

Introduction

The current state of the fair use doctrine, as applied to nonprofit educational institutions, has been described as “quite unclear” (Samuelson, 2009, p. 2619), marked by “widespread misunderstanding” (Patry & Posner, 2004, p. 1643), and existing in a “climate of misinformation” (Jaszi & Aufderheide, 2009). The components leading to this confusion include a vague federal statute, a nationwide patchwork of guidelines that differ from school to school and which define fair use differently than the statute, and two federal cases concerning fair use for nonprofit educational purposes, which, though influential, are of limited scope and precedential value, and leave many related issues unresolved.

The resulting situation is one where instructors have no way to know, with certainty and absent litigation, whether the use of a particular text-based resource will be deemed a fair one; where the high cost of permission fees can leave instructors making choices based on the cost of a resource rather than content; and where copyright policies of educational institutions appear to be guided more by the fear of lawsuits than the desire to further the progress of learning.

The solution recommended by this paper is an amendment to the fair use law, applicable to fair use for nonprofit educational purposes. The proposed amendment would create a rebuttable presumption of noninfringement for the nonprofit use of up to one-third of the content of any text-based, copyrighted materials for multiple classroom handouts, e-reserves, password-protected links on courseware and course syllabi, and any similarly purposed future technology, by teachers at all levels of nonprofit educational institutions. The new law would replace the current four-part statutory test, and supersede the assorted versions of classroom guidelines now in use. The result of such legislation would be to provide all stakeholders with clear and predictable parameters, thereby furthering the progress of learning, leveling the educational playing field, and eliminating the current imbalance favoring content providers.

The paper will begin by describing the backdrop of the current state of fair use, including the statute itself, Classroom Guidelines, case law, and electronic resource licensing. The next section explains why educational fair use is still an important issue, deserving of renewed attention. Following that is a review of various alternative solutions that have been proposed, including new guidelines, best practices, and compulsory licensing. The final sections explain why the alternatives are unsatisfactory, why the law needs to be changed, and how the author’s proposal for an amendment to the current law would work.

Background

Statutory Law

The common law doctrine of fair use was first enacted as statutory law as part of the Copyright Act of 1976. This set of revisions to copyright law in general and fair use in particular came about as the result of 12 years of congressional debate and consultation with groups of publishers, educators, and authors (Brandfonbrener, 1986). Section 107 of the law reads in relevant part as follows:

[T]he fair use of a copyrighted work, including such use by reproduction in copies ... 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
- (4) the effect of the use upon the potential market for or value of the copyrighted work. (17 U.S.C. §107)

The term “fair use” is not defined, no maximum page or word limits are stated, and no guidance is offered as to how the four factors should be weighed. Nor is any indication given as to whether the four factors are exhaustive, or if other factors might be taken into account as well. According to the legislative history, Congress rejected “the formulation of exact rules in the statute,” in order to accommodate “the endless variety of situations and combinations of circumstances” that might arise in each case, as well as unforeseen technological changes (H.R. Report No. 94-1476, 1976, p. 66; hereinafter “House Report”). The United States Supreme Court, in the case of *Sony v. Universal City Studios*, characterized this stance as the rejection of a “rigid bright-line approach” (*Sony v. Universal City Studios*, 1984, p. 448, fn. 31)—language that would be repeated in later cases, as well as in much of the literature on fair use.

Originally, educators had argued for a blanket exemption for educational fair use, stating that a requirement of advance clearance and payment of fees would “inhibit use of teachers’ imagination and ingenuity” (H.R. Report No. 90-83, 1967, p. 30). However, the AAP and Authors League successfully countered that a blanket exemption would hurt “authorship, publishing, and ultimately education itself” (H.R. Report No. 90-83, 1967, p. 31), and the Judiciary Committee agreed, stating that the exemption was “not justified” (House Report,

1976, pp. 66-67). As a compromise, the educators were given language in the statute referring to “multiple copies for classroom use” and “nonprofit educational purposes.”

Guidelines

During negotiations over the language of the fair use statute, the Judiciary Committee of the House of Representatives charged stakeholders from the fields of publishing, writing, and education with drafting guidelines that would achieve a “meeting of the minds as to permissible educational uses of copyrighted material” (House Report, 1976, p. 67). The groups participating in the negotiations were the Association of American Publishers (AAP), the Authors League of America, and representatives of a group of 25 educational groups called the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision (Ad Hoc Committee).¹ No members of a conceivable fourth stakeholder, school libraries, were invited to participate.

The compromise reached after a year of meetings was called the “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals” (Classroom Guidelines). The Classroom Guidelines stated, among other “safe harbor” provisions, that complete works could be copied only if they were shorter than 2,500 words, that only 1,000 words or 10 percent of longer works (whichever was less) could be copied, and that the instructor’s decision to photocopy must be spontaneous—that is, so close in time to the work’s proposed classroom use that there would be insufficient time to request permission from the copyright holder (House Report, 1976, pp. 68-69).

The American Association of University Professors (AAUP) and the Association of American Law Schools (AALS)—two groups that were not part of the Ad Hoc Committee—wrote to Congress objecting to the Classroom Guidelines as “too restrictive with respect to classroom situations at the university and graduate level” (House Report, 1976, p. 72). The Committee’s response was that higher education had been represented on the Ad Hoc Committee, that the guidelines stated only minimum standards, and that the preface to the guidelines recognized that there might be instances of copying that would fall outside the guidelines but which might still be permissible.

