



Academe, Technology, Society, and the Market: Four Frames of Reference for Copyright and Fair Use

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abstract: In response to the argument against the theory that fair use exists only to fill a need that the market cannot, and in favor of the constitutional purpose of copyright law to balance between the rights of creators and the public, this paper suggests that varied and often understated uses of copyrighted materials exist in academic settings. Four “frames” of reference are introduced: Academic, Technological, Social, and Market. Court cases relevant to each frame are presented, and two scenarios involving the use of copyrighted materials are explored. As technology increases both access and control, it is important to preserve and continue the tradition of fair use in higher education and to differentiate it from other commercial uses.

In a recent *portal* article, Samuel Trosow examines the controversy involving the fair use of copyrighted materials in noncommercial environments such as colleges and universities.¹ Employing a hypothetical court case modeled after the dissenting opinions in landmark copyright cases *Basic Books, Inc. v. Kinko's Graphics Corp.* (1991) and *Princeton University Press v. Michigan Document Services, Inc.* (1996) cases, Trosow posits that because of the commercial nature of the infringing entity, economic harm due to lost publishing and licensing revenues weighs heavily against a finding in favor of fair use, in situations concerning the use of academic coursepacks. Trosow hypothesizes that were a new case to come before the courts involving university-owned, educational/nonprofit copy centers, fair use would be determined. He concludes by arguing against the theory that fair use exists only to fill a need that the market cannot fill and in favor of the constitutional purpose of copyright law that seeks a balance between the rights of creators and the public.

While Trosow's argument is well-stated and insightful, especially his anticipation of amplified licensing and pay-per-use fee structures in an age of digital resource man-

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agement, the reliance on the *Kinko's* and the Michigan Document Services (MDS) cases as predictors of future copyright legislation trends fails to address the diverse missions of public universities and their many service units. For example, faculty members, librarians, academic researchers, and public patrons of university libraries are all potential targets of litigation, as their use of copyrighted materials is frequently in conflict with previous court rulings on fair use. In addition, employees and students are involved in the production of intellectual property, as well as its use, placing them on either side of the issue of copyright infringement.² It is likely that the next appearance of an intellectual property dispute in the federal courts will involve digital content rather than photocopied materials, as the *New York Times, Inc. v. Tasini* and the *A&M Records, Inc. v. Napster, Inc.* cases have already demonstrated. If we are indeed becoming an information technology oriented society, as argued by Manuel Castells, then the past by itself is no longer adequate to predict the future, a complication for legal researchers and information scholars.³ In some ways we are experiencing the social, economic, and legal ramifications of Moore's Law, which states that technology advances exponentially, leaving society to respond to or anticipate the intended and unintended consequences.⁴

The face of intellectual property management in higher education has changed since the *Kinko's* and *MDS* cases, largely because of these court rulings, which were in favor of copyright holders. However, higher education itself has changed, as it has become increasingly entrepreneurial and more likely to seek profit through industrial relationships and sponsored research.⁵ Indeed, even service units like academic libraries are becoming more market-oriented in their behaviors toward operations and management.⁶ Thus, "higher education" should not be automatically assumed the defendant, and its functions should not always be considered nonprofit. Rather, institutions of higher education are sites of multiple (and sometimes conflicting) missions and constituencies. This paper addresses the varied and often understated uses of copyrighted materials in academic settings by introducing four "frames" of reference from which to better understand the important functions of higher education institutions: the Academic Frame, the Technological Frame, the Social Frame, and the Market Frame. Court cases relevant to each frame are presented, and two scenarios involving the use of copyrighted materials are explored in depth.

Background

Throughout the language of copyright law and related court cases, one assumption is unchallenged and pervasive: education, and by extension academic research, is a public good. The foundation of this assumption is the U.S. Constitution, where copyright was first addressed in the legal record of the newly formed United States. Article 1, Section 8, Clause 8 states that [The 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," thereby placing a high value on invention and creativity and positioning Congress as the branch of government concerned with the oversight and regulation of intellectual property. However, the Constitution's protection for authors and inventors was not merely to spread American ingenuity and to contribute to the public good, but also to serve as an economic incen-



tive for the robust trade of goods among states and between the U.S. and Europe. As such, copyright law is but a spoke on the wheel of the American economy, alongside education, the arts and sciences, patents, industry, tariffs, and labor. It is in this context that the so-called “academic exception” of the copyright law must be considered.⁷

As the economic aspects of copyright law became more significant over the course of American history, the educational exception has been reframed as a potential threat to commerce rather than as an economic incentive, thus tipping the balance of the two functions: to offer protection of a creator’s work and to encourage innovation and creation of new knowledge. While the Fair Use Doctrine that became part of the Copyright Act of 1976 seems to exclude educational uses from situations that constitute copyright infringement,⁸ it has been interpreted as actually narrowing educational use by requiring legal review, via litigation, for any use to be deemed “fair.”⁹ It is also important to note that the Fair Use Doctrine, a rubric of four points by which potential copyright infringement is measured, does not imply that “fair use” is “free use,” monetarily or otherwise. Among other additions to the Copyright Act, the Digital Millennium Copyright Act, passed in October 1998, provides both civil and criminal legal sanctions for the circumvention of technological measures employed by copyright owners to control access to their works; a violation of federal law occurs regardless of why such circumvention is undertaken.¹⁰ In today’s era of digital libraries and online teaching and research, perhaps it is not an “academic exception” that those in higher education should be seeking, but rather, an “economic exception” for noncommercial or state-subsidized use that may extend well beyond the walls of the ivory tower.

