vast works that exist, and demonstrate the negative effects of stringent copyright laws on future scholarship.

The Creative Commons is a nonprofit that “spans the spectrum of possibilities between full copyright and the public domain. From all rights reserved to no rights reserved.” Its intended purpose is to allow authors to modify their copyright terms through the use of legal licenses that give them the option of choosing less restrictive rights, allowing his or her work to be accessible freely without a user having to request prior permission. Creative Commons licenses are complex legal tools and are of little assistance to the work at hand in this paper, however they represent recognition by authors of the need to exercise a great degree of sovereignty over his or her work. Organizations such as Creative Commons, are dependent both on authors owning the rights to their own works and on their willingness to modify those rights for the good of the public.

To understand information in the public domain, it is necessary to lump together two categories: previously published and never published works. (There are other categories including sound recordings and works published internationally by U.S. citizens, but for probe of these requirements is beyond the scope of this essay). Under the 1976 copyright act, copyright for never published and never registered work would last on a work for the life of the author, plus an additional 50 years that began at the author's death. For a work of corporate authorship, the terms of ownership were 75 years. However in 1998, in a move that threatened the viability of the public domain, Congress extended terms in an effort to prevent a large amount of information from entering the public domain.

The Copy Term Extension Act:

Formally known as the Copy Term Extension Act of 1998, this piece of legislation is also known as the Sonny Bono Act or more pejoratively, as the Mickey Mouse Act, extended copyright, making work by authors protected for the life of the author, plus an additional 70 years and work-for-hire to 120 years from date of creation. The constitutionality of this act was challenged in a United States Supreme Court case called *Eldred v. Ashcroft*. Following oral arguments, the *New York Times* wrote an opinion editorial piece entitled "An Abuse of Copyright", in which they called for a balance between the interests of copyright holders and the public.

The editorial declared that it was the constitutional right of the public that works eventually lapse into free and appropriate public use. The *Times* article was written before the court's ruling was made, and they concluded the article by stating that the 1998 act

was on the wrong side of the law, protecting the powerful and hegemonic media companies that benefit financially from receiving royalties for use of work and stifling the research and creativity of artists and the general public who rely heavily on new information continuously entering the public domain.

The court's 7-2 ruling that the CTEA was constitutional was rationalized by justices delivering the near-consensus majority opinion that the Constitution gave Congress the discretion to determine appropriate limits. Despite active lobbying from proponents of the Act, the Supreme Court did not believe that Congress had abused its power in extending term limits and freezing the availability of information that was on the verge of entrance into the public domain, including Disney's Mickey Mouse. The monopoly over ideas and expressions was upheld by the courts, giving the advantage to Congress and media conglomerates that will inevitably see this as approval for future overreaching.

The Conference on Fair Use (CONFU) was formed "to determine whether or not educational or library guidelines--like those developed under fair use for classroom copying, educational uses of music, and off-air taping for classroom use" could be created for the Clinton Administration's The National Information Infrastructure (NII). CONFU proposed a set of non-binding guidelines in 1996, identifying five areas that needed addressing: distance learning, multimedia, electronic reserves, interlibrary loans and image collections. The Conference, composed of copyright users and copyright holders, concluded their talks with guidelines for all subgroups, save electronic reserves. The "agreements" that were reached were one-sided; the result of talks having broken

down between user groups, who later did not support the guidelines because they believed they did not adequately balance the interest of users and owners of protected works.

CONFU was made up of more than 60 parties; still, there has been much criticism of these guidelines and open lack of support for them including the Association of American Universities, the American Council on Education, the American Library Association and the Association of Research Libraries.

While much opposition to CONFU's guidelines were based on the idea that the interest of professors and scholars were not well represented in the group, further opposition includes the disdain for the use of non-binding guidelines as determining whether an infringement is being committed. Wrote Professor Kenneth Crews in 1997: *None of the fair-use guidelines has the force of law; only statutes and court rulings have that authority.* (original emphasis) None of the fair-use guidelines from the past or the present has been read into the law. Congress has never voted to make them law. Their appearance in congressional reports does not make them law. None of the few court cases that have looked at guidelines has read them into the law.