Another group that disapproved of the Classroom Guidelines was the American Library Association (ALA). In 1982, the ALA drafted its own “Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use,” and stated therein that the Classroom Guidelines’ standards “normally would not be realistic in the University setting” (Austin, 2004, p. 79).

The Classroom Guidelines, while incorporated into the House Report, were not made part of the 1976 Copyright Act. However, many educational

institutions went on to adopt the Classroom Guidelines, either verbatim or in modified form, as official policy. Kenneth Crews stated that as of 1993, some 80 percent of college and university copyright policies were based on the Classroom Guidelines, adding that, “no university policy is any more restrictive than the Classroom Guidelines, and no policy even suggests that the guidelines are too permissive” (Crews, 1993, p. 74).

One reason for such extensive adoption of the guidelines is the outcome of a 1982 lawsuit—the first of its kind—filed by eight publishers, including Addison-Wesley, against New York University (NYU). The publishers, with the backing of the AAP, claimed that NYU professors and lecturers illegally used photocopies of copyrighted works in their classes (Austin, 2004; Brandfonbrener, 1986). The case settled before going to court, with NYU agreeing to adopt the Classroom Guidelines—not as minimum standards, but as the maximum allowable unless permission of the copyright owner or the university’s general counsel was obtained in advance (Brandfonbrener, 1986). As reported by Brandfonbrener, “Publishers in the AAP, threatened by increasing photocopying, immediately began using the NYU settlement to campaign for the imposition of photocopying policies similar to NYU’s at colleges and universities across the country” (p. 672). The success of that campaign is apparent not only in the fear of lawsuits that seems to dominate copyright policy on most campuses today, as well as the broad-scale adoption of the guidelines noted above, but also in the lucrative secondary market for permission fees that adoption of the guidelines has created.

The Judiciary Committee, at the close of the section of the House Report dealing with classroom use, expressed the hope that “if there are areas where standards other than [the] guidelines may be appropriate, the parties will continue their efforts to provide additional specific guidelines” (p. 72). Such an attempt was made by a much larger group of stakeholders—this time including the AALS, AAUP, and library associations—during the 1994-1998 Conference on Fair Use (CONFU).² However, no agreement on any of the proposals regarding use of digital images, electronic reserves, interlibrary loans, distance learning, or other topics related to electronic resources was reached, and as of this writing, the Classroom Guidelines have not been revised or updated (Crews, 2001; Lehman, 1998, pp. 11-12).

Case Law

Scant case law authority exists interpreting the fair use statute in the context of fair use for nonprofit educational purposes. The U.S. Supreme Court has dealt directly with educational fair use only in dicta, in the case of *Campbell v. Acuff-Rose*, which states in a footnote that when weighing the first factor of the statute, “The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution” (*Campbell*

v. Acuff-Rose, 1994, p. 579, fn.11). Only two federal court cases, one at the district court level and one at the appellate, have ruled on the issue of educational fair use since the 1976 Copyright Act went into effect. Both cases involved commercial copy shops that prepared coursepacks on behalf of university professors. In both cases, the court found that because commercial copiers were involved, the copying was not for a nonprofit educational purpose. Both also made approving references to the Classroom Guidelines in deciding the amount and substantiality factor, and both concluded that there was a detrimental market effect because the publishers were deprived of permission fees.

Basic Books v. Kinko's was decided by the Southern District Court of New York in 1991. The court began by recognizing that, “Courts and commentators disagree on the interpretation and application of the four factors,” and that, “The search for a coherent, predictable interpretation applicable to all cases remains elusive” (*Basic Books v. Kinko's*, 1991, p. 1530). The court then proceeded to do its part in further muddying the waters. Great reliance was placed on the Classroom Guidelines with its proscribed word counts, followed by a statement that a “bright line pronouncement” was improper (p. 1537). As Crews noted, the court’s attempt to apply the guidelines to a situation already determined not to involve copying by a nonprofit organization “was both superfluous and deleterious” (Crews, 1993, p. 7).

The second case, *Princeton University Press v. Michigan Document Services, Inc. (MDS)*, decided by the Sixth Circuit in 1996, is significant primarily for interpreting two of the factors in such a way as to make it virtually impossible for an educational institution to prevail in a fair use lawsuit. Having found that the purpose in question was not educational in nature, the court went on to state that the third factor in the statute—the amount and substantiality of the portion used—required an assessment of the “value” of the excerpted material, and that, “the fact that the professors thought the excerpts sufficiently important to make them required reading strikes us as fairly convincing ‘evidence of the qualitative value of the copied material’” (*MDS*, 1996, p. 1389, quoting *Harper & Row v. Nation*, 471 U.S. 539, 565). Essentially, this meant that a chosen resource—if it exceeded the safe harbor word count of the Classroom Guidelines—couldn’t qualify as fair use under this factor simply by virtue of its having been chosen by the instructor.

The fourth factor—effect on the potential market—also defaulted to the publisher. The court held that the fact that a licensing market exists meant that, “the potential for destruction of this market by widespread circumvention of the plaintiffs’ permission fee system is enough...to negate fair use” (*MDS*, 1996, p. 1388). The court rejected the argument that no permission fees would be owed in the first place if a determination of fair use could be made based on other factors.