Methods

While the *Kinko’s* and *Michigan Document Services* cases are important to higher education, they only just begin to address the complex story of copyright as it applies to academic libraries. For a more thorough understanding of copyright law in practice, we narrowed down our search to nine cases for final examination because of their association with the duplication and distribution of copyrighted work.¹¹ These cases feature prominently in the court record. Other cases that involved the inclusion of copyrighted work in a derivative form are not considered here, but are also of potential interest to the field of higher education and library services.¹²

The Four Frames and Educational Concerns about Copyright

Several functions of higher education are associated with the use of copyrighted materials in common practice: classroom teaching, research, library reference and interlibrary loan, student assignments, and public use of library materials. These scenarios have been placed into a matrix of possible interpretations of the fair use doctrine, as viewed through four conceptual frames: Academic, Technological, Social, and Market. The applicable court cases from this discussion are placed in the matrix alongside the scenario(s) that best reflect the issues presented during trial. Of particular interest to understanding the development of copyright law and its relevance for higher education is that each frame may experience shifts in attitude or execution over time. As such,

it is possible that certain frames may become tightly joined in the future, as one viewpoint blends with another to form a new frame, distinct from the previous ones. For example, the Market Frame could become closely associated with the Social Frame if

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economic incentives solely formed the foundation of the public good. The Technological Frame could become married to the Academic Frame if e-learning should eclipse face-to-face instruction. These developments would require a reassessment of the four frames and their relevance to daily practice.

In figure 1, the column titled “Academic” serves as a list of four scenarios that occur daily in higher education institutions in the United States. In many ways this column is used as a functional reference point for this discussion. Most, if not all, of these scenarios involve academic library facilities and staff. Each situation in the Academic Frame column intersects with the other frames. For example, when an instructor utilizes copyrighted materials in his or her class (Academic Frame), there are technological choices and capabilities for obtaining/providing the materials (Technological Frame), a public good justification for the use of those materials (Social Frame), and economic ramifications for copyright holders (Market Frame). Likewise, each scenario listed in the Academic Frame column is associated with one or more federal court cases that have addressed some aspect of that situation, either directly or indirectly.

The Academic Frame

The Academic Frame was conceptualized by considering the common uses of copyrighted materials in a higher education setting, as informed by participant observation and by uses mentioned in the court cases we reviewed. These uses are centered on duplicating materials for classroom (teaching) purposes, academic research, student

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learning and entertainment, and public interest. The Academic Frame also reflects functions of many academic libraries through their commitment to scholarly communication and access to research and teaching materials.

The Technological Frame

In this frame, technological capabilities are mentioned in relation to academic functions that concern the use of copyrighted materials. The Technological Frame is adapted from Weibe Bijker’s discussion of elements that influence the interactions within relevant social groups and lead to the attribution



of meaning to technical artifacts.¹³ Technology, from the printing press to the Internet, has affected most of the changes evidenced in copyright litigation. It is important to view technology as neither neutral nor deterministic, but rather as socially constructed, and in some ways academically constructed, that is, shaped by its relevant environment. Academic research centers have played a part in the development of new technologies that contribute to the ability to create, store, search, and encrypt digital materials.

The Social Frame

The Social Frame attempts to explain the traditional justifications for state support of higher education and represents the “public good” and public attitudes toward the benefits of higher education to society. This frame assumes a large social benefit of education, and while private benefit (personal and corporate) exists and should remain part of the educational system, public funds are best spent on the types of endeavors that contribute to the public good.

The Market Frame

Finally, the Market Frame is associated with economic returns for public and private investments into the higher education system. To some degree, the Market Frame suggests that the public good is best served by giving the foreground to the private good. This frame represents the perspectives of the litigating parties in most of the copyright infringement cases listed in figure 1, as well as the academic publishing industry,¹⁴ and to some extent that of the courts to date. The Market Frame holds that intellectual property is just that, property. Royalties, commercial transactions, and license fees are the concern of this frame.

Copyright Scenarios in Higher Education

Four scenarios involving the use of copyrighted materials in higher education are presented in figure 1. Each scenario is intended to illustrate how the four frames (Academic, Technological, Social, and Market) can be utilized to understand the varying and often competing interests within the higher education sector. While the scenarios discussed here relate solely to copied materials, the frames can be used to better understand other situations involving intellectual property in a higher education setting. Two of the scenarios are discussed at length below: classroom copies and research copies. Each scenario describes a common occurrence in higher education today. While much of the debate about copyright infringement in higher education has revolved around the first scenario, we hope that the second scenario will widen the scope of the discussion to include those functions of the university and library that involve the profit-making potential of academic research.¹⁵ The “stories” of the scenarios are told through each of the four frames, with court cases illustrating the situations after each.



