

To promote the progress of science and the useful arts: A reconsideration of the fair use doctrine for the academy.

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Veronica Diaz, Amy Metcalfe, Rick Wagoner

University of Arizona

Education as a public good

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 is first addressed in the legal record of the newly formed United States. Article 1, Section 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,” 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. Thus a bond was formed between the federal government and the pursuit of knowledge, with the legislative branch serving as “protectorate”. In the late 1700s the struggle between secular learning and private denominational schools had found a public voice in the federalist promotion of a national university, further strengthening the connections between government and knowledge creation in early American society. George Washington addressed the Congress in 1790 on behalf of such a nationalized university, stating that “Knowledge is in every country the surest basis of public happiness.” Yet the Constitution’s protections for authors and inventors were not merely to spread American ingenuity and to contribute to the public good, but also served as economic incentives for a robust trade of American goods between 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 sciences, patents, industry, tariffs, and labor.

It is in this context that the so-called Academic Exclusion of the copyright law must be

considered. As the economic aspects of copyright law became more substantial over the course of American history, the educational exception has been re-framed as a potential threat to commerce rather than as an economic incentive. The Copyright Act of 1976 was the first legislative mention of the educational use of copyrighted materials. The Fair Use Doctrine (see Appendix A) states that “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.” While at first glance this excerpt seems to exclude educational use from copyright infringement, it has been interpreted as actually narrowing educational use by requiring it to be reviewed before it can be deemed “fair” (Frazier, 1999; Gassaway, 1997). 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.

We believe that any litigation involving fair use in the higher education context will be argued through these three conceptual frames. As no cases have come to trial in federal court to date, it may be that potential plaintiffs are wary of the “public interest” frame, and have not chosen to fight the battle on this premise. However, as our case history shows, the economic/market value framework has been successfully used in situations where profits were either indirect (*American Geophysical Union v. Texaco*) or absent (*Marcus v. Rowley*), especially since the Copyright Act of 1976. It remains to be seen if the technological-determinism frame will sway the courts, but as yet this has not been sufficient cause to decide against fair use for freely available materials (*Sony v. Universal City Studios*), nor to defend the fair use of marketable materials (*A&M v. Napster*). Thus technology is but an instrument of the

economy, in these examples. 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 using to defend against the commodification of education; rather, it is an "economic exception" that should be proposed.

The tradition of use

The traditional ideas of personal and academic use, which have rarely been articulated, but always understood and protected by Article 1 section 8 of the Constitution, have become increasingly framed in commercial terms as new technologies have developed and their "legitimate" uses have been negotiated. This is most evident in the Copyright Act of 1976 where educational use is included under the fair use clause even though fair use has always applied only to commercial uses of a copyright. In other words, by the time of the Copyright Act of 1976, the statutory basis for almost all of the cases studied in this analysis, fair use had come to encompass any use of a copyrighted work, not just commercial uses of a copyright. This trend of all uses, being either a fair commercial use or infringement, has accelerated during the 20th century not only because of the development of new technology, but also because of the negotiated and contested legitimate uses that are an integral part of the development of any technology. In terms of copyright in the United States it has been the responsibility of congress to legislate these legitimate uses.

Copyright intersects with technology

Historically, technology has had a profound impact on Copyright law. From her review of its legislative history, Litman (1987) points out how despite all of the technological change and its effects on copyright, revision (to the copyright act) has been extremely difficult and slow as it has been nearly impossible for the various constituencies to reach consensus. Technology,

from the printing press to electronic reserves, continues to present challenges to controlling infringement, but has also aided in measuring copyright “violations.” New photocopying technology has made producing a copy of a work, for personal or commercial use, less expensive than the cost of purchasing an original, which, of course, has caused publishers to stop ignoring the practice and to invoke the right to copy contained, but perhaps not intended, in the 1909 Copyright Act. Computer technology has made it possible to track the use of copyrighted materials and the granting of permission for their use, which has resulted in a trend toward using licenses in all areas of copyright, not just musical performances. While it is nearly impossible to assess how many students or faculty members walk into a library and run off copies of a particular journal article, it’s easy to log onto a department’s (after acquiring the necessary permissions) course website and look over their electronically available required reading list devoid of copyright permissions. Technology has certainly enabled the development of the coursepack; however, it leads us to question the difference between the reproduced copyshop coursepack and the ‘student-prepared’ coursepack obtained by going to the library personally and making copies or downloading the required reading from the electronic repository. One is merely facilitating the act of the other, an act that is supported by tradition and the seemingly noble intent of the Act itself.