While neither case has the same weight of authority as a ruling by the U.S. Supreme Court—federal district court decisions are binding only on the parties to

that case, while appellate court decisions bind only courts in that circuit—both are considered persuasive authority and have clearly caused many educational institutions to take a conservative stance on fair use. Steven Melamut, commenting on the fact that after *Kinko's* many academic institutions began reexamining their policies and paying permission fees, stated that, “It is interesting that so many colleges and universities chose to treat themselves as if they were commercial photocopy services” (Melamut, 2000, p. 182). This was true even when the copying was done by on-campus, non-commercial copy shops, or when the copies took the form of electronic reserves or digital copies made available through hyperlinks—forms of copying not addressed by the courts.

It should also be noted that *MDS* was recently followed by the District Court for the Eastern District of Michigan in its ruling on a motion for partial summary judgment. The case involved students who made their own copies of coursepacks delivered to a commercial copier by professors, using the commercial shop's machines (*Blackwell*, 2009). In ruling in the publishers' favor, the court observed that it was the copy shop, not the students, that was accused of infringement for making copies without permission or payment of fees, that it did not matter who pressed the button on the shop's copiers, and that the situation would be different if students had obtained the coursepacks from a friend or third party rather than the shop. While the ruling does not have the weight of case law, it demonstrates that courts still struggle with defining the exact parameters of educational versus commercial copying and fair use.

Licensing of Digital Resources and State Contract Preemption of Federal Copyright Law

An additional factor that bears upon the ever-diminishing allowance of fair use is the licensing of digital resources. Because access to most electronic resources is leased rather than sold to libraries, the doctrine of state contract preemption applies, effectively overriding federal copyright law (Braman & Lynch, 2003). Parties to the license must negotiate which, if any, provisions of copyright law will still be in force under the terms of the contract. If the publisher has more bargaining power than the library, as is usually the case, the right to make copies, to put scholarly articles on e-reserve, or to provide links to articles through course management systems may be limited or prohibited outright.

On the other hand, it should be noted that some authors have advised that federal copyright law should preempt conflicting state contract law provisions, not the other way around. Gordon and Bahls (2007) stated that, “courts should be more willing than they are now to use preemption to strike down those purported contractual restraints that violate congressional intent as found in the fair use provision” (p. 648).

Why Educational Fair Use is an Important Issue

In his dissent in the *MDS* case, Judge Ryan explained why the issue of educational fair use is an important one. He stated that

Society benefits when professors provide diverse materials that are not central to the course but that may enrich or broaden the base of knowledge of the students. Society is not benefited by establishing a presumption that *discourages* professors from exposing their students to anything but complete original works even when most of the work is irrelevant to the pedagogical purposes, and students are not benefited or authors/publishers *justly* compensated if students are required to purchase entire works in order to read the 5% or 30% of the work that is relevant to the course. (*MDS*, 1996, p. 1404, italics in original)

In the same case, Judge Martin, also dissenting, made approving reference to the long-established practice of making copies for classroom use. He also pointed to publishers' efforts to thwart such educational use, noting that in 1976, the publishing industry sought a ban on such copying, but that Congress refused—"and the publishing industry has been trying ever since to work around the language of the statute to expand its rights" (*MDS*, 1996, p. 1396).

Building on Judge Martin's comments, an argument can be made that the issue of educational fair use is important because this ongoing expansion of publishers' rights and concomitant diminution of educators' rights to make fair use of copyrighted materials thwarts an important public policy goal. The public education system in this country was developed in an effort to equalize educational opportunities and to ensure that all children received at least a grade-school education (see, e.g., PBS, 2001). Fair use is a necessary part of the implementation of that policy. As Bartow (1998) noted, "students and educators are among the primary beneficiaries of fair use" (p. 150). A school that cannot afford to provide reading materials, in either print or digitized form, cannot fulfill its purpose.

Yet, risk-averse behavior continues on the part of educators because they believe that the uncertain boundaries of fair use, along with the known enforcement strategies of publishers, make the payment of permission fees less costly than any assertion of fair use (Aull, 2008, pp. 601-602). An effort to change the law so that any layperson could understand it without resorting to advice from lawyers or judges—in essence, a law that would make it "safe" to use educational fair use—is important in order for the law to work as intended. Fair use should align with the overall intended purpose of copyright law: the advancement of knowledge.

The issue of educational fair use is important because providing access to information and enabling instructors to teach to the best of their ability should not depend on the financial resources of a high school, the endowment of a college, or

the amount of state resources that can be allocated to a university. Fair use levels the playing field, at least to some extent. It holds the promise of allowing teachers to make decisions based on content rather than cost, of promoting the progress of learning regardless of economic status.

Exactly what these financial costs are can be illustrated by looking at one high school composition class. In this example, the instructor, instead of using a textbook, decides to have his students compare and contrast excerpts he has copied from A. S. Neill's *Summerhill* and B. F. Skinner's *Beyond Freedom and Dignity*. According to the Copyright Clearance Center, as of January 31, 2009, the cost for permission to copy 15 pages from each book, for a class with 25 students, is \$129.75.³ If that amount is multiplied by the same number of handouts over the course of a quarter or semester, the cost rises beyond what many schools can or will pay—especially if the school is one that cannot afford textbooks or where teachers are using their own money to pay for supplies—because remember that copyright laws apply to middle schools and high schools, as well as colleges and universities.