	Academic Frame	Technological Frame	Social Frame	Market Frame	Cases
S c e n a r i o s	<p>Classroom Copies:</p> <p>Instructor assigns readings from published materials for a course, such as journal articles or book chapters.</p> <p>Instructor assigns multimedia materials such as video, music, images, and web pages and provides hyperlinks to such materials on course homepage.</p> <p>Instructor uses another person's unpublished (but copyrighted) works in own teaching materials.</p>	<p>Xerography enables this practice to be efficient and cost effective. Electronic reserve systems allow libraries to hold larger reserve collections with less chance of loss, due to theft and marking of paper copies. Electronic copies can be password-protected, tracked, and individually purchased/licensed. Web sites can host course materials. Campus network can be used to track copyright infringement.</p>	<p>Journal articles contain up-to-date scholarship, which will positively impact the quality of teaching and learning. Teaching materials are non-profit and should be free to use. Authorship should be ascribed, but permission fees and royalties are not necessary.</p>	<p>Photocopies of journal articles provide no revenue to the copyright holders, save that which is obtained through library subscriptions, and therefore should not be allowed without the opportunity for the copyright holder to obtain permission fees or license fees. The creation of intellectual property is a prime objective of higher education. Faculty members should be able to guarantee their rights to authorship and profit. Non-faculty member authors should be able to participate in the educational market without giving away their copyright privileges.</p>	<p>Matcus v. Rowley (1983)</p> <p>Harper & Row v. Nations Enterprises (1985)</p> <p>Basic Books v. Kinkos (1991)</p> <p>Princeton University Press v. Michigan Document Service (1996)</p>
	<p>Research Copies:</p> <p>Instructor makes copies of articles and books for own reference for research purposes.</p> <p>Librarian makes interlibrary loan copies to send to another institution that does not own the same books and journals.</p>	<p>Hand-copying would be an uneconomical use of time; xerography or digital scanning is better.</p> <p>Fax transmission of photocopies and sending PDF files over the Internet have made this process more efficient and cost-effective than mailing entire books or journals.</p>	<p>Academic research benefits the public through scientific advancement and diffusion of knowledge. Copying should be unrestricted for this purpose. Duplicate libraries or journal subscriptions would be a waste of public funds, therefore interlibrary loan services should continue. Libraries are essential to knowledge formation and transmission in our society. The free use of materials purchased with public funds is a public right.</p>	<p>Economic gain is one of the main motivations for academic research. Copyright holders are due their share of the profits generated from the use of their intellectual property. Interlibrary loan copies circumvent subscription fees and book acquisitions. License fees would shift costs from the institution to the individual.</p>	<p>Williams & Wilkins v. United States (1973)</p> <p>American Geophysical Union v. Texaco (1992/1994)</p>
	<p>Student Copies:</p> <p>Student makes copies of library materials for a school assignment.</p> <p>Student uses the university or library network to download copyrighted materials for own entertainment (not related to academic work).</p>	<p>Photocopy equipment is easy to use and can be placed in public areas for self-service copying. Campus network can be used to track copyright infringement. The Internet is a repository of information and materials, easily accessed by anyone, anywhere. Network bandwidth is sufficient for the transfer of audio, video, and text files. Campus network can be used to track copyright infringement.</p>	<p>Students pay tuition, which enables the library to purchase materials for use. In addition, the state subsidizes education for the benefit of society. In a free society, information transfer should not be subject to undue scrutiny, especially at institutions of higher education.</p>	<p>Services can be contracted where students obtain reference materials for their coursework, for a monthly fee. Can be bundled with course textbooks. Students pay tuition that enables them access to the campus network and Internet through campus ISP services, and are entitled to full access based on this contract. Copyright holders should be able to hold institutions liable for copyright infringement when campus networks are used for illegal purposes.</p>	<p>Sony v. Universal City Studios (1984)</p> <p>Basic Books v. Kinkos (1991)</p> <p>Princeton University Press v. Michigan Document Service (1996)</p> <p>A&M v. Napster (2001)</p>
	<p>Public Copies:</p> <p>Patron makes copies of an interesting article at a library at a public university.</p> <p>Patron uses a university or library network to download copyrighted materials for own entertainment.</p>	<p>Photocopy equipment is easy to use and can be placed in public areas for self-service copying. Campus network can be used to track copyright infringement. The Internet is a repository of information and materials, easily accessed by anyone, anywhere. Network bandwidth is sufficient for the transfer of audio, video, and text files. Campus network can be used to track copyright infringement.</p>	<p>Taxes support higher education and the public has a right to use some services, such as library materials. Internet access at public libraries helps society by reducing the digital divide.</p>	<p>If libraries allowed free access to everyone, publishers would lose incentive to continue to create periodicals and books. Libraries can subscribe to databases that charge per use, thereby accounting for the general public's use of such materials. These costs can be absorbed by the library/institution or passed on to the customer. Copyright holders should be able to hold institutions liable for copyright infringement when campus networks are used for illegal purposes.</p>	<p>Sony v. Universal City Studios (1984)</p> <p>N. Y. Times v. Tasini (2001)</p> <p>A&M v. Napster (2001)</p>

Figure 1. Fair Use Frames.



