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Copyright, Fair Use, and Teaching and Learning Innovation in a Web 2.0 World

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The dynamic nature of information technologies and the Internet has challenged some of the social norms, market models, and laws that traditionally provided structure for conformity to copyright restrictions, academic integrity policies, and general expectations of privacy. Computer functionality and the availability of malleable media on the Internet would make it seem as if anything that is technically possible, such as cutting, pasting, sharing, ripping, burning, and posting, is also legal and appropriate for academic pursuits in a community of scholars. Unfortunately, that assumption is incorrect. Historically, technology disrupts traditional rules, and it often takes decades, if not centuries, for new business models, laws, and social norms to catch up and align with new distribution methods and expectations of privacy. The United States, and in fact the world, is currently in a state of flux about these issues. This makes it difficult for faculty and students to know what is appropriate behavior and proper form when engaged in academic projects such as writing papers, doing research, creating a multimedia presentation, or posting information about themselves or others on course sites or on the Internet.

This ECAR research bulletin reviews some of the basic tenets of copyright in the digital millennium. Specifically, it discusses the ways in which copyright law, fair use provisions, and the TEACH Act interact with today's teaching and learning, especially the use of Web 2.0 tools by both faculty members and students.

Highlights of Copyright and Teaching and Learning Innovation in a Web 2.0 World

The Copyright Act of 1976 is the existing copyright law in the United States, and by virtue of treaties and other international agreements, it is also the legal framework for copyright law in most developed countries. Designed to reflect the technologies in use in 1976, the act is a catalyst for friction between the law as it was designed and its applicability to technologies that have revolutionized communications and the distribution of information, tools, and entertainment.

Under copyright law, the United States protects original work set in a tangible medium. The threshold for originality is generally quite low. For example, the law does not protect a simple index such as a phonebook, but a clever reorganization of the list according to categories or accompanying artwork in advertising design would be protected. Originality is commonly found in literary, academic, dramatic, musical, artistic, and other intellectual works. Tangible media include anything from print and paper to Hypertext Markup Language (HTML), hard drives, film, and architectural blueprints.

Copyright law grants exclusive rights to copy, distribute, prepare derivative works (such as a translation), perform, or display the work publicly. These privileges apply for the life of the author plus 70 years for an individual rights holder, and 95 years for a corporate rights holder. The law requires neither registration (except to acquire greater damages in a lawsuit) nor any symbol (such as a ©) for protection; the process of creating an original work in a tangible medium is sufficient to obtain copyright.

The Digital Millennium Copyright Act of 1998

The Digital Millennium Copyright Act (DMCA) is an amendment to the existing Copyright Act. Promulgated in 1998, 22 years after the Copyright Act of 1976, it is an attempt by lawmakers to update copyright law to comport with new technologies, including digitization and data networking in particular. It consists of two main parts: a procedural section devoted to outlining the process whereby content owners can notify Internet Service Providers (ISP) about an alleged infringer, and a substantive section that makes the breaking of encryption codes a violation of copyright law. The DMCA is of particular interest to higher education. As the stewards and custodians of campus data networks, information technologists tend to be more familiar with the first part of the law. As shorthand, this section is known as the “500” provisions for its numbered section in the law. It is this section that defines, for example, the safe harbor provisions and requirements for the registration of a DMCA agent, many of whom are information technology (IT) or library professionals. Even in cases where the DMCA agent sits outside of the IT shop, such as in legal counsel, the implementation process almost always involves networking personnel. Engineering and computer science research faculty have taken a keen interest in the second part of the law, or the “1200” section, because in their view it criminalizes research and consequently stifles innovation. This research bulletin focuses most heavily on the 500 section provisions.