Yet, some publishers have argued that making multiple copies for classroom use should not be considered fair use at all. Sanford Thatcher, director of the Penn State University Press, wrote that this kind of “quantitative” fair use is “no more than a form of parasitical publishing,” neither creative nor transformative, but mere “free riding” by those who don't want to contribute to the cost of publication (Thatcher, 2006, pp. 217-218). Thatcher includes not only photocopies, but also digital copies, such as those maintained in e-reserves, as uses that undercut the economic basis of academic publishing, and which therefore should not be protected. This is an argument that privileges publishing over learning. As Bartow (2003) described the situation, “content owners have effectively positioned themselves as the victims of an immoral citizenry that will ‘steal’ copyrighted works at every opportunity unless the laws and the courts intervene” (p. 16). However, what publishers seem to forget, and what Judge Martin sought to remind them in his dissent in *MDS*, is that, “The essence of copyright is the promotion of learning—not the enrichment of publishers” (*MDS*, 1996, p. 1395). The institution of education does not need more obstacles to the process and progress of learning, especially not those erected by the AAP.

Without fair use we are left with a system of information resource haves and have-nots. The issue of educational fair use should be revitalized, because doing away with fair use, or letting the AAP set the terms, harms teachers and students. Educational fair use makes sense as a matter of public policy, and fulfills our responsibility to further the Constitutional purpose of promoting the progress of science and the useful arts. As Christine Borgman (2007) stated, “Scholarship progresses by discussion, transparency, and accountability, all of which require that scholarly works are widely and readily available” (p. 101).

Alternative Solutions

While almost everyone has agreed that the current situation involving fair use is unsatisfactory, no unanimity exists regarding the proper course toward the future. Various alternatives have been suggested, ranging from imposing a compulsory license system similar to that in place for sound recordings (Morris, 1992),⁴ to renewed calls for “free use” (Lessig, quoted in McLeod, 2007, p. 329).⁵ Others have pessimistically concluded that when it comes to anything related to the Internet, if “there are royalties to be collected and any potential commercial interest in the vicinity”—including Internet Service Providers—educators should assume that no fair use exists (Howe-Steiger & Donohue, 2002). Below is a review of suggested strategies for change—or in some cases mere caution—organized into categories of legislative action, judicial action, institutional or group-based action, and private action.

Legislative Action

Parchomovsky and Goldman (2007), in their article, “Fair Use Harbors,” propose that legislators adopt a “minimalist approach” and define the permissible scope of fair use according to subject matter (p. 107). For example, the use of literary works would be restricted by law to 300 words or 15 percent, whichever was less (p. 128). Any use exceeding this safe harbor would not necessarily constitute infringement, but would be subject to the statutory four-factor analysis. However, the authors make no reference to proposed limits for the use of scholarly works—text-based nonfiction resources that would not be considered “literary”—and so provide no guidance for much of the material that would be used outside of the humanities (and certainly some utilized within that field).

Michael Carroll (2007) states that Congress should create a Fair Use Board within the Copyright Office (pp. 1090, 1023). The Board would have the authority to issue rulings from petitioners seeking opinions on actual or contemplated uses of copyrighted works, although the rulings would be binding only on the parties to the case, and the losing party would have the option of appealing to a federal circuit court of appeals. Carroll recommends that filing fees for petitions to the Fair Use Board be set on a sliding scale, but does not address the issue of the high costs of federal court appeals. He also cautions that “Fair use judges with an eye toward returning to practice would have strong incentives to render rulings favorable to copyright owners” (p. 1124).

Gordon and Bahls advocate amending the law to make clear that fair use is a right and not an affirmative defense. They further endorse language by which Congress would make “emphatically clear that the availability of licensing does not foreclose the possibility of fair use” (Gordon & Bahls, 2007, p. 624). Carole Silberberg recommends new legislation replacing the Classroom Guidelines with

“a statute specifically addressing educational fair use” (Silberberg, 2001, p. 655). She provides no details for such legislation, however, instead suggesting that Congress hold hearings and take public opinion into account.

Legal action also includes opposing legislative attempts aimed at limiting fair use or otherwise broadening copyright protection. In 1998, Colbert and Griffin presciently made note of the active publishing lobby, and cautioned academic institutions to “vigilantly monitor” the content providers’ legislative efforts (p. 460). They advised colleges and universities to support groups representing academic interests, assert themselves into the legislative process when educational issues are at stake, and oppose bills that threaten to curtail scholarly research and teaching efforts. For proof that the publishing lobby is still active, one need look no further than the current Congress, where the Fair Copyright in Research Works Act (H.R. 801) was introduced for the purpose of overturning the 2008 National Institutes of Health (NIH) open access policy. The bill is supported by the AAP and the American Association of University Presses (AAUP), and opposed by the American Library Association and the Association of College and Research Libraries (Suber, 2008).

Judicial Action

Silberberg, in addition to recommending new legislation, also suggests that courts adopt a more favorable attitude toward fair use for nonprofit educational purposes, and, in weighing the second statutory factor, focus on the proportion of licensed to unlicensed works used by an instructor. She states that use of at least 66 percent of licensed materials for a single class should be the threshold for favoring fair use (Silberberg, 2001, p. 652). Silberberg, like Gordon and Bahls, also asserts that the existence of licensing should not preclude a finding of fair use.