Scenario One: Classroom Copies

Academic Frame

This scenario involves the “classroom copies” of an instructor who has assigned readings to his or her students during a term. The materials may be in published form such as books and journals, digitized multimedia materials served over the Web, or adapted from unpublished material created by someone other than the instructor. The instructor has chosen the materials for their currency and relevance to the topic of the course. Student learning outcomes are expected to be affected positively by the use of the materials. The instructor may not seek permission from the copyright holders due to time constraints, the absence of institutional policy on the matter, or lack of apparent consequences for ignoring this requirement.

Technological Frame

Technically, the process of providing course materials such as these has been greatly enhanced by xerography, scanning capabilities, and the use of computers. Prior to the convenience and affordability of personal photocopying or the creation of digital copies, library reserve desk services enabled students and instructors to utilize this type of assignment through limited borrowing (sharing) of paper copies or the original texts. Today, electronic reserve systems enable libraries to offer better services to students by allowing multiple-user access and extended viewing through online delivery. This method has also reduced the theft and defacement of paper copies. While technical difficulties still exist (laborious scanning procedures, bandwidth limitations), many libraries have reduced traditional reserve services in favor of electronic reserve systems. Access to the materials can be, and often is, password protected, ensuring that only registered students are able to view the materials. Should the institution choose, the campus network may be utilized to track copyright infringement and require instructors to seek permissions for all materials used in coursework. Also, the technical capability exists for students to be charged a fee for access to course materials.

Social Frame

Regardless of the technical process used to obtain the course materials, using up-to-date research and information in the classroom enhances the quality of education. Instructors are likely to be more enthusiastic when they are able to teach about current events in their field and as such may inspire students to seek careers and future education in new areas. The social benefit of higher education is enhanced when students become productive members of society, and instructors may be able to contribute to the career aspirations of students through exposure to trade publications and multimedia. Further, the instructor derives no personal economic benefit from the use of teaching materials. Therefore, the educational use of such materials should be free to students. Also, while the public good is served by the ascription of authorship as an incentive for future creative endeavors, license fees or permission fees are not necessary for educational materials as the social benefit is compensation enough.

Market Frame

Higher education is a market sector, one that is especially significant for the competing industries of textbook publishing and software manufacturing. Without services such as e-reserves and web-based courseware, many instructors would choose published anthologies of important works such as course textbooks, or might rely on other reading materials to supplement classroom teaching materials. The choice to use journal articles, which have institutional subscriptions, over textbooks purchased by each student, has an economic impact in the educational publishing industry. The absence of textbook purchases creates a market void, which can and should be filled through licensing fees or permission fees, obtained through the copyright owners (usually the publishers). Further, the creation of intellectual property is a prime objective of higher education, and faculty should be able to guarantee their rights to authorship and profit. Nonfaculty member authors should be able to participate in the educational market while retaining their copyright privileges. Without the participation of authors and content developers in the economic system, publishers and software developers would lose shares of the educational market.

Cases

This scenario is related to four well-documented copyright cases: *Marcus v. Rowley*, *Harper & Row v. Nation Enterprises*, *Kinko's*, and *MDS*.¹⁶ As the *Kinko's* and *MDS* cases were both well described by Trosow, a brief introduction to the other two cases is provided below.¹⁷ While the academic, technological, and social frames are somewhat represented in the cases, the courts were most swayed by the market frame in each of the rulings.

Marcus v. Rowley (1983)

Eloise Toby Marcus was a home economics teacher in the San Diego Unified School District from September 1972 to June 1974. In 1975, she copyrighted a thirty-five-page booklet titled "Cake Decorating Made Easy," of which 125 copies were published. Marcus sold the booklets to her students in an adult education class. Shirley Rowley, a food-service employee at the San Diego Unified School District, enrolled in a cake decorating class taught by Marcus in 1975. Rowley purchased the booklet written by Marcus, and the next year used eleven of its pages (retyped) in a twenty-four-page "Cake Decorating Learning Activity Package" prepared for a food service career class for the district. Rowley did not ask permission from Marcus to use the material nor was Marcus given credit for the work in the learning activity package (LAP). The LAP was used for three years and did not generate any profit for Rowley or the school district. Marcus discovered the infringement in 1977 when a student refused to purchase "Cake Decorating Made Easy" and instead brought to class a copy of Rowley's "Cake Decorating Learning Activity Package." Marcus filed suit shortly thereafter. Even though the LAP package was not a profit source for Rowley, the court did not deem the use of the materials as "fair."



Harper & Row Publishers v. Nation Enterprises (1985)

This case involved the copyright owners of former President Ford's memoirs and the right of first publication. Harper & Row Publishers, the copyright owners, sold the exclusive right to print prepublication excerpts to a national magazine, but another magazine acquired a copy of the manuscript and rushed into print with an article consisting of quotes, paraphrases, and facts drawn from the manuscript, leading the first magazine to cancel its contract. The Supreme Court ruled against a fair use finding in this case. Although this case differs substantially from the copyshop cases of *Kinko's* and *MDS*, it sets some legal standards that affect the way future fair use cases are analyzed and ultimately decided. This case establishes the legal significance of the fourth factor of fair use: the effect of the use upon the potential market for or value of the copyrighted work as the single most important element of fair use. Also, the burden of proof is assigned: once a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and a loss of revenue, the burden properly shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression.

