Copyright Law & Teacher-Created Digital Content: Important Policy Considerations

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Introduction

The proliferation of digital learning material created for classroom use by teachers and university professors over the last several years has prompted a number of questions around who owns the content developed by teachers and what are the rights and liabilities of school districts. The uncertainty surrounding this area of intellectual property law suggests that school districts to consider updating their policies and use form contracts to avoid conflict and achieve the goals of the institution.

Copyright Law & Teacher-Created Material

The Copyright Act broadly protects an "original work that is fixed in a tangible medium" and which meets minimal standards for creativity.[1] The definition of "works" includes electronic material prepared for educational purposes, both inside and outside of the classroom setting.

Copyright does not extend to the protection of ideas but rather, the original, creative *expression* of those ideas. For example, an online course on how to build a tree-house protects the course itself but not the underlying method of building a tree-house. In protecting the author or other owner's expression, the Copyright statute gives the owner the exclusive power to: "1) copy or reproduce the work; 2) create derivatives or adaptations; 3) sell or transfer the rights; 4)

[1] 17 U.S.C. § 102. See also Feist Publ'n, Inc. v. Rural Tel Serv., 499 U.S. 340 (1991) (regarding minimum standards of creativity).

publicly perform the work; and 5) publicly display the work."[2] Copyright protection lasts for the life of the author, plus seventy years.[3]

Copyright attaches automatically when the work is created. Copyright *registration* is a legal formality that is not required to establish ownership of rights in a work. However, in the United States, registration is a pre-requisite to enforcing rights in a work through a complaint for infringement in court. Timely registration also creates a legal presumption that the facts stated on the registration certificate are accurate, shifting the burden on a would be infringer to prove, for example, that the work is not owned by the claimant.

Even more importantly, if the owner of a copyrighted work fails to register the work prior to infringement or, in the case of a published work, within six months of first publication, then two important legal remedies are forever lost: statutory damages and attorney's fees.[4] Statutory damages can be very helpful in a case where infringement is clear, perhaps even purposeful, but the economic harm to the copyright owner is not so clear. Under the Copyright statute, a court may award between $750 to $30,000 for each act of infringement.[5] In the case of willful infringement, the maximum recovery of statutory damages can be increased to $150,000. Taken together, the copyright owner's ability to collect statutory damages and attorney's fees can create a powerful incentive for the infringer to settle quickly.

What limitations exist on a copyright claim? A general exception provided by the Copyright Act that also applies to the educational setting is Section 107, also known as the "fair use" exception. This exception permits the limited use of copyrighted materials without first obtaining permission from the copyright holder. In determining whether an unauthorized use of a

[2] Id.
[3] 17 U.S.C. § 302(a).
[4] 17 U.S.C. § 412
[5] 17 U.S.C. § 504(c)(1).

copyrighted work is "fair," courts will consider 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the work as a whole; and 4) the effect of the use upon the potential market value of the work.[6]

The Copyright Act also expressly includes specific provisions designed to balance the societal need to protect the freedom of teachers to conduct lessons while protecting the rights of copyright owners, which may include teachers themselves and the institutions in which they are employed. For example, Section 110(1) of the Act contains a "classroom use" exception which exempts from copyright liability the "performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution…" so long as the person using the work did not know or have reason to know that the copy being used was not lawfully obtained.[7]

In 2001 Congress passed the Technology, Education and Copyright Harmonization Act (TEACH Act) with a goal of providing more explicit guidance on the balance between the competing interests of owners and users of educational materials in light of the emerging trend of digital learning. The TEACH Act provides somewhat broader protections for use of education materials by teachers in a number of ways: 1) it expands the type of content that can be used; 2) it allows the digitization and short-term retention of content that the Internet and similar technology require; and 3) it eliminates a provision that required students to be physically present in the same location.[8]

However, the TEACH Act also includes a number of detailed, narrowing provisions designed to prevent these exceptions to copyright infringement from swallowing the rule and rendering copyrights in educational works worthless to their owners. For example, "a work

[6] 17 U.S.C. § 107.
[7] 17 U.S.C. § 110(1).
[8] 17 U.S.C. § 110(2).

produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks" does not qualify for the exception, and thus, would require permission before use.[9] This avoids the unfairness that would result in creating an exception to copyright infringement that allowed teachers to steal the online curricula of other teachers.