As most changes to copyright protection have been viewed by many as centering on technological changes, understanding how technology frames a problem is important. A technological frame has eleven elements: goals, key problems, problem-solving strategies, requirements to be met by problem solutions, current theories, tacit knowledge, testing procedures, design methods and criteria, users’ practice, perceived substitution functions, and exemplary artifacts (Bijker, 1995, p. 125). A technological frame is built up when interaction

“around” an artifact begins; existing practice does guide future practice, though without logical determination. If existing interactions move members of an emerging relevant social group in the same direction, a technological frame will build up; if not, there will be no frame, no relevant social group, and no future interaction. A technological frame comprises all elements that influence the interactions within relevant social groups and lead to the attribution of meaning to technical artifacts—and thus to constituting technology (Bijker, 1995, and Thomas, 1994).

Copyright and commerce

The commercial nature of the infringer, as well as the use in dispute are important considerations in fair use determinations. In fact, especially since “the effect of the use upon the potential market for or value of the copyrighted work¹” has been established as the most important element of fair use decisions, the economic activity around use is a critical consideration in case outcomes. The courts, especially the Supreme Court, has taken a conservative approach in deciding cases and has acted in the best interest of business, in these cases, the publishing business. In light of these competing interests, commercialism has consistently risen above the promotion of the progress of science and useful arts: the explicit purpose of fair use.

In the midst of all this commercialism there has been some implied protection of higher education. In contrast to higher education’s involvement in patent policy formation and litigation, the academy has been notably absent from discussions and case law conceptualizing and applying fair use. Fair use cases all have in common the unique interpretation of copyright law that has been applied to each of them. In two of the fair use cases examined in this analysis: Basic Books, Inc. v. Kinko’s Graphics Corp. (1991) and American Geophysical Union, et al. v. Texaco Inc. (1995), the courts appear to make a point of saying that their decision would differ if

higher education were involved. In Basic Books, Inc. v. Kinko's Graphics Corp. (1991), the court says "Expressly, the decision of this court does not consider copying performed by students, libraries, nor on-campus copyshops, whether conducted for-profit or not." In American Geophysical Union, et al. v. Texaco Inc. (1995), the court says "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." Two conclusions can be drawn from these statements. First, the court desires to make the distinction between fair use determinations in cases to date and potential cases involving higher education. The suggestion is that perhaps higher education would be treated differently, with more protection extended to that use. Second, the commercial nature of the infringing entity is pivotal as is made clear in the Texaco case where the division is clearly made between an independent research scientist and research that is being conducted for an institution, a profit-seeking one. The profit-seeking nature of the institution is also considered; this defining feature could have some potential implications for higher education as it more frequently engaged in profit-seeking activities.

One argument used to support a finding against fair use is that of potential revenue lost. Publishers argue in the copyshop cases (discussed below) that if the kind of copying that has been taking place were to continue, they would lose substantial revenue, revenue that in fact does not yet exist, but potentially could exist in the form of per-use licenses, fees, additional subscriptions or book purchases. Technology, in this case, has greatly simplified the process of quantifying that lost revenue by observing copies made, publications or portions thereof listed on electronic reserve lists for downloads, or copyshops taking copy orders for faculty members. However, this argument is less one of lost revenue than one for a creation of a new market with

new revenue that has not been previously actualized. Unfortunately, this new market concept rests on the assumption that researchers, faculty members or students will actually subscribe, purchase or license said works. The facts in these fair use cases resemble those in Sony Corporation of America v. Universal City Studios, Inc., et al. (1984) where the court found “time-shifting” (taping of cable shows for later viewing) acceptable with no substantial impact on cable revenues. A more convincing argument could be made that copies are prepared for or by various constituents to be used at a later time, a use for the progress of science and useful arts, with no substantial impact on publisher revenues.