Scenario Two: Research Copies

Academic Frame

In the course of research, a faculty member may make copies of copyrighted materials for reference as he or she may not have a personal subscription to the journal or ownership of the book in which it was published. Members of a research team may need to read the same materials and may find it easier and more convenient to have individual copies made. Science research, in particular, is extremely tied to the dissemination of knowledge through journal articles. Also, as academic research becomes more globalized, international journals that were once only marginally utilized outside their home countries are now very important to scholarly communication. As library budgets have been stretched to provide more services with fewer resources, journal subscriptions are cut or consolidated. Interlibrary loan services are able to make up for lost subscriptions or to provide access to materials that are infrequently used. In this manner, libraries form a consortium to allow greater access to researchers all over the country.

Technological Frame

Before xerography and scanning, researchers would take handwritten notes of books and articles when personal copies were unavailable. Today researchers can photocopy articles from the library, download articles from online journals and search engines, and request copies of materials from interlibrary loan services. Many of the traditional interlibrary loan services have been migrated to the Web, and now requests for materials, searches for materials, and document delivery to patrons is all done online. This process is much more efficient and cost-effective than mailing entire books or journals. Although the technology exists to track usage of such materials and to charge individual researchers or departments for access to online journals, it has not been widely utilized.

Social Frame

Academic research is an important part of our national economic structure. If a researcher needs his or her own copy of a journal article or book chapter to aid in the advancement of science and the useful arts, so be it. To charge faculty members and researchers for the use of such materials when the library has already purchased a subscription would

The free use of materials purchased with public funds is a public right.

be a waste of public resources, as that money is likely to come out of federal research grants or a state-funded salary. Further, if there is only occasional demand of a journal, interlibrary loan services help to reduce costs while still providing

access to the information. Libraries are essential to knowledge formation and transmission in our society. The free use of materials purchased with public funds is a public right.

Market Frame

Economic gain is one of the main motivators for academic research, and as such all claims to intellectual property must be enumerated. Copyright holders are due their share of the profits generated from the use of their intellectual property. While universities may have been founded for the betterment of society, as it stands now, many individual faculty members and private corporations are siphoning profits from public funds. Library materials play an important part of the profit-making process, yet interlibrary loan copies circumvent subscription fees and book acquisitions, depriving publishers of their share of academic research dollars. License fees would shift costs from the institution to the individual researcher, which would allow publishers to account for their role in the academic production cycle.

Cases

Two cases feature library copies and the debate over for-profit and nonprofit research: *Williams & Wilkins v. The United States* and *American Geophysical Union v. Texaco*.¹⁸ Although the first case was tried before the Copyright Act of 1976 had been enacted, the determination of market impact and public benefit featured prominently in the trial as it came before the United States Court of Claims. However, the legal referent for *Williams & Wilkins* was the 1909 Copyright Act, which stated that copyright was “[n]ot primarily for the benefit of the author, but primarily for the benefit of the public.”¹⁹ As such, the *Williams & Wilkins* ruling was in favor of fair use, but the *Texaco* case ruled against a fair use finding because of the commercial nature of the research for which the copies were made. Both cases illustrate the responsibilities institutions bear for providing copies of journal articles to their employees, along with implications for policy and practice.

Williams & Wilkins Company v. United States (1974)

Williams & Wilkins Company was a publisher of medical journals. The publisher accused the Department of Health, Education, and Welfare of infringing upon its copy-



rights by allowing the photocopying of its journal articles by the National Institutes of Health (NIH) and the National Library of Medicine (NLM) in Bethesda, Maryland. The Library had engaged in a practice of photocopying the articles from these and other journals for interlibrary loan purposes, but had taken action to limit the number of articles any patron or institution could obtain in this manner during any given month. Also, the Library would not allow the photocopying of an entire journal. NIH had similar practices for limiting the scope of photocopying, a service available only to NIH personnel. On appeal to the United States Court of Claims, the plaintiff's charges of copyright infringement and the pursuit of remuneration for lost revenue due to the photocopying were dismissed. The Court based its decision on a discussion of the Fair Use Doctrine and the belief that, should the practice of photocopying cease, the potential injury to medical and scientific research was far greater than the monetary loss alleged by the plaintiff resulting from fewer subscriptions or the absence of licensing fees.

American Geophysical Union v. Texaco, Inc. (1995)

This class action suit, brought by eighty-three publishers of scientific and technical journals against the oil company, Texaco, claimed that the company was infringing upon copyright by allowing its 400–500 research scientists to photocopy articles from journals, which were purchased by the company and held in a company library. To illustrate their claim, a randomly selected researcher, Dr. Donald H. Chickering II of the Beacon, New York facility, was chosen and his photocopying practices were examined. Eight photocopies were found in his files from the *Journal of Catalysis*, and were entered for consideration in the lawsuit. The publisher of *Catalysis*, Academic Press, Inc., was one of the plaintiffs in the case. The plaintiffs claimed that Texaco assisted its employees in making illegal photocopies by circulating relevant journals using a routing list. When a particular journal reached the desk of an interested researcher, that person could make or have a photocopy made of any articles therein and keep the copies on file for later reference. While Chickering was not on trial, his practice of photocopying articles for his own use was unrestricted, thus implicating the company's consent. Through a review of the four factors of fair use, the court found Texaco in violation of copyright, upholding the lower court's decision.