Section 512(a)

The first and foremost point about the 500 section of the DMCA is the immunity that it provides ISPs as passive conduits of allegedly infringing material. This provision, 512(a), is perhaps the most misunderstood provision in all copyright law by higher education administrators because, as a “safe harbor,” it is often confused with the safe harbor of 512(c) that addresses circumstances in which the institution is both the ISP and the owner of the server of allegedly infringing material. Under 512(a), so long as the ISP acts only as the conduit and does not interfere with the content of the data, it enjoys this immunity from copyright infringement liability, with one interesting exception: the obligation to terminate the account of repeat offenders. Unfortunately, the definitions of these terms, “terminate” and “repeat offenders,” are unclear in statute and case law. But the central point remains worth reiterating: unless the institution has provided and continues to own the computers from which a student, for example, is distributing copyright-protected material without permission, the institution DOES NOT have liability for the infringement deriving from a computer connected to its network. This provision, which was written into copyright law for the purpose of promoting the Internet, all but guarantees legal protection for ISPs to act as conduits for content.

Section 512(c)

As noted above, Section 512(c) concerns circumstances in which the institution owns both the data network services and the device serving the allegedly infringing material. This provision outlines a process whereby a content owner can contact the ISP of the alleged infringement and also specifies what the ISP can do in response to mitigate its potential liability. As a matter of choice, the ISP can register a DMCA agent with the

Library of Congress, which makes that registry available to content owners so that they know to whom to address the notice. Furthermore, the institution should make an electronic mail address easily available and identifiable on its web pages to expedite the process by which the content owner can send the notice. Eleven elements make up the notice, such as a claim of authority to issue it as either owner or agent of the content, identification of the allegedly infringing material, the time of the alleged act, and the Internet Protocol (IP) address of the alleged infringement. It is important for custodians to know that content owners face those obligations in order to identify a notice as legitimate. In exchange for mitigated liability, the institution must “expeditiously eliminate the traffic from the network,” which many campus networks accomplish by blocking the IP address either manually or through an automated program. This provision also allows for a “counter-notice” process whereby the person responsible for the transmission may use a legally sanctioned process claiming ownership or permission to distribute the material. If such notice is issued according to due process, the ISP is required by law to allow the transmission. Any subsequent legal action then occurs between the content owner and the user in a federal court of law. The ISP, having extinguished its legal obligations via the provisions of this section of the DMCA, should not be a party to that action.

Fair Use in Higher Education

Prior to the Copyright Act of 1976, common law defined fair use. The 1976 act codified fair use to be determined by four factors:

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.¹

Since then, case law has introduced other factors that qualify as a fair use exception; for example, a parody, even when it uses the entirety of a work, qualifies. “Transformative effects”—a concept open to interpretation but often applied to technology—through case law has effectively become another factor; for example, allowing the use of a full reproduction of a photograph as a thumbnail sketch on the Internet. The artistic reproduction of a photograph of President Obama has recently become a copyright case that rests on this interpretation, and as mash-ups continue to drive much innovation in sound, video, and graphic arts, the courts will undoubtedly continue to refine the meaning of this common law factor.

Students often first learn about copyright in connection with peer-to-peer networks and file sharing on the Internet. But copyright is a consideration for academic work, too. Original work, such as a research paper or a video that was made for a class project, is

protected by copyright. Similarly, other people's work is protected, although often with meaningful exceptions that allow the use of the work in classroom or academic settings. For example, the fair use exception allows individuals to quote passages from a book or journal article and to use at least short segments of songs and movies. Whether you can use an entire work sometimes depends on the circumstances—for example, if you are transforming it from one medium to another, as in a montage, or so long as it is only available in the classroom setting and not on the Internet where it might have the effect of lessening the market value of the original.

Copyright and Academic Integrity: Differences

Especially in academic environments, copyright infringement is frequently confused with plagiarism, but it is not the same thing. Citing the source of a work will not exonerate you from an infringement if in fact the use is infringing. As a rule, it does, however, satisfy academic integrity requirements. To understand the difference between copyright infringement and plagiarism it might be helpful to remember that copyright is a U.S. federal law (and by treaties, in other countries as well), and academic integrity is a policy of academic institutions and a practice within literary and scholarly communities. Copyright infringement can lead to financial penalties and, in extreme cases, incarceration. Plagiarism is not against the law, but for a student, an act of plagiarism can have disciplinary consequences, such as a failing grade; in the case of a faculty member, it can result in significant public embarrassment and even a ruined career.

