The Case for clarifying the conundrum of US Copyright Law: What is fair about status quo perceptions of “fair use”?

by Jason Stone

Oklahoma State University

EDLE 6463
**Introduction**

Dictionary.com defines a conundrum as a noun. The specific preferred usages are “1. a riddle, the answer to which involves a pun or play on words, as ‘What is black and white and read all over? A newspaper.’ 2. anything that puzzles.” US copyright law certainly qualifies as a conundrum using both of the above popular uses.

Imagine a scenario that is everyday happenstance in higher education. A university with limited resources empanels a taskforce with the job of auditing the university’s current educational and instructional practices to determine if the school is violating copyright. Imagine the first meeting of such a taskforce. In this meeting a project manager, the University Attorney has been asked to meet with a three faculty members, the Director of Library Services, The Director of the Center for Faculty Excellence, and the Director of Information Services.

It would be safe to assume that this group will have very different ideas about what current copyright law is (Solomon, 2000). It is probably even safer to assume that within this group there will be very different ideas about what constitutes “fair use”. This group will wrestle with the questions, is our institution violating copyright, and if so, are we protected under fair use. At some point during their deliberations the faculty members and the Director of Library Services are likely to agree that there is nothing fair about status quo interpretations of fair use; hence, the pun which qualifies our examination of this puzzling topic as a conundrum.
Map of the Territory

This writing is not a comprehensive and unbiased description of current US copyright law. This writing is a brief overview of a few major historical happenings impacting the “fair use” doctrine of US copyright law. Additionally, this writing will examine two recent copyright cases that are significant to the application of fair use doctrine on US college campuses. These two cases are the digital reserves case of Cambridge University Press et. al. v. Patton et. al., and the digital video streaming case of The Association for Information and Media Equipment v. UCLA. Not surprisingly, both of these cases wrestle with how new computer technologies are impacting and changing understandings of US copyright law. The ever-expanding use of these technologies in instruction contributes to the confusion of Higher Education administrators, faculty, and staff regarding the application of the fair use doctrine to US copyright law (Solomon, 2000).

This paper argues that both of these cases are welcome in that they clarify serious points of confusion in current copyright law. While being welcome clarifications, it is clear that both of these rulings could have and should have gone farther to clarify what constitutes fair use. This paper will conclude with examples of how these two cases should have clarified current copyright conundrums.

US Copyright Law

Article 1, Section 8 of the US Constitution states is commonly referred to as The Progress Clause. It reads that Congress has the authority, “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" (U.S. Constitution, 1878). US copyright law was the natural offspring of this language in the Constitution. Copyright law assures the creators of written, audio, or video works the rights to financial profits from their constructions. Fair use, which is an affirmative defense to copyright infringement (McDermott, 2012), states that under certain circumstances, the free use of a copyrighted work for “criticism, comment, news reporting, teaching, scholarship and research” (Kogan, 2012) are legally acceptable uses. What constitutes fair use has become increasingly unclear in recent decades (McDermott, 2012). The application of digital computer technology, more diffuse access of video editing software, and ever-growing publishing costs have all conspired to muddy the fair use water.

Fair use was legally codified in the US copyright Act of 1976 (Kogan, 2012). However, before the passage of that law, fair use had already been carved out by judicial fiat (Soloman, 2000; Kogan, 2012). Congress’s codification in 1976 was based on guidance provided by the Federal Copyright Register’s 1961 Report. Which defined fair use as:

Quotation of excerpts in a review or criticism for purposes of illustration or comment; quotations of short passages in a scholarly or technical work, for illustration or clarification of the author’s observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson (Kaminstein, 1961)
Additionally, Section 107 of the Copyright Act of 1976 establishes four factors to be used in determining if a specific use is fair or not:

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.

Kogan (2012) deems it important to note that courts are not prevented from examining other factors, nor are courts required to give any particular weight to any of the aforementioned factors. However, factors 3 and 4 have been given the most weight by the court in recent rulings (Soloman, 2000). Armed with a better understanding of the legal roots of fair use law, an exploration of the Digital Millennium Copyright Act (DMCA) is appropriate.