Hannibal Travis (2006) argues that courts should not deny fair use “whenever a merely potential harm may be imagined” (p. 765). Marjorie Heins and Tricia Beckles (2005) recommend creating a network of attorneys and law students trained in intellectual property law who would provide free or low-cost legal assistance and other resources to clients threatened with legal action by content providers (p. 57).

Pamela Samuelson (2009) posits that because educational fair use involves three of the six statutorily favored purposes of fair use—teaching, scholarship, and research—courts should therefore presume educational and research uses are fair, and shift the burden of proof to the publisher. Following the approach taken by the Supreme Court in *Sony v. Universal City Studios* (464 U.S. 417), Samuelson would require publishers to prove actual or potential harm to the market for the work in order to overcome the presumption of noninfringement (p. 2587). Samuelson further states that, “Given the important role that fair use plays

in mediating tensions between copyright law and the First Amendment and other constitutional values, it would be appropriate for the burden of showing unfairness to be on the copyright owner” (p. 2617).

Cambridge University Press v. Becker (*Becker*, originally *Cambridge v. Patton*), filed in April of 2008, may serve as a test case for educational fair use of digital copies. In *Becker*, three academic publishers sued officials at Georgia State University (GSU) for copyright infringement. The copyrighted material in question was made available to GSU students through e-reserves, department web pages, and hyperlinks on online course syllabi, without the publishers’ permission. In its answer to the publishers’ complaint, GSU stated that “Plaintiffs’ claims are barred by the doctrine of fair use pursuant to 17 U.S.C. § 107, including the fact that any alleged use of copyrighted materials was for the purpose of teaching, scholarship or research and for nonprofit educational purposes” (*Cambridge University Press v. Becker*, 2008, Answer, Fourth Defense). In addition, in its answer to the publishers’ first amended complaint, GSU specifically denied that its electronic course reserve excerpts competed with the publishers’ sales (*Becker*, 2008, Amended Answer, para. 33).

Unlike *Kinko’s* and *MDS*, *Becker* does not involve commercial copy shops, so the use in question cannot be construed as commercial. In addition, the GSU faculty and library staff have the advantage of being able to claim that they were following guidelines (significantly revised after the lawsuit was filed) promulgated by the school’s Regents Copyright Committee. Those guidelines defined as fair use the posting of journal articles or book chapters on password-protected sites, as long as the use is for pedagogical purposes and not simply to avoid purchasing a work (Regents Copyright Committee, 1997). As of this writing, the *Becker* case is still pending. If the parties do not settle, a decision could greatly impact the future of educational fair use, for better or worse. A settlement, on the other hand, would probably reinforce the status quo of paying permission fees for any use deemed outside the Classroom Guidelines.

Institutional or Group-Based Action

Jaszi and Aufderheide recommend the development of user community-based best practices guides, giving as an example the Documentary Filmmakers’ Statement of Best Practices in Fair Use. Jaszi asserts that a consensus of the use community can then sway judges and legislators to act in their favor.

Colbert and Griffin acknowledge that the Classroom Guidelines are not considered satisfactory to users, and further may not apply to electronic resources. Their recommendation is for academic institutions to develop better guidelines, noting that, “if bright-line standards can be defined to aid decision-making as to the use of copyrighted materials, an opportunity exists to mount a successful defense to charges of infringement and possibly diminish the onset of such

allegations at large” (Colbert & Griffin, 1998, p. 455). They also recommend increased training and education for academics, so that everyone understands that no blanket exemption for educational purposes exists.

Prudence Adler, of the Association of Research Libraries, also endorses the use of university guidelines, stating that, “This has to be locally driven. A one-size-fits-all approach does not work” (Foster, 2008, p. A10).

The need for a review of university policies and increased training and education was likewise the conclusion of a group of researchers who conducted a 2003 study of research library policies regarding print and electronic reserves (Gould, Lipinski, & Buchanan, 2005). The study found that 36.2 percent of respondents imposed a specific percentage, page, or chapter limit for use of a copyrighted resource without first obtaining the copyright holder’s permission or paying permission fees (Gould et al., 2005, p. 189). Of those, 61.9 percent relied on the Classroom Guidelines, while 31.8 percent said their limit was based on statutory law—an obvious problem since the fair use statute contains no express page limits (pp. 189, 191).

Carol Ou, commenting on the use of copyrighted material in electronic reserves, and taking a more conservative approach, advised that, “libraries should make an effort to play it safe. Libraries need to make sure that they do not incur any liability for themselves or their parent institutions” (Ou, 2003, p. 95).

In regard to licensing, the California Digital Library (CDL), International Coalition of Library Consortia (ICOLC), and National Information Standards Organization (NISO) have all created model licenses or statements of preferred practices that include provisions recognizing fair use. The CDL Standard License Agreement also contains a paragraph stating that, “Licensee and Authorized Users may use a reasonable portion of the Licensed Materials in the preparation of Course Packs or other educational materials” (California Digital Library, 2006). The word “reasonable” is not defined.