It is therefore extremely important to keep both requirements of copyright and academic integrity in mind when engaging in academic work. Each requires different behaviors and has distinct purposes. Copyright infringement usually revolves around the act of copying, distributing, performing, or making a derivation of another work you do not own or have permission, or an applicable exception, to use. The emphasis here is on the work itself, and not its ideas. The key questions to keep in mind are why you are using it (for an academic paper or to make an illegal profit on it?), how much you use (is it the heart of the whole or a part of it?), and in what context (protected academic site or open on the Internet?). Remember, citing a work is insufficient to avoid infringement.

Academic integrity is about giving credit to another author's ideas and the expression of those ideas. Plagiarism usually involves passing off ideas and/or their expression as if they were one's own or failing to cite a work properly. The emphasis on citing work is to recognize one's debt to existing scholarship. That recognition has the complementary effect of demonstrating one's research skills and the intellectual ability to build off of other people's work creatively. Citation of work should not be regarded as diminishing one's research or authorship; rather it implies participation in the exciting world of the life of the mind and intellectual pursuits. The purpose of academic integrity is both to invite and to initiate students into a community of scholars.

Technology, Education, and Copyright Harmonization Act

In 2001, Congress passed the Technology, Education, and Copyright Harmonization (TEACH) Act. Designed to bring distributed education into essential parity with the traditional face-to-face teaching exception of copyright law, TEACH does, in theory, offer

protection to accredited, nonprofit educational institutions that use copyrighted materials in distance learning environments to the same extent as they would be protected in classroom settings. Some important exceptions should be noted, however. For instance, TEACH permits the performance of only “reasonable and limited portions” of audiovisual works, such as movies, even though such works could be shown in their entirety in a live, face-to-face classroom. Many additional, technical restrictions also apply. For instance, access to the materials must, “to the extent technologically feasible,” be limited solely to students officially enrolled in the relevant course, and the institution must employ “technological measures that reasonably prevent” those students from downloading and/or further distributing the materials. The jury may still be out on whether TEACH provides the quality of protection that higher education must have in the copyright arena to accomplish its mission, but many university attorneys, IT professionals, and librarians believe that TEACH does not sufficiently alleviate their concerns about potential liability in the operation of their course management sites, electronic reserves, or other distributed learning functions. In many cases, institutions are relying on the fair use exemption rather than attempting to work through the numerous, complex details that go into compliance with this legislation.

Table 1. Comparison of Prior and Current Law Governing Use of Copyrighted Materials in Instructional Activities*

| Face-To-Face Instruction (17 U.S.C. § 110(1)) | Distance Education (former 17 U.S.C. § 110(2)) | TEACH Act (revised 17 U.S.C. § 110(2)) |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Applies to nonprofit educational institutions | Applied to nonprofit educational institutions | Applies to accredited nonprofit educational institutions |
| Permits the display of any work | Permitted the display of any work | Permits the display of any work in an amount comparable to that which is typically displayed in the course of a live classroom session |
| Permits the performance of any work | Permitted the performance of non-dramatic literary and musical works | Permits the performance of non-dramatic literary and musical works and reasonable and limited portions of any other works |
| (No similar provision) | (No similar provision) | Excludes the performance and display of works produced or marketed primarily for performance or display as part of mediated instructional activities** transmitted via digital networks |
| The performance or display of a motion picture or other audiovisual work cannot be made by means of a copy that was made unlawfully if the person responsible for the performance or display knows or has reason to believe that the copy was made unlawfully | (No similar provision) | The performance or display cannot be made by means of a copy that was made or acquired unlawfully if the institution knows or has reason to believe that the copy was made or acquired unlawfully |
| The performance or display must be made in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction | The performance or display had to be by or in the course of a transmission made primarily for reception in classrooms or similar places normally devoted to instruction | The performance or display must be by or in the course of a transmission made solely for, and to the extent technologically feasible reception of which is limited to, students officially enrolled in the course for which the transmission is made |