The DMCA...

The TEACH Act was passed into law in 2002. In the context of this law, TEACH is an acronym that stands for Technology, Education, and Copyright Harmonization. This law was designed to make the use of digital media easier in online teaching. The TEACH Act allowed instructors more latitude in using copyrighted works in distance education, online, and hybrid courses. This relaxation included rules for digitizing, copying, and storing copyrighted works used for approved distance education purposes. Until the passing of this law the digital teaching space was very different from the physical teaching space.

A recent ruling form the US copyright office clarified tension between the TEACH Act and the DMCA. As stated above the DMCA prevents the
ripping of copyrighted video materials. Prior to this ruling, conventional wisdom was that the TEACH act protected the streaming of video in a password protected online class, however, the DMCA prevented the ripping of the video from a DVD. Functionally, information technology workers, librarians, and academic technologist had the capability to both rip and stream the video; however, they only had legal standing to do the later as opposed to the former. The clarification provided by the copyright office allows for both of these actions.

**Recent Cases**

Having completed a cursory, basic, and wholly inadequate primer on a very convoluted and contested facet of US federal law, a summation of two recent cases involving distance education, digital rights, and unresolved disputes within the law is in order. The two dominant modes of sharing learning with students these days are documents and videos. Cases involving both of these modes of sharing will be discussed in this section.

**Cambridge University Press et. al. v. Patton et. al.**

Reserve textbooks and readings have been a mainstay of educators for centuries. When educators bring hard-to-find, out of print, or limited resources into their teachings, they will often put those materials on reserve with the college’s library. This long-accepted practice has taken on a digital version of itself. Many libraries have made digital achieves available to their instructors for the purpose of digitally distributing e-reserve readings to students. This practice is the functional, digital equivalent of reserves that
used to be located behind the check-out desk at most university libraries. However, as is often the case with US copyright law, once a computer is used, rampant confusion engulfs what were long-settled legal issues. Such was the case when a consortium of publishers and copyright holders began to examine the practice of digital reserves.

The American Association of Publishers (AAP) took up the cause and accused several schools of using their e-reserves system as a vehicle to intentionally skirt copyright laws. The AAP represents Cambridge University Press, Oxford University Press, Inc., and Sage Publications, Inc. Before bringing pressure on Georgia State and eventually suing, the AAP threatened Cornell, Hofstra, Syracuse, and Marquette. Georgia State was singled out because it did not immediately ascribe to the AAP’s guidelines of cost-per click/no pay equals no click copyright (McDermott, 2012). The AAP was threatening suit against anyone who didn’t fold to their new industry guidelines.

Although not part of any literature reviewed for the purposes of this writing, it is important to note that each of the above threatened institutions are private or semi-private institutions. Georgia State is a public, land-grant institution; hence, it enjoys a measure of Sovereign Immunity. This no doubt led to individuals being named in the suit as opposed to Georgia State’s Library. Additionally, Georgia State is an urban, largely minority serving institution, so GSU’s thought process about what should be considered a fair use for their students’ learning surely differed significantly from the private,
more affluent, more well healed universities. A comparison of the size of these university’s endowments is instructional. Cornell has a $5 billion endowment. Georgia State’s endowment is the smallest of any of the AAP’s target universities at just over a $100 million (NABUCO, 2011). It is possible that Georgia State’s sovereign immunity coupled with their comparable much more shallow pocket contributed to their decision to make the plaintiffs seek redress in the courts as opposed to bowing to the new licensing guidelines.