Private Action

Both Ann Bartow and Samuel E. Trosow look upon the issue of fair use as one of personal responsibility, and recommend that instructors assert their right to educational fair use through action. Trosow (2001) states that educators should “not be intimidated by the aggressive tactics of a handful of publishers who wish to place locks and meters on the store of human knowledge,” even if it means risking a lawsuit (p. 54). Bartow (1998) advises her readers to “be subversive”—to publish only in journals that will designate their work “permission fee free” for nonprofit educational use, and not to pay permission fees themselves, because to do so would be an admission that permission is needed (pp. 229-230).

Along somewhat similar lines, Joseph B. Baker recommends the use of what he terms “conditional waiver contracts” such as Creative Commons licenses

or the GNU General Public License to supplement fair use law and resolve its weaknesses. Baker (2009) states that licenses where all or some of the author's exclusive rights under copyright law are waived provide "specific and explicit contract terms [that] can function as a definite set of standards by which to judge an actor's conduct (p. 759).

Why the Law Should Be Changed

The alternatives outlined above are either unsuitable, insufficient, or both. While Bartow and Trosow offer brave and perhaps admirable advice, the risk of a lawsuit is not one that many universities or individuals would invite. The Creative Commons licenses mentioned by Baker are an excellent way for authors to decide how and when to share their work, but Baker fails to address the situation of publishers who refuse to accept the work to begin with unless all rights are assigned or the author pays a large fee for open access. The suggested legislative changes do not go far enough to ensure clarity or predictability under the law, and changes to university policies or guidelines do nothing to ensure uniformity or help to equalize the educational playing field. Samuelson's idea of requiring publishers to prove harm to the market for the work rather than mere loss of permission fees is especially commendable, all the more so because under her formulation it appears that any educational use would be presumed fair, regardless of the amount copied. But with no legislation requiring such a presumption, there is no guarantee or reason to believe that courts would follow her advice. Further, requiring parties to litigate each questionable instance of fair use is neither fair nor practical. The process of federal litigation is costly and time-consuming, and, absent a Supreme Court decision, fails to ensure the pronouncement of a fair use law applicable to all jurisdictions.

The fair use statute, as it stands, has not protected the common good. The most commonly articulated sentiments about Section 107 are that the law is vague, uncertain, and confusing to both lawyers and laypersons (see, e.g., Colbert & Griffin, 1998; Crews, 2001; Silberberg, 2001). The flexibility sought by legislators has resulted in language that is overly vague and unfair to educators, who must second-guess judges in deciding whether a given classroom use of copyrighted materials will be deemed a fair use. William W. Fisher III, in his article on the growth of intellectual property in the United States, noted the public was very rarely represented in the negotiations that took place over the language of the 1976 Copyright Act. Fisher stated that, "Congress itself—whose job, one might think, is precisely to protect the public's interest—failed to do so" (Fisher, 1999, section II.D).

The court system likewise has proved inadequate to the task of protecting the public interest, as expressed in the Copyright Clause's stated goal of

promoting the progress of learning and knowledge. Lawrence Lessig (2004) stated that

As lawyers love to forget, our system for defending rights such as fair use is astonishingly bad—in practically every context.... It costs too much, it delivers too slowly, and what it delivers often has little connection to the justice underlying the claim. The legal system may be tolerable for the very rich. For everyone else, it is an embarrassment to a tradition that prides itself on the rule of law. (p. 187)

Even the majority in *MDS*, making note of the changes in technology and teaching practices that had occurred since the 1976 Copyright Act went into effect, stated that, “If the law on this point is to be changed...the change should be made by Congress and not by the courts” (*MDS*, 1996, p. 1391).

Another reason why the law should be changed is that for too long now, too much deference has been paid to the publishing industry, and not enough to the welfare of students. As Silberberg (2001) observed, “Allowing publishers to determine what is fair use provides incentives for them to appropriate greater control while reducing public access” (p. 651). Bartow (2003), putting the matter more succinctly, stated that, “Copyright owners have a profit-maximizing normative view of copyrights best described as ‘absolute control’” (p. 16).

Brice Austin (2004), considering the question of whether the payment of permission fees has mattered, in terms of their effect on education, stated that

If one imagines students and faculty from different institutions having vastly different educational experiences in terms of quality—some unhindered in their teaching and learning and research, others continually confronted by restrictions that seem to fly in the face of what was the original purpose of copyright law: “To promote the progress of science and the useful arts”—then, yes, it does matter. (p. 42)

Therefore, although a number of authors, Jaszi and Crews among them, do not want the current law revised (Jaszi fears the “negative implication” that would result from imposition of a legal bright line—that anything on the wrong side of that line would be deemed infringement [Jaszi & Aufderheide, 2009], and Crews lauds the law’s flexibility as “essential for fair use to meet unpredictable needs” [Crews, 2001, p. 697]), this author feels strongly that a clear, “bright-line” amendment to the law, generously interpreting educational fair use, would be preferable to maintaining the current risk-your-job or play-it-safe environment. The time has come for educators to reclaim control of the doctrine of fair use in the name of academic freedom for instructors and enrichment of the learning environment for students. Parents, teachers, administrators, students, and legislators must insist that education comes first.