(Cont'd)

| | | |
|-------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| The performance or display must be made by an instructor or pupil | (No similar provision) | The performance or display must be made by, at the direction of, or under the actual supervision of an instructor |
| (No similar provision) | The performance or display had to be: <ul style="list-style-type: none"> • directly related and of material assistance to the teaching content of the transmission • a regular part of the systematic instructional activities of the institution | The performance or display must be: <ul style="list-style-type: none"> • directly related and of material assistance to the teaching content of the transmission • an integral part of a class session offered as a regular part of the systematic mediated instructional activities** of the institution |
| (No similar provision) | (No similar provision) | The transmitting institution must: <ul style="list-style-type: none"> • institute policies regarding copyright • provide faculty, students, and relevant staff with informational materials that accurately describe and promote compliance with copyright law • provide notice to students that materials used in connection with the course may be subject to copyright protection |
| (No similar provision) | (No similar provision) | In the case of digital transmissions, the transmitting institution: <ul style="list-style-type: none"> • must employ technological measures that reasonably prevent recipients from retaining the work in accessible form for longer than the class session and further disseminating the work to others without authorization • must not interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination |

* This table is the work of Steve McDonald, General Counsel at the Rhode Island School of Design. Used with permission.

** The term *mediated instructional activities* means activities that are an integral part of the class experience, that are controlled by or under the actual supervision of the instructor, and that are analogous to the type of activities that would take place in a live classroom setting, other than activities that use works such as textbooks, course packs, and similar materials in any media that typically are purchased by students for their independent use and retention.

Note that the TEACH Act authorizes the institution to convert print or other analog material into digital format in order to conduct TEACH-authorized displays and performances if “no digital version of the work is available to the institution” or “the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use” for such TEACH-authorized activities.

Copyright and Web 2.0 Environments

What is Web 2.0 and what does it have to do with copyright? Web 2.0 defines a set of emerging technologies such as blogs, wikis, social networking sites, photo- and video-sharing sites, and folksonomies, to name a few. These tools, not necessarily developed for a higher education audience, may be purposed for all kinds of instructional uses. They support and require individual creativity while placing the control and creation of content and knowledge in users’ hands. These low-cost, sometimes no-cost, instructional

innovations and their ease of use have enabled faculty and learners to meet many of their own teaching and learning needs without relying on an institution to identify, purchase, and support the tools of their choosing. Web 2.0 tools, while presenting many teaching and learning opportunities, also present some institutional challenges.

The shift away from organizational control of electronic instructional tools toward the individual user has several copyright implications. To fully understand the Internet's impact on instructional environments, it is helpful to compare previously copyrighted academic materials to the digital media used in today's face-to-face and virtual classrooms. Traditionally, copyrighted materials included books, articles, and other instructional products, such as lecture notes, overhead slides, and reference materials. These materials were typically published works that could be archived, filed, shelved, and modified or copied only as often as the publisher and author mutually agreed to do so. Most classroom-based materials used for teaching were only available to the instructor or to students during lectures. Ultimately, it was much more difficult to violate copyright in higher education's pre-digital world. Today, virtually all materials that contribute to learning, especially in electronically mediated environments such as web-enhanced, hybrid, or online courses, are (or can be) digitized, saved, archived, modified, and tracked.