Figure 1. Fair Use Frames

Academic Frame	Technological determinism Frame	Public Interest Frame	Economic/Market Value Frame	Cases
Classroom Copies: Professor assigns readings from journal articles for a course.	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 copies. Electronic copies can be pay-per-view or timed-usage.	Journal articles contain up-to-date scholarship, which will positively impact the quality of teaching and learning	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.	Basic Books v. Kinkos Princeton University Press v. Michigan Document Service
Classroom Copies: Professor uses another person’s copyrighted works in own teaching materials.	Same as above	Teaching materials are non-profit and should be free to use. Authorship should be ascribed, but permission fees and royalties are not necessary.	The creation of intellectual property is a prime objective of higher education. Faculty should be able to guarantee their rights to authorship and profit.	Marcus v. Rowley Harper & Row v. Nations Enterprises
Research Copies: Professor makes copies of articles and books for own reference for research purposes.	Hand-copying would be unreasonable use of time; xerography or digital scanning is better. Electronic copies can be pay-per-view or timed-usage.	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.	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.	American Geophysical Union v. Texaco
Library Copies: Librarian makes interlibrary loan copies to send to another institution that does not own the same books and journals.	Fax transmission of photocopies and sending PDF files over the Internet have made this process much more efficient and cost-effective than mailing entire books or journals. Electronic copies can be pay-per-view or timed-	Libraries are essential to knowledge formation and transmission in our society. The free use of materials purchased with public funds is a public right.	Interlibrary loan copies circumvent subscription fees and book acquisitions. License fees would shift costs from institutions (no longer need to send materials) to the individual.	Williams & Wilkins v. United States

	usage.			
Student Copies: Student makes copies of library materials for a school assignment.	Photocopy equipment is easy to use and can be placed in public areas for self-service copying. Electronic copies can be pay-per-view or timed-usage. Campus network can be used to track copyright infringement.	Students pay tuition, which enables the library to purchase materials for use. In addition, the state subsidizes education for the benefit of society.	Services can be provided where students can obtain reference materials for their coursework, for a monthly fee. Can be bundled with course textbooks.	Sony v. Universal City Studios Basic Books v. Kinkos Princeton University Press v. Michigan Document Service A&M v. Napster
Public Copies: Patron makes copies of an interesting article at a library at a public university.	Photocopy equipment is easy to use and can be placed in public areas for self-service copying. Electronic copies can be pay-per-view or timed-usage.	Taxes support higher education and the public has a right to use some services, such as library materials.	If libraries allowed free access, publishers would lose incentive to continue to create journals and books. Libraries can subscribe to databases that charge per use, thereby accounting for the general public's use of materials.	N.Y. Times v. Tasini

While the fair use cases examined in this paper did not involve institutions of higher education directly, they do have implications for university and college environments. 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 three conceptual frames: technological-determinism, public interest, and economic/market value (see figure 1). The applicable court cases from our discussion are placed in the matrix alongside the scenario(s) that best reflect the issues presented during trial.

Research design and methodology

In this paper, we review federal court cases that have proven significant to the fair use debate. Of particular interest are cases that involve the duplication of copyrighted materials (such as the photocopying of journal articles) for later use rather than the inclusion of copyrighted works in another form (such as the use of quotations in a published book or the use of a few minutes of music in a video). We have given attention to cases that involve copyright infringement in higher education settings, although no cases have been found that directly

involve a college or university in this issue. Additionally, we are interested in cases that relate to the use of information technology, such as computers or the Internet.