How the Law Should Be Changed

The fair use law should be amended to give academic institutions engaging in copying done for nonprofit educational purposes a presumption of noninfringement. While the Supreme Court in *Sony v. Universal City* stated that if a use were found to be noncommercial, it would carry a nonconclusive presumption of fairness, the Court also stated that such a presumption would not be “the end of the inquiry,” and went on to analyze market effect (*Sony v. Universal City Studios*, 1984, pp. 448-450). This approach does not serve the best interests of students or teachers. The law proposed herein involves a two-part test for the use of text-based resources by nonprofit educational institutions that would supplant the current four factors, and supersede both the Classroom Guidelines and local (single university or college) fair use policies. Under this law, the only questions would be:

1. Is the use for a nonprofit educational purpose?

And, if the answer is yes,

2. Is the use reasonable?

“Nonprofit educational purpose” would mean that no profit could be made either through the mechanical copying process or the distribution of copies to students. “Copies” would be defined to include photocopies, e-reserves accessible only by students in the class for which the reading material was assigned, links to electronic resources via password-protected websites, and any like technologies now known or realized in the future. “Reasonable,” in this context, would be defined as 33 percent or less of the content of a book, monograph, journal, magazine, or other text-based resource. If a challenged use met both of these tests, the burden would then shift to the content provider to prove that the use was not for a nonprofit educational purpose, or was not reasonable. Potential market effect would not come into play unless copyright infringement was found to have occurred and damages had to be assessed.

The result would be a much simpler framework for courts to utilize in deciding educational fair use cases where text-based resources were at issue. Instead of first examining the four-section 107 factors—deciding in whose favor each should fall, and how much weight to give to each—then taking the Classroom Guidelines into account (and, conceivably, the institution’s own guidelines as well), and finally commenting on prior case law, judges would have one narrowly-drawn law to interpret.

Better still, there might be less of a necessity to rely on courts. With passage of the proposed law, instructors at nonprofit educational institutions would know exactly where they stand regarding the use of text-based resources. Fear of lawsuits may not end, but it would be much diminished. Librarians, too, would benefit, by having one universal definition of “fair use” language in

licenses for electronic resources, as well as certainty regarding how many pages of a given resource could be put on e-reserve.

While publishers will undoubtedly (and understandably) worry that the proposed law might undermine sales, subscriptions, and general income, it should be noted that they have, in the past, proved remarkably resilient and creative when it comes to finding new ways to generate revenue. One example is the publishing industry's adaptation to the perceived threat of open access. In response to the growth of open access journals, publishers created the concept of gold open access, whereby contributors to scholarly journals were given the option of paying publishers up to thousands of dollars for the privilege of having their work made immediately available through open access upon publication. Another point for publishers to bear in mind is that the proposed law does not abolish permission fees; it simply defines the level at which they must be paid.

As Michael Carroll (2007) noted, "Copyright law must respond to the rise of owner aggression and its chilling effects" (p. 1148). The proposed amendment to copyright law attempts to accomplish this goal in a politically palatable manner by offering a means to improve education and access to information at no cost and much benefit to the tax-paying public.

Conclusion

In no other area of substantive law is the level of vagueness found in the current fair use statute considered a positive attribute. Overly restrictive guidelines negotiated between private parties, without input from the public, are not the answer. A blanket exemption for educational fair use is not likely to be passed, as legislative history has shown. On the other hand, as Colbert and Griffin (1998) stated, "it is clear that taking no position on these matters serves neither the interests of scholarly research nor academic teaching efforts" (p. 462). The position taken by this paper, therefore, is to advocate an amendment to the law for fair use for nonprofit educational purposes that falls reasonably between a blanket exemption and doing away with educational fair use altogether.⁶ This amendment draws a "bright line" between infringement and noninfringement, thereby providing clear standards and predictability. The proposed allowance of one third of any text-based resource is sufficiently generous to advance the goals of leveling the educational playing field and prioritizing education.

Appendix A: Participants in 1975-1976 Discussions About Permissible Educational Uses of Copyrighted Material

- Authors League of America

- Association of American Publishers
- Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision (the Ad Hoc Committee)
 - American Association of Colleges of Teacher Education
 - American Association of Jr. Colleges
 - American Association of School Administrators
 - American Association of University Women
 - American Association of Teachers of Chinese Language and Culture
 - American Association of Teachers of French
 - American Association of Teachers of Spanish and Portuguese
 - American Council on Education
 - Association for Higher Education
 - College English Association
 - Council of Chief State School Officers
 - Department of Audiovisual Instruction, NEA
 - Department of Classroom Teachers, NEA
 - Department of Foreign Languages, NEA
 - Department of Rural Education, NEA
 - Midwest Program Airborne Television Instruction, Inc.
 - National Association of Educational Broadcasters
 - National Catholic Educational Association
 - National Catholic Welfare Conference
 - National Commission on Professional Rights and Responsibilities, NEA
 - National Council of Teachers of English
 - National Education Association
 - National Educational Television and affiliated stations
 - National School Board Association
 - National Science Teachers Association

Appendix B: Conference on Fair Use Participants

Alliance for the Promotion of Software Innovation (APSI)
American Association for the Advancement of Science (AAAS)
American Association of Community Colleges (AACC)
American Association of Law Libraries (AALL)
American Association of Museums (AAM)
American Chemical Society (ACS)
American Council of Learned Societies (ACLS)
American Council on Education (ACE)
American Library Association (ALA)

