

# Issue Brief Assignment

## Copyright and Fair Use In New Media

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## Summary

As media and technology evolve, copyright law changes. With the rapid expansion of digital technologies now available to consumers, both consumers and copyright holders increasingly challenge the concepts of copyright, fair use, and derivative works. Consumers, educators, copyright holders, and the courts are often at odds when the concept of fair use arises, especially when it pertains to new forms of digital media and derivative works. As use of these new mediums continue to grow, digital protection of copyrights becomes paramount to the author or artist. However, consumers and educators recently became vociferous when it comes to new technologies that assist in proper copyright attribution circumventing fair use. This article seeks to explore fair use under current U.S. copyright law, digital and streaming media, derivative works, attribution, and the controversy surrounding these ideas.

## Fair Use

**Fair Use Defined.** The notion of “fair use” is rather loosely defined and thus is open to interpretation. The Copyright Act of 1976, Title 17 of the United States Code, states that copyrighted work may be fairly used for the purposes of criticism, comment, news reporting, teaching, scholarship, and research. This includes the use of multiple copies of a work for classroom teaching, although not all educational uses are allowed. The Supreme Court has ruled that, in order for a use to be deemed fair, it must meet the following four factors:

- (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 copyright work as a whole; and
- (4) The effect of use upon the potential market for or value of the copyrighted work.<sup>1</sup>

In short, the first factor aims to determine whether or not the use is intended for the advancement of artistic or scientific knowledge or if it is intended merely for personal financial gain. The second factor aims to determine whether the copyrighted material more appropriately belongs in the public domain, as well as whether or not the use of the material violates the rights of the artist or author in regards to when and where his work is first published. The third factor takes into consideration how much of a copyrighted work has been appropriated; generally speaking, the less, the better. The fourth factor is intended to assess how much financial damage the original copyright holder would stand to incur from the use of the “infringing” work. These four factors together determine the legality of fair use on a case-by-case basis.

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<sup>1</sup> Legal Information Institute of Cornell University Law School. (n.d.) *U.S. Code: Title 17, Chapter 1, Section 107*. Retrieved December 4, 2007, from [http://www.law.cornell.edu/uscode/html/uscode17/uscode17\\_usc\\_sec\\_17\\_00000107----000-.html](http://www.law.cornell.edu/uscode/html/uscode17/uscode17_usc_sec_17_00000107----000-.html).

**Importance of Fair Use.** The doctrine of fair use has held an important place in copyright law for many years, as it is meant to counterbalance the rights of the author or creator with the rights of the public to benefit from these works. It is important to note that fair use is really a defense against claims of infringement, rather than an affirmative right to copy. Fair use has important implications for both copyright holders and those who seek to use their work, including educators, scholars, and those seeking to “remix” media. Although the U.S. Copyright Act did originally include a separate set of rights regarding fair use for educators, these rights were limited to face-to-face classroom teaching. Section 110 allowed educators many freedoms, in addition to fair use, to display and perform others’ work in the classroom. However, technological advances in distance education made evident that the existing copyright law was woefully inadequate in addressing the needs of the distance educator to share material with students outside of the face-to-face setting.

**Digital Millennium Copyright Act.** Title 17 of U.S. Code was amended in 1998 to incorporate two 1996 World Intellectual Property Organization treaties. The Digital Millennium Copyright Act extended copyright protection on the Internet by raising the penalties for copyright infringement on the Web and by making it illegal to produce or disseminate any service, device, or technology that is meant to bypass or circumvent any measures that are taken to control access to copyrighted works.<sup>2</sup> The DMCA also protects, through Safe Harbor Provisions, Internet service providers from liability stemming from illegal uses of copyrighted works by their users, so long as they have in place a prescribed set of safety measures, and so long as they promptly block access to any alleged infringing material on their servers. The Act gives the Librarian of Congress the power to issue exemptions to the anti-circumvention measures of the Act when it can be shown that the access-control technology in place has adversely affected the ability of the public to use the copyrighted works for non-infringing purposes.<sup>3</sup>

**Safe Harbor Provision.** In addressing liability issues involving online service providers, Congress passed the On-line Copyright Liability Limitation Act (OCILLA) in 1998. It was codified as section 512 of the Digital Millennium Copyright Act, and shields service providers from being sued, having met certain requirements, because of activities of their clients. The client who has infringed on a copyright can be held liable for monetary damages, but the qualified network disseminating the work is not.<sup>4</sup>

**The TEACH Act.** Also in 1998, Congress directed the Copyright Office to study and make recommendations as to how to address the issues faced by distance educators. In 2001, a

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<sup>2</sup> Crews, K. (2001). Copyright Law for the Digital Library: Framework of Rights and Exceptions. Retrieved December 5, 2007, from <http://dml.indiana.edu/pdf/CopyrightLawforDLibFramework.pdf>

<sup>3</sup> U.S. Copyright Office. (1998). The Digital Millennium Copyright Act of 1998, U.S. Copyright Office Summary. Retrieved December 6, 2007, from <http://www.copyright.gov/legislation/dmca.pdf>.

<sup>4</sup> Chilling Effects Website. (n.d.) Frequently Asked Questions About DMCA Safe Harbor Provisions. Retrieved December 5, 2007, from <http://www.chillingeffects.org/dmca512/faq.cgi#QID125>

bill following the Copyright Office's recommendations was introduced, and in 2002, the Technology, Education, and Copyright Harmonization, or TEACH, Act became law. Although the TEACH Act greatly expanded the rights of educators to use copyrighted materials for distance education, it still places a great many restrictions on when, how, and by whom the materials can be used. For example, although in a face-to-face meeting, an instructor can legally show an entire film, that same instructor can only show a "reasonable" portion of that same film to a distance class.<sup>5</sup> Additionally, the instructor must show that only students enrolled in the class will have access to the materials, that the materials will be provided only during the relevant class time, and that the materials will be provided in such a manner that it reasonably limits the ability of the student to store or transmit the materials, among other provisions.<sup>6</sup> Because of the limitations of the TEACH Act, educators still may need to rely on the four-factor fair use test to determine whether or not their intended use of a copyrighted work is within the limits of the law.