We began our search for cases using the legal database LEXIS-NEXIS Academic Universe, with the keywords “fair use” and “copyright.” We utilized the “cyberlaw” topic area, which references selected U.S. federal court cases “relating to computer and cyberspace law, including Year 2000 issues, public domain disputes and questions on jurisdiction, computer industry cases and intellectual property issues,” as described on the search page of LEXIS-NEXIS. In a search conducted on October 31, 2001 with the above parameters, 317 cases were returned by the database. Of these 317, nine were chosen for examination in this paper due to their association with the duplication and distribution of copyrighted work. 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.²

Copyright history

Although the Copyright Act of 1976 currently regulates fair use, examining its history helps to better understand it. Fair Use was first discussed in Folsom v. Marsh (1841) by Justice Story in 1847, where he set the terms for determining fair use. Story’s decision not only related directly back to the Copyright Act of 1790 and Article 1, section 8 of the U.S. Constitution, it referred back to British Common Law on copyright, which dates to 1557 and the Stationers Copyright. In case after case it is conceded that fair use is one of the most difficult questions a court faces because there are no bright line rules meaning each case must be decided on its particular facts using the non-exclusive guidelines introduced by Story and finally codified by Congress in 1976. Studying the development of fair use and copyright is even more difficult from a higher education perspective because Academe has traditionally been excluded from

discussions of fair use, at best located on the periphery of important cases. This is particularly true because copyright and fair use, until very recently, have dealt exclusively with questions of commercial enterprises, as opposed to non-commercial, academic ones.

The Stationers Copyright of 1557 was granted so the crown could enforce a higher level of censorship and, in return for said censorship, publishing houses could protect their commercial interests from rival publishers with complete monopoly in perpetuity on their publications. By the late 17th and early 18th century, Parliament and other interested parties, most notably publishers who were deliberately excluded from membership in the Stationers guild and therefore not protected by the Stationers Copyright, came to take an unfavorable view of this monopoly and succeeded in seriously diminishing the power and profits of Stationer's publishing houses. Their response, much like today, was to lobby Parliament for new protections. Knowing that their position was tenuous at best, publishing houses created the ruse that they were seeking protection for authors of works, not for themselves. Members of Parliament, not being fools—at least a majority in this case, created the Statute of Anne in 1710. While the Statute of Anne turned out to be a failure, at least in the sense that it did not curtail the power and profits of the publishing monopolies, it did introduce one new right and two great contributions to copyright law. The author's right was legally established in the statute. Until 1710, authors had no legal right to their work and were treated poorly by publishers. Publishers themselves had introduced the idea of an author's right because they knew they would be able to force an author to assign his right to them if he wished to have his work published, ensuring their continued monopoly. This is particularly important in the United States because in the Constitution, copyright is framed as an author's right, not a publisher's.

To promote learning and lessen the total and perpetual monopoly of publishers, the

Statute of Anne introduced the idea of copyright as a trade regulation. Copyright was granted for a fixed duration, not in perpetuity, and copyright holders were given the right to “print, publish, and vend” their work. Closely related to this innovation was the creation of Public Domain. In order to receive a copyright one now had to create a new and original work and any work that had already surpassed the new time limit would no longer be protected and would fall into the Public Domain.

The Statute of Anne failed to curtail the monopolistic practices of publishers because they lobbied to have special exceptions made, particularly an extension of all their existing copyrights, and, as they had always planned, they were able to exploit and control authors with the threat of not publishing their works. This ability to manipulate the system is evidenced by the fact that even after two overwhelming court defeats, Millar v. Taylor (1767) and Donaldson v. Beckett (1772), publishers ignored the rulings and continued on with business as usual. Clearly from the beginning British common law was focused only on commerce, for the most part protecting the profits of a select group of publishers, the Stationers. The new rights and ideas presented in the Statute of Anne and upheld in the court cases of 1767 and 1772, while a failure in England, were central to the development of copyright in The United States.

As mentioned above, the Constitution frames copyright as an author’s right, it also takes the idea of public domain introduced in the Statute of Anne and enlarges it to include the advancement of knowledge and the public’s access to it as a central tenant. Article 1, Section 8 states: 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. The language of the Constitution creates three policies: the promotion of learning, the preservation of the public domain, and the protection of the author (not the

publisher). There is also an implied right within these three: individuals have a right to use copyrighted materials, to have access to them. It is clear that the framers of the Constitution were much more interested in the public good and the rights of authors than they were in the rights (or profits) of publishers.