Cambridge and Oxford University Presses in cooperation with Sage Publications brought suit against individual employees of Georgia State University: Patton, Henry, Hurt and Albert. In filings submitted to the Georgia northern District Court in April of 2008, Cambridge et al alleged that copyright to 99 of their published works were infringed upon by Georgia State University’s overly liberal e-reserve policies. The plaintiff’s alleged that the overly permissive use of the e-reserves were a functional, low-cost, “market replacement” to paying proper royalties for these items through the use of a course pack which would use photocopies and pay a royalty (Albanese, 2012).
Presiding Judge Orlina Evans rebuked the publishers. The publishers sought comprehensive injunctive relief that would have had major implications for fair use doctrine. Judge Evans found that of the publisher 99 asserted instances of copyright violation that only 5 actual infringements occurred. Most of these centered around a faculty member scanning of an entire book into a .pdf that included every page of a written work. Judge Evans also ruled that based on the tax returns and royalties earned for the works in question, that Georgia State's use, even if an infringement had not significantly impacted the market for the work or Sage's profits.

Brandon C. Butler, the director of public-policy initiatives for the Association of Research Libraries characterized the ruling as a "crushing defeat" of the publishers. Butler further asserted that Judge Evans ruling suggests that Georgia State is "getting it almost entirely right" given that only 5 of the 99 alleged infringements were found to be infringements.

Subsequently, Judge Evans has further clarified her rulings and indicated that the publishers were guilty of filing frivolous litigation and are responsible for over $3 million in defendants' legal fees and court costs. The publishers filed their appeal USCA Case number 12-14676-FF; 12-1514 on November 20, 2012 (www.justia.com, 2012).

However, Judge Evans did not enthusiastically endorse the e-reserve policy of Georgia State either. Judge Evans made a comprehensive and sweeping examination of copyright as it relates to digital reserves and issued scores of pages of dicta in her nearly 350 page ruling. Specifically, Judge
Evans proposed a 10% rule to clarify fair use with regard to e-reserves. If a book has fewer than 10 chapters, then according to Judge Evans, “unpaid copying of no more than 10 percent of the pages in the book is permissible under factor three” (Howard, 2012). For works with more than 10 chapters, Judge Evans asserts, “permissible fair use would by copying up to one chapter or its equivalent” (Howard, 2012).

A comprehensive analysis of Judge Evans ruling is beyond the scope of this writing. Additionally, because the publishers have filed an appeal, such an analysis might not be productive. However, the ruling was comprehensively analyzed by New York Law School Professor James Grimmelmann. On Grimmelmann’s (2012) blog, The Laboratorium, he stated, the operational bottom line for universities is that it’s likely to be fair use to assign less than 10% of a book, to assign larger portions of a book that is not available for digital licensing, or to assign larger portions of a book that is available for digital licensing but doesn’t make significant revenues through licensing. This third prong is almost never going to be something that professors or librarians can evaluate, so in practice, I expect to see fair-use e-reserves codes that treat under 10% as presumptively okay, and amounts over 10% but less than some ill-defined maximum as presumptively okay if it has been confirmed that a license to make digital copies of excerpts from the book is not available

Clearly, Grimmelmann’s analysis asserts that in nearly all circumstances that faculty members are safe using less than 10% of a text. In many circumstances, it may not be considered an infringement for a faculty member to use more than 10% of a work. Additionally, in many instances it will not be considered and infringement to offer much more of a work that is
not available for digital licensing. Further, Grimmelmann (2012) asserts that this ruling gives libraries a green light to use all or nearly all of so-called “orphan works”. Some of the tests that Judge Evans fashions in dicta revolve around the question of licensing. Since a publishing company may not even be aware that they own a copyright and have subsequently orphaned their work, librarians and faculty members are free to digitally copy these works in their entirety because no publishers will be crying foul.

**The Association for Information and Media Equipment v. UCLA**

This case involves UCLA’s use of video recordings of Shakespeare’s plays for use by faculty and students in their courses. The Association brought suit alleging that UCLA had violated their copyright. The co-plaintiff, Ambrose Video Publishing, had recorded the videos. The plaintiffs allege that UCLA’s act of streaming them was a violation of their copyright. The plaintiffs further allege that UCLA has violated the provisions of the DMCA and sought declaratory relief for breach of contract. UCLA initially desisted from streaming the videos and removed them from course sites. However, after internal consultation between members of UCLA’s library staff, academic technologist, professors, and legal counsel, UCLA sent a letter to AIME and to AVP and indicated that they were going to continue to stream the videos and did not believe themselves to be in violation of their use agreement.