The institutional use of a copyrighted work makes the *Texaco* case important to higher education, although the court dismissed such a broad interpretation. The court stated,

The parties and many of the amici curiae have approached this case as if it concerns the broad issue of whether photocopying of scientific articles is fair use, or at least the only slightly more limited issue of whether photocopying of such articles is fair use when undertaken by a research scientist engaged in his own research. Such broad issues are not before us.²⁰

In addition, while the court says that "our opinion does not decide the case that would arise if Chickering were a professor or an independent scientist engaged in copying and creating files for independent research, as opposed to being employed by an institution in the pursuit of his research on the institution's behalf,"²¹ Mertonian norms of

knowledge sharing and peer review, which are commonly used in academe, were expressed in the ruling. Interestingly, the court found it significant to state that had Chickering been working on independent research (presumably any research that would not benefit his employer), photocopying of “isolated journal articles” would have been considered fair use.

Summary and Conclusions

The four frames presented in this paper (Academic, Technological, Social, and Market) help to illustrate the conflicting and competing missions of higher education institutions. Rather than viewing higher education as a monolithic entity with a single motivation, we have provided a framework from which to understand the many constituencies of academic institutions. Also, we have shown that the four frames are inter-related, and that courts have favored the Market Frame thus far in deciding fair use cases. The exception, *Williams & Wilkins v. The United States*, might be decided differently if the case were tried today. The traditional ideas of academic use have become increasingly framed in commercial terms as new technologies have developed and their “legitimate” uses have been negotiated. As technology has progressed, it has opened up a very complex territory. The notion of what is fair and what constitutes infringement has become much more complicated as technology has made it not only less expensive to make a personal copy of an author’s work, but has also made it much easier for a copyright holder to electronically monitor all uses of copyrighted material. As this commercial interest has expanded, personal use and the promotion of the progress of knowledge, the public good, has diminished.

While the *Kinko’s* and *MDS* cases are important to understanding fair use in the context of academic settings, the future of this type of discussion will be closely connected to profit-making, such as the cases presented here. However, the law regarding intellectual property is rapidly evolving, and information policy studies and scholarship cannot be tied too tightly to the past. The implied protection of the 11th Amendment has been recently challenged,²² and the Digital Millennium Copyright Act (DMCA) of 1998 sets the stage for unprecedented legal conflicts and change in this area. As both producers and consumers of intellectual property, those in higher education (students, staff, and faculty) have a stake in the manner in which copyright is interpreted in the academic context. As public opinion about the value of research and education shifts toward market relevance, it is no surprise that copyright law is changing to reflect the commercial impact of educational use rather than the assumption of public benefit. It is important to preserve and continue the tradition of fair use in the educational realm and to distinguish it from *other* commercial uses, as it must be understood that education is now a commercial sector.

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Notes

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6. James G. Neal, "The Entrepreneurial Imperative Advancing from Incremental to Radical Change in the Academic Library," *portal: Libraries and the Academy* 1, 1 (January 2001). Available: <http://muse.jhu.edu/journals/portal_libraries_and_the_academy/v001/1.1neal.html> [January 29, 2003].
7. The academic exception refers to an exception made for academic, educational, and scholarly institutions and organizations, which may duplicate articles and reviews subject to the following restrictions:
 - The article or review is reproduced in its entirety
 - The copyright notice is preserved
 - The material is distributed free of charge, or for no more than the actual cost of duplication
 - The material is used entirely for educational purposes
 - No more than 20 copies are made for any one course

Judge Richard Posner wrote in *Hays v. Sony Corporation of America*, 847 F. 2d 412 (1988): "Nevertheless it is widely believed that the 1976 Act abolished the teacher exception, see Dreyfuss, *supra*, at 598–600; Simon, *supra*, at 502–09; Weinstein v. University of Illinois, 811 F.2d 1091, 1093–94 (7th Cir. 1987)—though, if so, probably inadvertently, for there is no discussion of the issue in the legislative history, and no political or other reasons come to mind as to why Congress might have wanted to abolish the exception. To a literalist of statutory interpretation, the conclusion that the Act abolished the exception may seem inescapable. The argument would be that academic writing, being within the scope of academic employment, is work made for hire, per se; so, in the absence of an express written and signed waiver of the academic employer's rights, the copyright in such writing must belong to the employer. But considering the havoc that such a conclusion would wreak in the settled practices of academic institutions, the lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production, and the absence of any indication that Congress meant to abolish the teacher exception, we might, if forced to decide the issue, conclude that the exception had survived the enactment of the 1976 Act. A possible textual handle may be found in the words of section 201(b), which appear to require not only that the work be a work for hire but that it have been prepared for the employer." Available: <<http://web.archive.org/web/20010712212054/http://counsel.cua.edu/mainpage/needforpolicy1.htm>> [January 29, 2003].
8. Section 107, Copyright Act of 1976: "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—