The Copyright Act of 1790 is the first statutory application of copyright in the U.S. Immediately following the ratification of the Constitution, the act reaffirms public domain and personal access, while listing the limited rights and protections offered to authors. The Copyright Act of 1790 gave authors a limited period of monopoly (protection) to “print, reprint, publish, and vend” their works. An author was granted these protections and rights specifically to encourage knowledge and learning in the country.

In contrast to British civil law, the rights of publishers are not emphasized in early copyright policy or statutes in the United States. Publishers still were, of course, the means by which authors were able to get their works to the market and were, therefore, still prominent in the use of copyright in America. By 1841, the year of Story’s Folsom v. Marsh (1841) decision, publishers were at the forefront of legal action regarding copyright. Folsom v. Marsh (1841) was a lawsuit brought by one publisher against another claiming that the latter had illegally used (printed and published) materials protected by copyright. At odds in this case were two scholarly studies of the life of George Washington, the second of which reproduced letters written by Washington only available in the first. The case did not dispute that each work was an original piece of scholarship or that one author plagiarized the other, instead the case focused on the abridgement of letters from the first work in the second. Until this time, abridgement was a common practice in publishing and was protected by a fair abridgement clause in the Copyright Act of 1790; with his decision, Story sought to limit the capacity of abridgement, which in effect

did not diminish copyright protection, but increased it.

The introduction of fair use

While Story never uses the term “fair use,” he introduces the principles that have been used to determine fair use ever since. Story writes that one must consider “the nature, extent, and value of the materials used [and] the objects of each work.” These principles are included almost word for word in the Copyright Act of 1976. What is interesting about Folsom v. Marsh (1841) is that it focused on purely commercial points—one publisher was suing another, and the use considered was a commercial one. In Folsom v. Marsh (1841) publishers were once again given agency in the copyright process, but the rights of individuals were not included in the decision.

Personal use and public interest were the primary concern in the Constitution, but they were never considered in 19th century cases because these cases focused on the commercial use of the copyright, not the personal use of a work. An important principle is stated in Stover v. Lathrop (1888): The effect of a copyright is not to prevent any reasonable use of the book that is sold. I go to a bookstore and I buy a book that has been copyrighted. I may use that book for reference, study, reading, lending, copying passages from it at my will. I may not duplicate that book, and thus put it upon the market, for in so doing I would infringe the copyright. But merely taking extracts from it, merely using it, in no manner infringes the copyright.

By the end of the 19th Century, new technology, most notably the player piano, had caused new problems in interpreting copyright law. Congress, therefore, began the process of a major update. The Copyright Act of 1909 was the result and contained three particularly important elements. As a result of the player piano, compulsory licenses for musical recordings were added to the act. This marks the first time that licenses of any kind were considered as part of copyright; in the Copyright Act of 1909 licenses were only for musical recordings and the

author, not the first publisher, was granted the license.

Work-for-hire and the academic exclusion

The work-for-hire concept was also addressed for the first time in the Copyright Act of 1909. With the rise of large corporate entities, it had become possible for a corporation to be the owner of a copyright because of the work of an individual or group employed by the corporation. The Copyright Act of 1909 established that an employee who is paid by a company, specifically to produce material that is copyrightable, is not eligible for copyright protection because theirs is a work-for-hire; therefore, the copyright belongs to the entity that paid for the work to be completed, not the author. Congress allowed for only one exception to the work-for-hire clause: the work of academics belonged to them even though they were employed for that work by an educational institution. This academic exclusion is tied directly back to the Constitution and the notion of the advancement of science and the public good. It also results from the traditional belief that academic work and its use was central to the public good and therefore should not be subject to commercial exploitation.