American Musicological Society (AMS)
American Physical Society (APS)
American Printing House for the Blind (APHB)
American Society of Composers, Authors and Publishers (ASCAP)
American Society of Journalists and Authors (ASJA)
American Society of Media Photographers (ASMP)
American Society of Picture Professionals (ASPP)
Association for Information Media and Equipment (AIME)
Association for Instructional Technology (AIT)
Association of Academic Health Sciences Libraries (AAHSL)
Association of American Colleges and Universities (AACU)
Association of American Medical Colleges (AAMC)
Association of American Publishers (AAP)
Association of American Universities (AAU)
Association of American University Presses (AAUP)
Association of Art Museum Directors (AAMD)
Association of College and Research Libraries (ACRL)
Association of Recorded Sound Collections (ARSC)
Association of Research Libraries (ARL)
Association of Test Publishers (ATP)
Art Libraries Society of North America (ARLIS/NA)
Authors Guild, Inc./Authors Registry, Inc. (AG/AR)
Broadcast Music Incorporated (BMI)
Business Software Alliance (BSA)
Center for Computer-Assisted Research in Humanities (CCARH)
Church Music Publishers Association (CMPA)
College Music Society (CMS)
Computer and Communications Industry Association (CCIA)
Consortium of College and University Media Centers (CCUMC)
Copyright Clearance Center (CCC)
Copyright Management Services (CMS)
Copyright Society of the United States of America (CS)
Council of Literary Magazines and Presses (CLMP)
Creative Incentive Coalition (CIC)
Educom/Coalition for Networked Information (Educom/CNI)
First Church of Christ Scientist (FCCS)
Graphic Artists Guild (GAG)
Indiana Partnership for Statewide Education (IPSE)
Information Industry Association (IIA)
Information Technology Industry Council (ITIC)
Institute for Learning Technologies (ILT)

Instructional Telecommunications Council (ITC)
Interactive Multimedia Association (IMA)
International Association of Scientific, Technical & Medical Publishers
(IASTMP)
International Intellectual Property Alliance (IIPA)
J. Paul Getty Trust
Magazine Publishers Association (MPA)
Major Orchestra Librarians Association (MOLA)
Medical Library Association (MLA)
Motion Picture Association of America (MPAA)
Music Educators National Conference (MENC)
Music Library Association (MLA)
Music Publishers Association (MPA)
Music Teachers National Association (MTNA)
National Association of Broadcasters (NAB)
National Association of Schools of Music (NASM)
National Coordinating Committee for the Promotion Of History (NCCPH)
National Council of Teachers of Mathematics (NCTM)
National Education Association (NEA)
National Music Publishers Association (NMPA)
National Public Radio (NPR)
National School Boards Association (NSBA)
National Science Teachers Association (NSTA)
Newspaper Association of America (NAM)
Ohiolink
Picture Agency Council of America (PACA)
Public Broadcasting System (PBS)
Recording For the Blind & Dyslexic (RFB&D)
Recording Industry Association of America (RIAA)
Smithsonian Institution
Society of Music Theorists (SMT)
Software Publishers Association (SPA)
Sonneck Society for American Music (SSAM)
Special Libraries Association (SLA)
The Copyright Group
University of Texas, Office of General Counsel
U.S. Copyright Office
U.S. Library of Congress/National Digital Library Program
U.S. National Commission on Libraries and Information Science (NCLIS)
U.S. National Endowment for the Arts (NEA)
U.S. National Endowment for the Humanities (NEH)

U.S. National Library of Medicine (NLM)
U.S. National Science Foundation (NSF)
Visual Resources Association (VRA)

Notes

¹ A complete list of the Ad Hoc Committee is included in Appendix A.

² A list of the CONFU participants is included in Appendix B.

³ The CCC website (<http://www.copyright.com>) allows users to find out what a particular permission fee will be, per page, per student. This particular example was chosen because the author's favorite high school English teacher, Mr. Rod Flagler, handed out the excerpts described to her composition class back in 1973—before passage of the 1976 Copyright Act, and before publishers came up with the egregious concept of permission fees.

⁴ Stephen Breyer, in a law review article he wrote before joining the Supreme Court, also considered the viability of such a licensing mechanism in lieu of fair use, but concluded that, "it is doubtful that schools and libraries would be willing, or could afford, to pay as much for the right to make photocopies as commercial radio and television stations pay for the right to play copyrighted music" (Breyer, 1970, p. 332). He also noted the anticompetitive problems that a licensing clearinghouse creates, stating that they do little to promote competition or keep permission costs down.

⁵ The exact quote by Lawrence Lessig, referring to fair use in a larger context, is "*Fuck* fair use. We want *free* use."

⁶ The Google Book Search Amended Settlement Agreement (http://thepublicindex.org/docs/amended_settlement/amended_settlement_redline.pdf) allows Google to display up to 20% of any copyrighted book it scans, but not more than five adjacent pages at a time (Section 4.3(b)(i)(1)). The final 15 pages of any work of fiction would also be blocked under the amended agreement (which, as of this writing, has not been given final approval by the judge in the case). The standard set forth in the Agreement should be distinguished from that in the law proposed herein by the author by the fact that the former applies to a commercial enterprise and the latter to nonprofit educational institutions. United States public policy favoring education should dictate that nonprofit educational institutions be given broader fair use rights than a profit-driven business.

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