Other types of works can qualify for the exceptions under the TEACH Act if the detailed requirements of the Act are met. These included "the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission..." Users should take care, however, to ensure compliance with the very detailed requirements of Section 110(2) to ensure the exception will apply.[10]

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[9] 17 U.S.C. § 110(2).

[10] These Section 110(2) requirements to qualify for the TEACH Act exception to copyright infringement include the following: (A) the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution; (B) the performance or display is directly related and of material assistance to the teaching content of the transmission; (C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to— (i) students officially enrolled in the course for which the transmission is made; or (ii) officers or employees of governmental bodies as a part of their official duties or employment; and (D) the transmitting body or institution— (i) institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection; and (ii) in the case of digital transmissions— (I) applies technological measures that reasonably prevent— (aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and (bb) unauthorized further dissemination of the work in accessible form by such recipients to others; and (II) does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination;

Who is the author of teacher created materials? The short answer is that as technology has driven an increase in the variety and use of teacher created materials, this seemly simple question – who owns what – has can become complex and in need of explicit clarification. [11] Historically, educational materials such as lesson plans that were created by teachers in the course of their employment were viewed by the courts as the original work of the teacher.[12] As such, teachers were given the copyright to all of their educational materials.

It should be noted that this legal presumption giving teachers, and not their employers, the copyright ownership to the works they created in course of their employment was directly contrary to the general rule in most employment situations. [13] Under the general "Work for Hire" rule, if an employee creates an original work in the scope of his or her employment, courts generally identify the employer as the "author" of the work. There are several factors that courts weigh in determining whether this rule applies: "1) the employer's right to control the manner and means by which the product is accomplished; 2) the skill required; 3) the source of the instrumentalities; and 4) the tax treatment of the employee; and 5) whether the employer has the right to assign additional projects to the employee."[14]

The rationale for the "work for hire" rule is not difficult to comprehend. The rule acknowledges that "employers often invest substantial resources to support the creative work of their employees.[15] Furthermore, particularly with respect to university professors, often

[11] See, e.g., Johnson, Andrea. "Reconciling Copyright Ownership Policies for Faculty-Authors in Distance Education." 33 J. L. & Educ. 431 (2004). SETDA Policy Brief: Clarifying Ownership of Teacher-Created Digital Content Empowers Educators to Personalize Education, Address Individual Student Needs, May 2014.
[12] SETDA Policy Brief at 3.
[13] The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age: A Foundational White Paper. Available at http://cyber.law.harvard.edu/media/files/copyrightandeducation.html#3_2
[14] Johnson, *supra* note 4, at 442.
[15] Strauss, Nathaniel. "Anything but Academic: How Copyright's Work-for-Hire Doctrine Affects Professors, Graduate Students, and K-12 Teachers in the Information Age." 18 Rich. J.L. & Tech. 4, at 10.

employers would not invest such resources, commission the work, or even hire the employee if the employer did not retain ownership of the work.[16]

The history of the "teacher exception" to the "work for hire" rule, however, is complex. The exception emerged in common law in 1929 and enjoyed widespread acceptance for several decades until the late 1970s, when the Copyright Act was passed.[17] Part of the current legal uncertainty stems from the fact that neither the language nor the legislative history of the Copyright Act mentions the "teacher exception," or any other exception to the "work for hire" rule. Interpreting the Act is further complicated by the fact that the Act does not define the terms "employee" or "scope of one's employment."

Legal scholars and courts interpreting the Copyright Act are split as to why the "teacher exception" was not codified expressly in the Act. One view is that Congress did not include the exception because it was no longer viewed as appropriate, and therefore Congress wanted to abolish it. Another view is that the teacher exception was so well established in American jurisprudence by the time the Act went into effect that Congress took it for granted that the exception would continue to flourish.[18] Furthermore, with respect to teacher-created digital materials, which are increasingly becoming a common method of teaching, the Copyright Act is out of date. As a result, the answer to the question of who owns teacher-created digital materials is unclear under the Copyright Act.