The right to copy

The most significant change in the Copyright Act of 1909 was not intended as a change by Congress at all, but rather as a return to the original language and spirit of the Copyright Act of 1790. In section 1(a) of the 1909 Act, Congress expands the rights of the copyright holder, in the mistaken belief that they were returning to the language and spirit of the 1790 Act, to include the right to copy. In terms of copyright and certainly fair use as it has come to be used today, this single word, copy, has become most problematic. Congress clearly stated that it included the right to copy as a return to the original Act of 1790 and for no other reason. In 1790, the right to copy would have referred to making replicas of original art works, not written works, because

that was contained in the right to republish a work. In 1909, Congress was certainly not referring to modern photocopiers, as they did not yet exist. This reading of Congress' intention is strengthened by the position articulated in the Stover v. Lathrop (1888) decision mentioned above. Copying a written work had traditionally been seen as a matter of personal or educational use protected by the Constitution, and, because of the extreme labor and time needed to make a copy, copying a written work for personal use had always been accepted, certainly never challenged by publishers as acceptable, because at that time the cost of the copy would have been greater than the cost of the original.

Technological impact

Throughout the 20th Century, technology continued to develop, as it had from the introduction of the printing press, and continued to complicate the interpretation of the Copyright Act of 1909. New photocopying technology made producing a copy of a work for personal or commercial use less expensive than the cost of purchasing an original, which of course, has caused publishers to stop ignoring the practice and to invoke the right to copy contained, but perhaps not intended, in the 1909 Act. Computer technology has made it possible to track the use of copyrighted materials and the granting of permission for their use, which has resulted in a trend toward using licenses in all areas of copyright, not just musical performances. As a result, the traditional ideas of personal and academic use, which have rarely been articulated, but always understood and protected, have become increasingly framed in commercial terms. This is most evident in the Copyright Act of 1976 where educational use is included under the fair use clause even though fair use had always applied only to commercial uses of a copyright. In other words, by the time of the Copyright Act of 1976, the statutory basis for almost all of the cases studied in this analysis, fair use had come to encompass any use of a copyrighted work, not just commercial

uses of a copyright.

Four fair use factors: analysis

Factor 1: The purpose and character of the use

The first fair use factor from Section 107 of the Copyright Act of 1976 states that a determination should be made as to “[t]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” In the most basic sense, none of the cases we examined, with the exception of Williams & Wilkins (1974), has focused directly on “nonprofit academic” use. The cases that are related to education are only peripherally related to it and hinge on a commercial or profit-seeking motive. In this sense, the cases considered have no bearing on how a court might judge this factor if an institution of higher education were to be sued for copyright infringement for the use of academic writing in a classroom setting. The interpretation of the first fair use factor in American Geophysical Union, et al. v. Texaco Inc. (1992/1994) was again based on the fact that Texaco was a for-profit commercial venture, and, therefore, their use of copyright material would weigh heavily against fair use. There are, however, important points that should be examined from several of these cases that might have an effect on an academic case.

Factor 2: The nature of the copyrighted work

The nature of a copyrighted work has been examined by the courts as part of the Doctrine of Fair Use, at least after 1976. Although fair use was known prior to the Copyright Act of 1976, these guidelines did not figure prominently in the 1973 case, Williams & Wilkins (1974). In fact, the guidelines were listed, but were not individually addressed, as has been common practice since. The case, as heard in the United States Court of Claims, was more concerned about pecuniary damages than with the nature of the work that was copied. The only weight given to

the nature of the work in this case is the fact that it had scientific value, and therefore was significant to the promotion of the “progress of science and the useful arts,” as mentioned in Article 1, § 8 of the U.S. Constitution. The Court also cited the 1909 Copyright Act that said copyright was “[n]ot primarily for the benefit for the author, but primarily for the benefit of the public.” (H.R. Rep. No 2222, 60th Cong., 2d Sess., p. 7). Thus, in Williams & Wilkins (1974), the scientific nature of the photocopied material weighed heavily in favor of the defendant, the Department of Health, Education, and Welfare, and against the publisher.

Factor 3: The amount and substantiality of the portion used

The third factor that is weighed in fair use analyses is the amount and substantiality of the portion of the copyrighted work that is used, in relation to the whole. While this factor has not weighed heavily in most fair use cases, it has been central to some of the cases that have been close to higher education (such as Basic Books, Inc. v. Kinko’s Graphics Corp. (1991) and Princeton University Press, Macmillan, Inc., et al. v. Michigan Document Services, Inc., et al. (1996)). The manner in which this factor has been considered by the courts is significant for higher education, in that classroom assignments of written materials have been examined under this rubric. It is also important to note that the Guidelines for Classroom Copying established by Congress in 1976 have been conflated with this factor, especially in the interpretation of what length or amount is considered “substantial.”