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - (2) The nature of the copyrighted work;
 - (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."
9. Kenneth Frazier, "What's Wrong with Fair-Use Guidelines for the Academic Community?" *Journal of the American Society for Information Science* 50 (January 1999): 1320–1323; Laura N. Gassaway, *Growing Pains: Adapting Copyright for Libraries, Education, and Society* (Littleton, Co: Fred B. Rothman & Co., 1997).
 10. Lydia Pallas Loren, "The Purpose of Copyright: Are We Encouraging or Restricting Creativity?" *Open Spaces Quarterly* 2 (March 1999): 1–8.
 11. *Cases: A&M Records, Inc., et al. v. Napster, Inc., et al.*, 239 F. 3d 1004 (2001); *American Geophysical Union, et al. v. Texaco Inc.*, 802 F. Supp. 1 (1992/1994); *Basic Books Inc., et al. v. Kinko's Graphics Corporation*, 758 F. Supp. 1522 (1991); *Harper and Row, Publishers, Inc., et al. v. Nation Enterprises et al.*, 105 S. Ct. 2218 (1985); *Marcus v. Rowley*, 695 F. 2d 1171 (1983); *New York Times Company, Inc., et al. v. Jonathan Tasini, et al.*, 121 S. Ct. 2381 (2001); *Princeton University Press, Macmillan, Inc., et al. v. Michigan Document Services, Inc., et al.*, 99 F. 3d 1381 (1996); *Sony Corporation of America, et al. v. Universal City Studios, Inc., et al.*, 104 S. Ct. 774 (1984); *Williams and Wilkins Company v. The United States*, 487 F. 2d 1345 (1973).
 12. Other cases of interest to the copyright issue are *Addison-Wesley Publishing Co. v. Brown* (1963), *Encyclopedia Britannica Educational Corp. v. Crooks* (1982), *Educational Testing Services v. Katzman* (1986), *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group* (1989), *Stewart v. Abend* (1990), *Campbell v. Acuff-Rose Music* (1994), and *Educational Testing Services v. Stanley H. Kaplan Educ. Ctr.* (1997). Of particular interest to technology policy studies is the criminal case of *United States v. LaMacchia* (1995).
 13. Weibe Bijker, *Of Bicycles, Bakelites, and Bulbs: Toward a Theory of Sociotechnical Change* (Cambridge: MIT Press, 1995).
 14. Colin Day, "The Economics of Publishing: The Consequences of Library and Research Copying," *Journal of the American Society for Information Science* 50 (January 1999): 1346–1349.
 15. Mary R. Barry, "Multiple Photocopying by Educators and The Fair Use Doctrine: The Court's Role in Reducing Transaction Costs," *University of Illinois Law Review* (1994): 387–401; Ann Bartow, "Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely," *University of Pittsburgh Law Review* 60 (1998): 149–162; Kenneth Crews, "The Law of Fair Use and the Illusion of Fair-Use Guidelines," *Ohio State Law Journal* 62 (2001): 599–702; Robin Feingold, "When 'Fair is Foul': A Narrow Reading of the Fair Use Doctrine in *Harper & Row, Publishers, Inc. v. Nation Enterprises*," *Cornell Law Review* 72 (1986): 218–243; William Fisher III, "Reconstructing The Fair Use Doctrine," *Harvard Law Review* 101 (1988): 1661–1795; Wendy Gordon, "Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors," *Columbia Law Review* 82 (1982): 1600–1657; Marshall Leaffer, "The Uncertain Future of Fair Use in a Global Information Marketplace," *Ohio State Law Journal*. 62 (2001): 849–867; Pierre Leval, "Toward A Fair Use Standard," *Harvard Law Review* 103 (1990): 1105–1136; Jessica Litman, "Copyright, Compromise, and Legislative History," *Cornell Law Review* 72 (1987): 857–904; Willajeanne McLean, "All's Not Fair in Art and War: A Look at the Fair Use Defense after *Rogers v. Koons*," *Brooklyn Law Review* 59 (1993): 373–422; Steven Melamut, "Pursuing Fair Use, Law Libraries, and Electronic Reserves," *Law Library Journal* 92 (2000): 157–192; Ray Patterson