In the digital setting, it is possible to disaggregate instructional materials, distributing authority and responsibility for development, maintenance, and control of instructional products. The process of producing instructional content, specifically with learning tools, has transferred control to the faculty and learners, away from the institution itself. As digital teaching and learning activity increases with the growth in hybrid and online delivery models, so does faculty member and student use of digital instructional tools. For instance, in a pre-digital instructional world, a student in a history class may have been asked to write a paper about the civil war. Today, that same student may be asked to create a mini documentary with video footage, live interviews, and other electronic documents to be posted on a wiki and shared publicly. The proliferation of Web 2.0 tools and their ease of use have exponentially increased the amount of content that is generated as well as institutions' and individuals' exposure to copyright law. Further compounding the problem, it is nearly impossible for those institutions to track and monitor all the external activity that is taking place to ensure that these activities do not violate copyright.

From Protected Course Delivery to Open Spaces

Many faculty deliver courses behind the password protection of a course management system such as Blackboard or Desire2Learn. Within this secure environment, assumptions about which practices accord with copyright and fair use guidelines are often ignored and never tested. When faculty experiment with instructional tools that are open and public and outside the course management system, their awareness of these issues is raised, sometimes by external agencies that monitor copyright violations. Institutions that deliver a substantial portion of their courses entirely online can be particularly good at educating faculty members and purchasing licenses for tools and products to be used in their educational programs. But institutions might not know what faculty are using and, as a result, do not support or assist in copyright and fair use compliance. As more faculty begin to use Web 2.0 tools, so do more students. Although

faculty have at least some understanding of copyright, usually through their own publishing, most students have had very little or no experience in this area. Because institutions are typically held responsible for student and instructor activity, especially that which is connected with instruction, they are becoming more proactive in raising awareness. For instance, copyright clauses and guidelines are appearing in syllabi, and instructors are directing students toward open content, such as that which holds Creative Commons licenses.²

Web 2.0 Challenges for Faculty

It has been said that Web 2.0 is a platform with a set of principles and practices rather than a technology.³ Web 2.0 is about users controlling content and being in charge of their own behaviors. The content can come from anywhere and any source where the individual creator assembles or “mashes” the content into something new. Others review, comment, elevate, or set aside the results. This new environment, embodied in the tools, is about creativity, individualism, and the crowd.

Faculty are typically familiar with copyright and fair use, but they don't necessarily know how to apply copyright law, especially fair use exceptions, even in a non-digital environment. In the digital environment, the lack of understanding is even greater, especially as the technology continues to outpace clarity in the law.

A common copyright challenge for faculty involves posting content on the web, especially since digital content can be very easily copied and pasted. Students routinely ask for and expect class materials to be available electronically from anywhere at anytime, and they see little distinction between the web and the classroom. Copyrighted content can be displayed openly on the web so long as it meets appropriate exceptions under fair use, compliance with the TEACH Act, or is licensed. Otherwise, copyright law remains a potential liability for both the faculty member and the institution. Moreover, while the DMCA exists as an option for content owners to address alleged infringement, it is not a required prerequisite to a full-blown infringement claim. Combined with the uncertainties that loom over institutional intellectual property policies, the uncertainty of legal application to new technologies and media, and the fact that most faculty are neither trained nor interested in mastering the intricacies of copyright law in the new electronic age, the pressures that content owners increasingly apply to higher education institutions place faculty in an almost untenable position. It is no wonder then that many institutions and faculty have erred strongly on the side of caution by not placing materials online, whether in course management systems or e-reserves. Legal scholars, recognizing the threat that this unstable ground has presented to higher education's missions, have responded with detailed studies on the problem.⁴

Another challenge for faculty is working with a classroom that is both digital and physical. As an example, students are increasingly demanding recorded lectures, which commonly include copyrighted materials, such as photos or diagrams from books. Again, access to lectures can be limited to enrolled students by hosting the lectures within the course management system. But what about the demand from alumni, the community, and others for access to such lectures, or the desire by the faculty to make the lectures available as an outreach effort? This demand is apparent in the popularity of

MIT's OpenCourseWare, Apple's iTunesU, and YouTube EDU. To comply with copyright law, permissions must be obtained for the copyrighted materials, the materials must be removed from presentations, or the materials must be recreated in a way that might find protection under the "transformative" or "parody" common law additions to the fair use doctrine. Each of these options takes considerable resources and often prohibits reuse of lectures outside the physical classroom.