Crews found the guidelines to be more complex and stringent than the original law because they identified more specific violations of fair use than the general law did. The guidelines were viewed by many in the academic community as more prohibitive than the law it sought to explain. In addition, different guidelines were created for what CONFU perceived as separate fields (for example, distance learning and multimedia), although librarians would likely be involved in most of these arenas and therefore have to attempt to mediate the guidelines between the two. Fair use, and its four principles, were seemingly easier to adhere to. Also, fair use cases are generally determined on a case-by-

case basis.

The future of fair use in relationship to the digital environment was laid out on the Association of Research Libraries' paper entitled, *Fair Use in the Electronic Age: Serving the Public Interest*. Created as a source of information to address the confusion between printed and digital uses, this document was meant for circulation amongst librarians and their users. The paper stated that the public had the right to:

- Read, listen to or view publicly marketed copyright material privately on site or remotely
- To browse through marketed copyright material
- To experiment with variations of copyrighted material for fair use purposes, while preserving the integrity of the original
- To make or have made for them a first general copy for personal use of an article of small part of a publicly marketed copyright work in a library's collection for such purpose as study, scholarship or research; and
- To make transitory copies if ephemeral or incidental to a lawful use and if retained only temporarily.

While the report listed the rights of other stakeholders, including the libraries and educational institutions, the main purpose of said paper was to reiterate how guidelines from print are sufficient for beginning to deal with the new obstacles of the digital sphere.

The Consortium of College and University Media Centers (CCUMC) was meant not to create a polemical and highly contentious set of guidelines for fair use practice, but to negotiate between those on both sides of the debate who might have disparate interests in the argument. CCUMC and CONFU guidelines were developed under separate, although comparable situations. Eventually, CCUMC urged CONFU to become involved in their process, as there was an overlap of participants on the committees. CCUMC supported CONFU guidelines, but has since considered revoking

their support.

CCUMC held a satellite conference to announce their guidelines to their peers and over 600 sites “downlinked the conference and were able to participate in the row by calling in and faxing questions to the panel.” CCUMC’s end result was a set of restrictive and narrow guidelines that were burdensome to educators, scholars, librarians and students.

Independent bodies of scholars, publishers and authors have often created and circulated self-imposed guidelines for adhering to law-abiding practices of copyright law. One specific article that has influenced the use of multimedia for educational purposes is the Fair Use Guidelines for Educational Multimedia, adopted by the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary and U.S. House of Representatives on September 27, 1996. This Consortium of College and University Media Centers (CCUMC) non-legislative addendum was a quite controversial decision for various reasons.

The Association of Research Libraries wrote a letter to the Chairman of the Committee on the Judiciary, Senator Hatch, explicitly detailing the ARL’s denouncement of these guidelines, specifically on the grounds that they did not address the research needs of the elementary and post-secondary classroom student. The guidelines, according to the ARL were not conducive to young student research, namely:

- The guidelines set up a series of proportional limitations
- The two year limit on student projects is not realistic. Teachers need to be able to show current classes what previous classes were able to accomplish.
- The guidelines appear to make teachers and administrators legally responsible for the activities of students.

Digital Millennium Copyright Act of 1998:

Before discussing the DMCA, it is necessary to first briefly discuss the United Nations Organization that deals directly with international copyright law. According to its homepage, the World Intellectual Property Organization (WIPO) is comprised of 184 member states, and attempts to balance the interests of the various stakeholders on various sides of the copyright argument. WIPO clearly defines intellectual property as “inventions of the mind...divided into two categories...Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works...”

WIPO is actively engaged in supporting (i.e. financially lobbying for) the development of Intellectual Property legislation that serves its purpose. While WIPO identifies itself as a non-partisan group seeking to mediate the disparate causes of those of varying interests, there is evidence to suggest otherwise, such as the idea that “WIPO works to assist all nations, particularly developing and least developed countries, to use the intellectual property (IP) system to promote economic, social and cultural development.” While the intentions of intellectual property may differ from country to country, the need to promote economic development before social or cultural development is a somewhat dubious practice.