Factor 4: The effect of the use on potential markets for or value of the copyrighted work

The fourth factor of Section 107 of the 1976 Copyright Act, the effect of the use upon the potential market for or value of the copyrighted work, has been established by the Supreme Court as “the single most important element of fair use” in Harper & Row Publishers, Inc., et al. v. Nation Enterprises et al. (1985). In fact, the four factors employed for fair use analysis are not

equally weighted. This potential market value of the work in question sets the stage for what is a highly commercial framework for deciding fair use cases. Although American Geophysical Union, et al. v. Texaco Inc. (1992) calls for a more balanced analysis of the four factors³, a work's commercial potential and the hypothetical damage that may be caused as a result of violating fair use standards is prominent in subsequent cases and the resultant legal literature.

The intent of the 1976 Copyright Act is somewhat schizophrenic. On the one hand, it purports to “promote the progress of science and the useful arts, to act as the engine of free expression, to stimulate [the creation of useful works] for the general advancement of the public good⁴,” but via case law and the accumulation⁴ of substantial precedent, it appears that just the opposite is happening. Seen on a continuum, the inevitable outcome of such a rigid interpretation of the Act can only result in unfortunate potential consequences for higher education: the assessment of a “per use” charge to be paid by students or faculty members, additional license fees for libraries, downloading fees (online journals). Although copyright was originally intended to stimulate creativity by ensuring rights to 1) reproduce the copyrighted work in copies . . . 2) prepare derivative works based upon the copyrighted work and 3) distribute copies . . . of the copyrighted work to the public (rights seemingly associated with the author), it is altogether likely that it may have the opposite effect as academic authors find themselves in the position of paying a direct and indirect price for their own products.

Conclusions

Just as the courts have minimized the private use of copyrighted materials, educational use has been marginalized through the application of the Fair Use Doctrine. As both producers and consumers of intellectual property, those in higher education (students, staff, and faculty) have a stake in the way in which copyright is interpreted in an educational 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.

Although the protection of commerce has been an important consideration in fair use cases, to some extent it has impeded and diminished the original intention of the Fair Use Doctrine: the progress of science and useful arts. It is especially important to keep this objective in mind when considering the interests of higher education. Educational use of copyrighted materials is deeply embedded in the higher education tradition through the use of libraries and other repositories. To move in the direction of soliciting additional fees, subscriptions and purchases would not only obstruct the process of knowledge dissemination, but also prohibit it in some cases. It is important to preserve and continue the tradition of fair use in the educational realm and to distinguish it from other commercial uses.

The traditional ideas of personal and academic use, which have rarely been articulated, but always understood and protected by Article 1 section 8 of the Constitution, 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 where groups with conflicting perspectives about its legitimate uses must continually negotiate what is acceptable and what is not. The notion of what is acceptable use of copyrights has become much more constricted as technology has made it not only less expensive to make a personal copy of an author’s work, but, at the same time, has 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.

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¹ The fourth factor of Section 107 of the 1976 Copyright Act.

² Other cases of interest to the copyright issue are Addison-Wesley Publishing Co. v. Brown (1963), Encyclopaedia 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).

³ Leval writes in his 1992 opinion of American Geophysical Union, et al. v. Texaco Inc., "The importance of the fourth factor should depend on the analysis produced by examination of all the factors. If the other factors clearly indicate that the secondary use should be considered fair use, the copyright owner's deprivation of royalty revenue might play very little role in the analysis."

⁴ Intent of the 1976 Copyright Act as cited in American Geophysical Union, et al. v. Texaco Inc. (1992/1994), Basic Books Inc., et al. v. Kinko's Graphics Corporation (1991), Harper and Row, Publishers, Inc., et al. v. Nation Enterprises et al. (1985), Princeton University Press, Macmillan, Inc., et al. v. Michigan Document Services, Inc., et al. (1996), Sony Corporation of America, et al. v. Universal City Studios, Inc., et al. (1984).