A more difficult and complex challenge is adhering to copyright law and fair use guidelines while incorporating Web 2.0 tools used by students and faculty members in a course. This usually involves extensive use of digital resources and often encourages manipulation of the resources in new and innovative ways. For example, Jon McKenzie, associate professor of English at the University of Wisconsin–Madison, has developed StudioLab, a new pedagogy around media. Professor McKenzie says:

In terms of teaching, I have developed a pedagogy called StudioLab, which takes place in the environments of performance studio and computer lab. Its workshops explore connections between theory, performance, and new media through the production of actual and virtual works. These works are generated by individual and collective projects that investigate specific cultural problems, such as the impact of technology on everyday life and the role of the humanities in inventing new forms of sociotechnical interactivity. StudioLab was initially developed for theater and performance classes at New York University and then adapted for multimedia studio courses at the University of the Arts and, later, English courses at Dartmouth College and now at the University of Wisconsin.⁵

Professor McKenzie's students use tools such as YouTube, Google, VUE (Visual Understanding Environment), Illustrator, and Final Cut Pro. Student groups map parts of their undergraduate studies and are encouraged to remix materials from diverse subject areas. Such new approaches to teaching put pressure on the faculty to understand a new application of copyright and fair use while also implementing new pedagogical approaches. Faculty are no longer "sages on the stage" but "guides on the side," which means that they are constantly challenged to keep up with the students' discovery and use of new Web 2.0 tools.

Web 2.0 Challenges for Learners

In the pre-digital world, the physical space of libraries and choices about collections implicitly guided students' use of media in their research and writing. Cyberspace, while offering exciting new opportunities to learn and create, has nonetheless also introduced a host of new challenges and responsibilities that students must incorporate into their use of those resources. To students, Web 2.0 is all about communication and connections and not usually seen as a discrete technology. Students are naturally informal about using and combining content in the Internet world, so it is imperative for institutions to teach, and students to learn, some basic information about copyright, academic integrity, critical research methods, and privacy on the Internet.

As an example, Facebook, a social networking tool, is very popular with students for both personal and academic use. Using this tool, students communicate with friends and

classmates, advocate for issues, and form study groups. They share personal information, photos, and academic content. Some materials may be copyrighted. Some should be kept private. Facebook is an exemplar in employing granular permissions to control and access information. Facebook's individual settings include:

- *Profile:* Control who can see your profile and personal information
- *Search:* Control who can search for you and how you can be contacted
- *News Feed and Wall:* Control what recent activity is visible on your profile and in your friends' home pages
- *Applications:* Control what information is available to applications you use on Facebook

Students often choose Facebook as a Web 2.0 tool to facilitate collaborative group assignments. Consider a student working with other students in a Facebook group creating a marketing campaign for a product in a business class where they may create original content that is commercially viable. To plan for this, the students limit the viewing of their work to other students in the group. They allow searching but require permission to view; this allows the work to be found by potential commercial buyers. They post general information about their final product on their Facebook walls to proactively promote and display the content they choose for open viewing. The students, as creators of original work, use Facebook features to grant permissions to others to view and disseminate their copyrighted works.

Perhaps the most important lesson that students, or any Facebook users, need to understand is that by working within that medium they are implicitly accepting the site's terms of use. The tricky part is that U.S. law does not require anything substantive in a site's privacy statement—simply that it has one. A site that invites user contributions may, for example, claim total and complete control of the content (although it might be subject to pushback from users, as Facebook has experienced). Additionally, there is nothing in the law to prevent site owners from changing the terms of use (which Facebook has also done on occasion) with no warning and no requirement to inform users of the change. Thus, a statement today that users own the content they contribute to a site can be reversed tomorrow. Short of legal action against the site, with the burden of proof falling to the user, the user would have no recourse in that situation if the site owners appropriated and used the content for their own gain.