The relationship between the DMCA and WIPO is worthy of further probe here because the DMCA enabled the United States to become a member of WIPO. Acting as an international organization, WIPO drafts treaties which its member nations signs. The DMCA is a result of one of these treaties, the WIPO Copyright Treaty Implementation

Act. (This led to severe criticism from many who follow the intellectual property wars because they viewed the DMCA as representing the United States Congress' attempts to appeal to the interests of both national and international business needs.) The WIPO treaties contained an anti-circumvention measure that used broad language to inform member nations of their responsibilities to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights . . . and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law." The United States Copyright Office noted that they believed U.S. measures were insufficient to deal with these guidelines and DMCA was meant to fill this gap.

The Digital Millennium Copyright Act of 1998, signed into law under President Bill Clinton, was Congress' first attempt at dealing with how the digital environment affects copyright law. Before discussing what the DMCA entailed, it is worth exploring what was excluded from it. Perhaps the greatest feat of this act was the exclusion of the Collection of Information Antipiracy Act, an attempt to extend the monopoly of copyright to collections of fact. While compilations of facts that reflected "selection, coordination, and arrangement of facts" could be copyright protected as original works, facts have long been a part of the public domain, as facts are considered the basis of all knowledge.

The introduction of the Collection of Information Antipiracy Act represents an attempt to copyright fact in response to the Supreme Court decision in *Feist Publications Inc. v. Rural Telephone Service Company* (1991). The courts ruled that Rural's telephone

books could not be copyrighted because they consisted of facts, and that therefore Feist's publication of them did not require consent. The court's ruling is evidence of one of two characteristics of copyright--originality. Copyright law has consistently held that a work must qualify under both originality and fixation in order to qualify for protection. Facts are the building blocks of information, but do not necessarily originate from any one owner. The defeat of the Collection of Information Antipiracy Act reiterates this point.

The DMCA was first introduced to Congress by the chairman of the House Intellectual Property Subcommittee, Howard Coble, in October of 1997. It contained four parts:

- A person could not extract, or use in commerce
- A quantitatively or qualitatively substantial part of
- A collection of information gathered or maintained by another person through the investment of substantial resources
- So as to harm the actual or potential market for a product or service containing that collection of information

In short, the publisher of the database would own the exclusive rights to the information contained in this database. Library groups and their supporters organized and lobbied against said monopolization of knowledge for commercial incentive.

While Congress did pass the DMCA, activism on the part of those concerned with preserving the public domain, led to their being some restrictions on it, namely the elimination of the Collection of Information Antipiracy Act.

The goal of those who oppose the DMCA is not that users will be able to use a fair use defense to excuse the use of protected technology, but that protected technology will be safe from hackers and unfair use, yet is still accessible to those

who rely on it for research purposes. While the law is supposed to bring copyright laws up to date with digital materials, it instead criminalizes the development of technology (specifically software) needed to access copyrighted materials that are in digital formats—mp3's, DVDs, etc. In an effort to deter piracy and appeal to the capitalist driven greed of Hollywood studios and Music Recording Labels who complained that they were losing money, the act rewarded those with greater lobbying power and displaced the needs of educators, librarians and the general American public.

Technology, Education and Copyright Harmony Act of 2002:

While the DMCA did allow for the use of digital archive copies if they are used in the library setting, its response to the use of digital resources threatened the expansion of classrooms into the digital distance realm. It became obvious that the distance classroom was increasingly necessary to the American education system and that the problem of digital technology's pervasiveness would have to be dealt with further. Appropriately named, the Technology, Education and Copyright Harmony Act was meant to counter the losses that the digital sphere had suffered under the DMCA.

Educators frequently face the possibility of infringing on the rights of copyright owners in order to provide well-rounded multimedia education. In the traditional face-to-face classroom, this information is manageably contained. The digital distance classroom complicates this, because the web does not allow for containment of images; a vast classroom without borders, it transcends space and time. Since the beginning of copyright law in America, new technologies have led to new legislative endeavors. Congress,

responding to the growth of distance education at America's colleges and University's, wrote TEACH to ensure that the rights of authors were not being infringed on. Congress' understanding of the distance education classroom is synonymous to a traditional classroom--lectures that take place in a contained time, which they refer to as "mediated instructional activities." This is a limited understanding of that the distance classroom has become.