U.S. District Court Judge Consuelo B. Marshall ruled in a concise 13 page ruling was different in most ways to the ruling of Judge Evans in the
The aforementioned Cambridge University Press et. al. v. Patton et. al. Judge Marshall only briefly addressed the copyright issues. Most of Judge Marshall’s tersely worded ruling focuses on UCLA’s two primary defensive arguments; namely (1) that UCLA is a sovereign entity and never agreed to be sued and (2) that The Association for Information and Media Equipment and Ambrose Video do not own the rights to the videos and hence do not have standing to sue over copyright infringement.

Judge Marshall does briefly address a bona fide copyright argument on pages 8 and 9 of his ruling. Judge Marshall agrees with UCLA that their contract with Ambrose Video Productions grants UCLA the right to play the video. Judge Marshall agrees with Ambrose that they maintain the right to control copying, public performance, public display, and public distribution. Judge Marshall further rules that UCLA’s playing of the video was on an internal password protected website, and hence was not a public performance, display or distribution. Finally Judge Marshall indicates that any “unauthorized copying was an incidental ‘fair use under the Copyright Act and therefore permissible’” (Marshall, 2011, pp. 8-9). The implications of Judge Marshall’s sentence are sweeping. In addition to the clarification offered by the Register of Copyrights, this ruling gives a green light to universities to stream all sorts of media behind a password protected website like a course management system. That opens up a teaching space online that is just as robust as any onsite. Ultimately, that harmonization has been the goal of most of the legislation and legal decisions in this area.
Conclusion

As the cartoon on the title page indicates, copyright is a confusing conundrum. It is challenging for legal scholars like the previously cited expert Grimmelman to keep track of all the twists and turns of these complicated laws. As an esteemed professor of Higher Education Law recently lamented, “The single-most violated laws on any college campus are copyright laws” (Fern, lecture, 2012). As such, professors, librarians, academic technologist, information technologists, and legal counsel must all work together to ensure that the university is in compliance with the ever-changing and amorphous cannon of law.

This exploration terminates with the wisdom of Mark Twain, “Only one thing is impossible for God: To find any sense in any copyright law on the planet” (Brainyquote, 2012). Copyright law has always been an overly-complicated and pedantic enterprise. For much of human history, authors, musicians, playwrights, and artists have made a living based on what they produced by copyright. Our notion of media and the consumption of entertainment has changed dramatically in the past few decades. We have gone from Beta-Max tapes to NetFlix in less than 30 years. To assume that period patches like the Sony Bono Copyright Extension Act, the Digital Millennial Copyright Act, the TEACH Act and a few court rulings are sufficient to ensure that US copyright law has appropriately entered the digital age is hopelessly naïve. Congress should take up the issue, grant sweeping lieniancy to universities to use materials and to allow digital course reserves
to use extensive use of scanned materials with password protection. College costs are advancing at speeds that are outpacing inflation by a margin of 5 to 1 (McMahon, 2012). In fact, the cost of attending an average US state school is estimated to costs over $120,000.00 by 2015 (McMahon, 2012). One way to combat such pressures would be to allow for extensive use of digital reserves. With all the obstacles to effective teaching and learning, copyright law should be last thing that our taskforce in the introduction spends 60+ hours talking and researching this semester. Higher education has so many important challenges that are far more worthy of attention, resources, and grey matter. Congress should clarify the conundrum of copyright law with sweeping legislation that limits the timeframe of copyrights, expands the public domain, codifies the sanctity of the creative commons, eases the burdens of using orphaned works, and removes barriers to using any amount of any media, print or art work for educational purposes.
References:


Brainyquotes (2012),
[http://www.brainyquote.com/quotes/keywords/copyright.html#sv6gTWFGcMylf7s.99](http://www.brainyquote.com/quotes/keywords/copyright.html#sv6gTWFGcMylf7s.99)