Policy Considerations for States and School Districts

[16] *Id.* (citing Sandip H. Patel, "Graduate Students' Ownership and Attribution Rights in Intellectual Property." 71 Ind. L.J. 481, 496 (1996).
[17] Strauss, *supra* note 9, at 9.
[18] Townsend, Elizabeth. "Legal and Policy Responses to the Disappearing 'Teacher Exception,' or Copyright Ownership in the 21st Century University." 4 Minn. Intell. Prop. Rev. 209 (2003) at 226.

Given the uncertainty of level of copyright protection provided by both the Copyright Act and the TEACH Act, as well as the lack of consensus among the courts, states and school districts are advised to construct individual policies and use assignment and licensing form contracts designed to reflect their particular intentions as to who should enjoy copyright protection for teacher-created digital content. States and school districts need up-to-date policies which apply to both purchased content from traditional vendors as well as teacher-created content. These policies and contracts should address copyright and licensing explicitly so as to avoid the legal uncertainty created by the backdrop of "default" law – statutes, case law, etc. – which would control in the absence a policy or contract.

One approach, which may be especially relevant in the case of an institution that has invested a great deal of time and money in developing an online curriculum, is to treat the resulting work as an asset of the institution. Under this regime, the school's policy would state that a condition of employment for all teachers is that any educational materials they create are both (a) understood to be within the scope of their employment and (b) owned by the school. The policy would also state that the teachers agree to assign any works that later come into being. Use of the work would then be allowed by the school under a license agreement, reflecting whatever terms the school deems appropriate, which may include royalties, attribution, and restrictions on the use and distribution by licensees.

As K-12 institutions become more involved in the creation of digital curricular, they can benefit from review of myriad policies and licensing regimes already in place at colleges and universities, which have offered distance learning for decades. An intriguing approach being taken can a number of institutions of higher education is to foster an environment of collaboration between faculty-authors and the institution. In fact, some universities include as

their mission to assist faculty in the commercialization of their work.[19] Collaboration also allows teachers to focus on the content of their educational materials, and "shifts the responsibility for design of the courseware to specialists that understand the commercial uses of the product."[20]

These collaborative efforts at commercializing educational materials likewise require careful contract structuring with third parties in order to ensure adequate compensation for both teachers and their employers. Issues such as who is to be paid and how much must be carefully considered in these arrangements.

From the perspective of ensuring that the school is itself avoiding infringement by carefully checking the source of the content being used by teachers, some Districts have opted to use, when available, works offered under a "free" license. It is important to check the limitations of such licenses when doing so in order to ensure compliance.

One example of such works are those which are offered as Open Educational Resources (OER). OER are "teaching and learning materials licensed in such a way that they are free and may be used, reused, remixed, and otherwise customized to meet specific needs"[21] These are resources that exist in the public domain or are available under an open license so that they can be used freely by both educators and students alike.

Other examples of "free" type licenses are offered under the Creative Commons form licenses, which include six different variations defining differing permissions for use, distribution and revision. For example, the "Attribution license" allows others to "distribute, remix, tweak, and build upon your work, even commercially, as long as they credit you for the

[19] Johnson, *supra* note 11, at 451.
[20] *Id.*
[21] *See* SETDA, Out of Print: Reimagining the K-12 Textbook in a Digital Age (2012), available at http://www.setda.org/priorities/digital-content/out-of-print/ .

original creation."[22] Another license is the "Attribution Non-Commercial license," which allows others to "remix, tweak, and build upon your work, and although their new works must acknowledge you and be non-commercial, they don't have to license their derivative works on the same terms."[23]

Conclusion

Determining who owns teacher-created digital content in any context is not an easy task. Traditionally, the material teachers created for use in the classroom was treated as the original work of the teacher and not the institution. However, after the passage of the Copyright Act of 1976, this traditional approach is no longer widely followed. Courts provide conflicting answers as to who owns this material. In order to avoid litigation and the uncertainty surrounding this area of copyright law, school districts should consider developing clear policies regarding the ownership of teacher-created digital content. Clear and well drafted contracts between teachers, school districts, and third parties are also necessary in clarifying issues of ownership and licensing.

[22] Creative Commons, "About The Licenses," available at http://creativecommons.org/licenses/.
[23] *Id.*