Professor Kenneth Crews, in a paper written for the American Library Association, supported TEACH as beneficial to ALA members and the institutions they work for, but warns that it requires an active participation on the part of these educational institutions in order to be in full compliance with the law's stringent requirements for protection. He writes, "Educators will not be able to comply by either accidental circumstances or well-meaning intention. Instead, the law calls on each educational institution to undertake numerous procedures and involve the active participation of many individuals." The law calls for institutional policymaking, implementation of technological systems, and meaningful distribution of copyright information, and posits the educational institution as the regulator of its educational programs as well as overseer of the materials that are used in its distance education courses.

Before exploring the effectiveness of TEACH, the requirements of the law should be noted:

- All materials used in the classroom must be lawfully obtained
- Teaching must occur at an accredited nonprofit educational institution
- Use of resources must be within the confines of "mediated instructional activities", in other words sessions central to the course
- Digital transmission is made for enrolled students only and limited to them
- Institutions must use technological protection measures to prevent students

from retaining, disseminating or decrypting the work

While these measures clearly provide more rigid guidelines for protecting materials than provided for analog material, it does illustrate Congress' recognition of the digital environment and the ways in which it could potentially negatively affect the author's bottom line. Perhaps placing the burden of monitoring copyright use on the institution rather than the individual instructor is efficient because inevitably the institution would be at risk of infringement if a suit is brought.

At the close of his paper, Professor Crews gives recommendations for dealing with the broad task of implementing TEACH in the post-secondary classroom. The three recommendations are applying a fair use defense in the event of potential infringement, requesting copyright for materials that is clearly protected outside of the scope of TEACH and lastly, expanding the materials made available in the University's library holdings. This third recommendation is most interesting for this paper, because as a final paper for an archival and preservation course, it provides the most long term sustainability plan for obtaining permission for use of material and storing it on site for students use.

Other benefits of TEACH include allowing educational institutions to reach students through distance education even if they are not in classrooms or other comparable locations; and allowing for the digitization of a small amount of analog works that are not already available in digital form.

Carrie Russell, in her ALA published work, *Complete Copyright*, is less supportive of TEACH. She sees Congress' stand as protecting digital works more

aggressively than analog ones, and argues that this negates Congress' stand to remain technologically neutral in their creation of legislation. Congress' dilemma is clear. How can one be neutral about technological differences between media, when they do significantly differ? Yet Russell's point is also well-taken; can we allow one media form to suppress the needs of another?

Case Law:

The following court cases are mentioned in this paper because they both pertain to determining fair use in education and classroom instruction. They differ from landmark copyright cases in that regard. However they are pertinent to the discussion at hand because they represent real-life instances where instructors and those who they depend on to assist them in developing instruction, are affected by the copyright laws created, outside of the educational system and rooted in lobbying and Washington politics. These court cases are *Basic Books, Inc. v. Kinko's Graphics Corp.* (1991); and *Princeton University Press, Macmillan Inc. and St. Martin's Press v. Michigan Document Services and James M. Smith* (1996). These cases were chosen because of their personal applicability, the first involves my Graduate School (New York University) and my current employer (Columbia University) while the second involves my alma mater (University of Michigan, Ann Arbor).

In the first case, Kinko's position was that the copying that they were doing, although for sale to students, was protected by fair use because the majority of the material was factual information, which cannot be copyrighted because it is part of the public domain of information. Kinko's defended their case on the following grounds:

- Fair use
- Plaintiffs misused their copyrights by trying to create an industry standard beyond that mandated by Congress
- Plaintiffs are estopped from complaining of the copying because they have known for a long time about Kinko's 20-year practice of selling course packets and did nothing about it and Kinko's detrimentally relied upon their silence.