- and Stanley Lindberg, *The Nature of Copyright: A Law of Users' Rights* (Athens: University of Georgia Press, 1991); Maureen Ryan, "Fair Use and Academic Expression: Rhetoric, Reality, and Restriction on Academic Freedom," *Cornell Journal of Law and Public Policy* 8 (1999): 541–590; Carol Silberberg, "Preserving Educational Fair Use in the Twenty-First Century," *University of Southern California Law Review* 74 (2001): 617–655; Lloyd Weinreb, "Fair's Fair: A Comment on the Fair Use Doctrine," *Harvard Law Review* 103 (1990): 1137–1161; Bernard Zidar, "The Randolph W. Thrower Symposium: The Role of the General Counsel: Comment: Fair Use and the Code of the Schoolyard: Can Copyshops Compile Coursepacks Consistent with Copyright?" *Emory Law Journal* 46 (1997): 1363–1410. Available: <<http://web.archive.org/web/20010810015336/http://www.law.emory.edu/ELJ/volumes/sum97/zidar.html>>
16. *Marcus v. Rowley*, 695 F. 2d 1171 (1983), *Harper and Row, Publishers, Inc., et al. v. Nation Enterprises et al.*, 105 S. Ct. 2218 (1985), *Basic Books Inc., et al. v. Kinko's Graphics Corporation*, 758 F. Supp. 1522 (1991), *Princeton University Press, Macmillan, Inc., et al. v. Michigan Document Services, Inc., et al.*, 99 F. 3d 1381 (1996).
 17. Trosow, 49–50: "In a more problematic case, the plaintiffs, Princeton University Press, Macmillan, Inc., and St. Martin Press brought suit for copyright infringement against defendant Michigan Document Services, Inc. (MDS), a copy shop that, like Kinko's, provided coursepacks to students at the University of Michigan. Unlike Kinko's, MDS was a small local copy shop. However, it pursued an aggressive local advertising strategy that attracted the attention of the publishers. MDS produced the coursepacks at the request of professors for sale to students but they neither sought permissions from the copyright holders nor paid applicable licensing fees. In this case, the plaintiff publishers alleged infringement of six different works that were so excerpted and reproduced without permission. The amounts copied ranged from 5 percent to 30 percent of the works in question."

The plaintiff publishers claimed that the copying of substantial portions of their works without securing permissions and paying licensing fees constituted copyright infringement. Defendant MDS asserted the defense of fair use under section 107 of the Copyright Act. The District Court denied the defense of fair use and also found that the infringement was willful. On appeal, a three-judge panel of the Sixth Circuit reversed this ruling and upheld the fair use defense. On rehearing *en banc* the full court voted 8–5 against a finding of fair use. The U.S. Supreme Court denied MDS' request for review.

Regarding the first of the four fair use factors, the purpose and character of the use, MDS asserted the use of the work was noncommercial and educational because of the ultimate educational purpose of the materials, notwithstanding the commercial/ for profit nature of MDS' operation. They also argued that since the nature of the use was noncommercial/ educational, the burden of proof as to adverse market effect shifted to the plaintiffs, and that they failed to meet this burden. The plaintiff publishers urged the court to reject the claim that MDS "stood in the shoes of its customers" for purposes of determining the nature of the use and find that the nature of the use was commercial. They also stressed the nontransformative nature of the copying and production of coursepacks.

The court agreed with Princeton, rejected MDS' assertion that they "stood in the shoes" of their noncommercial customers, and held the nature of the use to be commercial. Accordingly, the court rejected MDS' assertion that the burden of proving market damage shifted to the plaintiff publishers. The court also noted that in any event, the publishers would have carried the burden of diminishing market value.

The second fair use factor, nature of the work, was not substantially in issue. The third factor, substantiality of the work in relation to the whole, was also contested. MDS claimed the amounts copied were insubstantial in relation to the whole, while Princeton Press claimed the amounts were substantial. Princeton relied on the *Guidelines for Classroom Use*, reproduced in the Copyright Act's 1976 Legislative History but not included in the text of the statute. MDS argued that the rules of statutory construction did not permit reference to

sources extrinsic to the statute since no facial ambiguity was demonstrated nor found. Princeton prevailed on this issue as well.

With regard to the fourth factor, market effect, MDS claimed that Princeton Press failed to demonstrate any significant adverse effect on the market relating to their work. MDS stressed the fact that professors would not have substituted copying for a work they would otherwise ask the students to purchase. In contrast, Princeton Press argued that the substantial adverse effect existed insofar as they lost potential licensing revenues. MDS also argued that the existence of potential licensing revenues is not a proper subject for fair use analysis. In response, Princeton Press stressed the substantial nature of their existing permissions revenue stream from other works.

On the fourth factor, the court applied the following test: to negate fair use, one only need show that if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work. The court found this adverse effect existed based simply on the loss of potential permission fees, which it deemed relevant for fair use analysis purposes. This was considered appropriate inasmuch as Princeton Press was able to demonstrate an existing licensing market that was already being successfully exploited. Given the convergence of these factors in favor of the plaintiff copyright holders, the court found that the fair use defense could not be sustained.

18. *Williams & Wilkins Company v. The United States*, 487 F. 2d 1345 (1973); *American Geophysical Union, et al. v. Texaco Inc.*, 802 F. Supp. 1 (1992/1994).
19. H.R. Rep. No. 2222, 60th Cong., 2d Sess.: 7.
20. *American Geophysical Union, et al. v. Texaco Inc.*, 802 F. Supp. 1 (1992/1994): Discussion, item 1.
21. *Ibid.*
22. Intellectual Property Protection Restoration Act of 2001 (2001 S. 1611; 107 S. 1611). See also Ben Baez and Sheila Slaughter, "Academic Freedom and Federal Courts in the 1990s: The Legitimation of the Conservative Entrepreneurial State," in John Smart and William Tierney, eds. *Handbook of Theory and Research in Higher Education* (Bronx, NY: Agathon Press, 2001), 73–118.