What It Means to Higher Education

The legal, technical, and cultural issues surrounding Web 2.0 are not trivial, and they go to the heart of the academic enterprise as it has taken shape in the 20th century and looks for relevance in the 21st century. New instructional tools, digital environments, and liabilities have impacted the way higher education interacts with the DMCA, the TEACH Act, and fair use. The seemingly "open" Web 2.0 world is becoming increasingly contested. One example is the case in which Viacom filed a lawsuit against YouTube/Google, accusing the heavily used video-sharing site of "massive intentional

copyright infringement” and seeking more than \$1 billion in damages. Viacom contends that nearly 160,000 unauthorized clips of their entertainment programming have been available on YouTube and that these clips have been viewed more than 1.5 billion times. Until now, YouTube’s strategy has been not to prevent its users from posting illegal material to the site but to ask individuals to remove clips that feature unauthorized material by issuing a takedown notice from the copyright holder. It is frequently the case, however, that no sooner than a company asks YouTube to take down a clip, users post a new version of the same clip. This case illustrates the difficulty of tracking copyright infringement in this community of users—a difficulty likely to be faced in higher education.

Further complicating this issue, a U.S. judge has ordered Google to expose to Viacom the video-viewing habits of everyone who has ever used YouTube.⁶ This request for data on which YouTube users watch which videos on the website was granted on the claim that Google acts as a willing accomplice to Internet users who put clips of Viacom’s copyrighted television programs on the popular video-sharing website. This landmark case is significant in many ways, but especially in that it exemplifies the way in which copyright violations are being increasingly monitored and pursued, thereby escalating liability implications for higher education institutions.

In such a dynamic environment there are no easy or simple answers. It’s important to realize that given the fluidity of these issues, institutions and units within institutions tend to approach them differently. Still, colleges and universities are devising creative ways of continuing to teach and learn in this environment. For instance, some course management systems are offering Web 2.0 tools, such as blogs and wikis, which are integrated into a password-protected environment. Using tools in this manner may not answer copyright questions to the letter of the law, but they at least provide a patina of protection for the institution against copyright infringement claims. Course site policies tease out the rights and responsibilities that accrue to users, especially for students. Information competency programs and digital literacy tutorials provide much-needed focus, at the very least to make students aware of sensitive areas in copyright law, plagiarism policies, privacy, and research on the Internet. Some even have “public” viewing options, as with blogs, giving users the choice to make their content available to an outside community with the appropriate permissions from students to assuage Family Education Rights and Privacy Act (FERPA) concerns.

Indeed, perhaps the most important contribution that educators can make at this time is to draw critical attention to these issues. Law and policy lag behind technology and practice. It will take time to sort, especially in the highly contested environments of legislators influenced by rent-seekers and courts uncertain about the cultural meaning that technology lends to the accumulation of knowledge and culture. Most likely, it will be the students of this generation who will be the decision makers for these questions in the future. We will serve our missions best by providing them with the frameworks for questions and the inspiration to ask them.

Key Questions to Ask

- How much information/data do we have as an institution about faculty and student behavior in relation to copyright and fair use?
- How broadly, frequently, and effectively is information about copyright, especially fair use, shared with the faculty?
- What local policies do we have about how to acquire, purchase (if necessary), and use copyrighted content for instructional purposes?
- What services and information do we, as an institution, provide to students and faculty about how to teach and learn using Web 2.0 tools while adhering to copyright law?
- What policy, if any, do we have about the use of publically available Web 2.0 tools for instructional purposes?
- Which local constituents should be involved in developing policies and support services around copyright, fair use, and Web 2.0 tools? Faculty, students, librarians, legal counsel, information technology, others?

Where to Learn More

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Endnotes

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