The courts ruled that Kinko's was not protected by fair use because the copying was not transformative; that is the case did not involve altering the original document for more efficient use, and the work was considered "mere repackaging." Further to fair use, the courts ruled that although the amount of profit the copy service made was not disclosed in court documents, the intent to profit did exist, and therefore "the facts show that Kinko's copying had the intended purpose of supplanting the copyright holder's commercially valuable right." While the courts did recognize that the majority of the photocopied text was of a factual nature, the portion of the work was deemed to be substantial to the original text and therefore violated yet another factor used to determine fair use. Of the four factors used to guide fair use decisions, this seemingly positions the amount of work used over the nature of the work used.

The plaintiffs in *Princeton University Press, Macmillan Inc. and St. Martin's Press v. Michigan Document Services and James M. Smith* claimed that the Michigan Document Services infringed on their copyrights by making multiple copies of excerpted and protected material for University professors, compiling them into coursepacks for students and selling them for a profit. James M. Smith was the owner of Michigan Document Services. Michigan Document Services did not pay permission fees on the material that they copied; their case was based on their interpretation of fair use as

protecting them from paying such a fee. Of the many arguments as to why the Publishers claimed fair use did not apply in this case, the most interesting are:

- The coursepacks had no transformative value (that is, it does not add a new context, aesthetic or contribution to the original work)
- The coursepacks were prepared for commercial purposes
- The excerpts in the coursepacks were lengthy and constituted the heart of the work

Both the District Court and the Sixth Circuit Court of Appeals ruled that MDS' course packs were not protected under the fair use doctrine. While the District Court ruled that the infringement was willful and awarded the publishers monetary damages, the Sixth Circuit Court overturned this ruling and did not find the infringement willful therefore repealing the monetary award. They did uphold the overall ruling of the lower court—a fair use defense was not applicable.

Was this case about a commercial copyright service's circumvention of a system that lawfully allowed them to obtain permission to use these rights? Or was it a direct challenge to the use of content outside of its original intention and its relationship to copyright compliance? The Circuit Court's ruling found that MDS differed from the many copy shops in Ann Arbor, Michigan in that they do not request permission from copyright owners nor do they pay royalties to authors. In fact, the defendant even advertised this as an advantage to professors to choose MDS over other copy services, because their coursepacks would not be delayed while waiting for permission from publishers. The courts further noted that the Publishers claim to respond in a timely manner (two to four weeks), a claim which the defendant did not test.

The portion of the photocopied works in question were cited in the court documents as

follows:

- Nancy J. Weiss, Farewell to the Party of Lincoln: Black Politics in the Age of FDR (95 pages copied, representing 30 percent of the entire book);
- Walter Lippmann, Public Opinion (45 pages copied, representing 18 percent of the whole);
- Robert E. Layne, Political Ideology: Why the American Common Man Believes What He Does (78 pages, 16 percent);
- Roger Brown, Social Psychology (52 pages, 8 percent); Milton Rokeach, The Nature of Human Values (77 pages, 18 percent);
- James S. Olson and Randy Roberts, Where the Domino Fell, America and Vietnam, 1945-1950 (17 pages, 5 percent).

The copyright exemption for fair use most likely failed because of second factor in determining fair use--that the amount and substantiality of the portion used in relation to the copyrighted work as a whole-- was not carefully considered.

Both of these cases represent the position that courts usually take in relation to copy services providing services to Universities. The courts did not view fair use as carte blanche for commercial business to claim their motives were other than market-driven. That said, what these cases failed to determine was what percentage of text was appropriate for determining fair use. The amounts used greatly fluctuated in these cases from five percent to about a quarter of the total book. How could the courts demand that Kinko's pay \$510,000 in damages (a figure which in the end was \$1.875 million including legal fees) and not give them better insight into how they can avoid further future detriment.

As educators design better instruction, they consult more media forms. This increases their chances of infringing upon the copyright because what would constitute a violation in print is more complex in the digital realm. Another factor that

was alluded to in the aforementioned court cases is just whose rights are being infringed on when copy shops fail to seek permission prior to the use of works for educational services. The original intent of copyright law was to encourage authors to continue to add to the body of discourse that would ensure growth of thought and scholarship. However the plaintiffs in both cases were Publishers and not individuals, even though the suit involved the work of many authors.

Stacy Carpenter, in her article entitled “Multimedia Communications” writes on the Association of Research Libraries’ website, “combine multiple works of multiple formats, and it can be extremely time consuming to locate all possible copyright holders to all original works.” While identification of proper copy right holders may not be an unfair burden to place on copy shops, it is something that the courts should have considered in these cases because the ability to turn a profit as a commercial copy shop depends on being able to create course packs in a timely manner.

Conclusion:

This paper explored various facets of copyright law in order to demonstrate the lack of balance between the interests of those who own copyright and those who rely on its use. While there are exceptions to the rule, such as Creative Commons licenses that allow authors to exercise sovereignty over their rights and uses, the public domain is consistently threatened by copyright extensions that prevent a vast number of works from being freely accessible. Fair use as a legal alternative for educators is also in jeopardy because while courts rule against fair use as a defense, they seldom offer a clear explanation for what it is or how to use it, instead offering a range of proportions that

further complicate the issue.

The non-binding guidelines have also been of little assistance to determining fair use in use of materials for the classroom, because they have proven to be more restrictive than the original written law. Further, they are not part of the law and there has been little indication that guidelines of this sort will eventually make their way into the law. What they have created is a great sense of frustration in the education community because they are a legal hindrance to culture and an imposition of the law on scholarly research.

Originally, U.S. copyright law was medium specific and dealt with the needs of print. Since the new Millennium and the digital technologies that have popularized, the need for Congress to employ the help of the education community and consider the specific intricacies of their encounters with technology have deepened. Congress has clearly shown in the DMCA and TEACH that it does not fully understand the digital classroom, nor how students and educators use these technologies. In doing so, the balance has tipped towards meeting the demands of copyright owners and puts users at a serious disadvantage.

The hoarding of information poses a serious threat to future generations of students. They position Universities against one another; the more powerful Universities with the larger student bodies are more likely to acquire copyright permission than less elite schools. They also pose a threat to socially-economically disadvantaged students because make it problematic for professors to compile cheaper course packs or make information available online.

Scholars used to worry about the preservation of materials—will these items still

exist when they need them? Will the supporting mechanisms necessary to properly use these materials also be available? Preservation of materials and traditional thoughts about access has now been replaced with legal loopholes and commodification of thought. The irony is that these materials may well be available, but United States copyright law now threatens their accessibility in a series of legislative moves that counters what Archivists and Librarians have dedicated their careers to preserving.

Copyright is intrinsic to the fabric of the American society because it was one of the first protections that the founders of the new nation sought to protect. Their goal was not to make authors rich, or publishers powerful, rather they hoped to encourage growth, research and creativity in a nascent nation. That body of scholarly discourse helped America to expand into a nation that has birthed the most respected colleges, Universities and museums in the world, produced canons of civilization in various fields, and ultimately led to the centralization of information within these respected American institutions. These same foundations are needed in order to ensure that current scholars, and their posterity, have access to this information in order to continue to contribute to the vessel of knowledge that characterizes this nation.

Works Cited Page

Books:

Bielefield, A. and Lawrence Cheeseman "Technology and Copyright Law: A Guidebook for the Library, Research, and Teaching Professional", Neal-Schuman Publishers, Inc, New York, 2007

Carrie Russell "Complete Copyright: An Everyday Guide for Librarians", American Library Association, Washington, 2004

Samuels, Edward B. "Illustrated Story of Copyright", St. Martin's Griffin, 2002

URLs

American Library Association

www.ala.org

American Research Libraries

www.arl.org

BitLaw Legal Resource

www.bitlaw.com

Cornell University School of Law

<http://www.law.cornell.edu/constitution/constitution.articlei.html>

Creative Commons

<http://creativecommons.org/about/what-is-cc>

Find Law

<http://www.findlaw.com/casecode/index.html>

Indiana University Purdue University Indianapolis Copyright Management Center

www.copyright.iupui.edu

New York Times

www.nytimes.com

Stanford University Libraries Copyright and Fair Use

<http://fairuse.stanford.edu>

United States Copyright Office

www.copyright.gov

World Intellectual Property Organization

www.wipo.org