**Who Fair Use Affects.** It is clear that copyright law and the doctrine of fair use affect the creators of copyrighted work much differently than those who use the copyrighted works. In the first category, we have artists, authors, and other media creators. In addition to preserving their original intent for their work, they are also concerned with protecting their financial interest in the work. Both of these issues should be taken into consideration, although only the financial aspect is covered under the four factors used in determining fair use.

As mentioned previously, not-for-profit educational institutions generally have more rights under the fair use doctrine than the general public. Although educators were granted expanded rights under the TEACH Act, fair use remains a gray area at best. Despite the fact that many professional groups have offered guidelines for fair use, they do not offer the force of law. Indeed, as court cases have shown, the fair use doctrine is fluid and subjective.<sup>7</sup> In writing Title 17, members of Congress put in place many safeguards for educators and librarians, including those designed to protect educational institutions from monetary damages if it found that a staff or faculty member, acting in good faith, broke the law. However, many members of the library and educational community continue to feel uncertain and uneasy about their rights under Title 17 and the DMCA.

Libraries depend heavily on the doctrine of fair use for fulfilling their mission statements. For example, instructors often direct their students to certain materials that are on reserve at the library. These materials are important to the class, and the library agrees to make these materials available only to students of the class for a certain time period. This is but one example of fair use in the library setting. Many libraries allow users to print materials off the Web, which may

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<sup>5</sup> Harper, G.K. (2001). The TEACH Act finally becomes law. In Copyright Crash Course. Retrieved December 7, 2007, from <http://www.utsystem.edu/OGC/intellectualProperty/teachact.htm>

<sup>6</sup> Crews, K. (2003). *New copyright law for distance education: The meaning and importance of the TEACH Act.* Retrieved December 7, 2007, from [http://www.copyright.iupui.edu/teach\\_summary.htm](http://www.copyright.iupui.edu/teach_summary.htm)

<sup>7</sup> Crews, K. (1997). Fair Use and Higher Education: Are Guidelines the Answer? *Academe*, 83. Retrieved December 4, 2007, from <http://www.copyright.iupui.edu/academ97.htm>

be copyrighted, but fall under the umbrella of fair use. Additionally, libraries may make some materials available under e-reserves, so that patrons can access content remotely. This is an effective way to provide patrons with access to copyrighted materials.<sup>8</sup>

**Fair Use in the Digital Age.** As technology continues to rapidly evolve, so too does the idea of what is allowable under fair use. The Digital Age has brought some unique challenges to copyright law and the doctrine of fair use, as file sharing, blogging, and new encryption technologies, among other things, have complicated the issue. As Title 17 was codified in 1976, Congress obviously had no way of planning for the technological advances that were to occur in the next few decades. Congress sought to clarify these issues somewhat with the passing of the Digital Millennium Copyright Act and the TEACH Act in 1998 and 2002, respectively. Although these laws do create new exemptions to Title 17, they also create new restrictions, such as the anti-circumvention statute. According to this part of the law, consumers are not allowed to circumvent any sort of encryption or access-control technologies put in place by the copyright holder, or make programs, services, or devices available that are intended to circumvent any technological measures.<sup>9</sup> Theoretically this is to prevent piracy, but it also has the very real effect of limiting how consumers can use materials they have legally obtained.<sup>10</sup> This would not have been an issue under old copyright law, but the DMCA has certainly changed what consumers can do with copyrighted materials, including what products they can use to view or listen to said materials.<sup>11</sup>

## Digital and Streaming Media

New advances in technology redefine audio and video delivery. Media is increasingly moving from the analogue to the digital realm. Commonly referred to as “webcasting,” digital programs can reach niche audiences or large general audiences. The Florida Digital Media Education Consortium defines digital media as “the creative convergence of digital arts, science, technology and business for human expression, communication, social interaction and education.<sup>12</sup>” Streaming media is audio-visual material distributed by on-demand requests via

<sup>8</sup> Adler, P.S. (2005). *Statement of Prudence S. Adler, Association of Research Libraries, on behalf of the Library Copyright Alliance, Hearing on “Fair Use: Its Effects on Consumers and Industry” Subcommittee on Commerce, Trade, and Consumer Protection, U.S. House of Representatives Committee on Energy and Commerce.* Retrieved December 7, 2007, from <http://www.librarycopyrightalliance.org/tstpsafair.pdf>.

<sup>9</sup> U.S. Copyright Office (n.d.). Copyright Protection and Management Systems. In *Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code* (Chapter 12.) Retrieved December 7, 2007, from <http://www.copyright.gov/title17/92chap12.html>.

<sup>10</sup> Steinhardt, B. (2000). *Preserving Fair Use in the Digital Age.* Retrieved December 4, 2007, from [webworld.unesco.org/infoethics2000/documents/paper\\_steinhardt.rtf](http://webworld.unesco.org/infoethics2000/documents/paper_steinhardt.rtf).

<sup>11</sup> Electronic Frontier Foundation. (2006). *Unintended consequences: 7 years under the DMCA.* Retrieved December 8, 2007, from <http://www.eff.org/wp/unintended-consequences-seven-years-under-dmca>

<sup>12</sup> Florida Digital Media Education Consortium. (2007). *Defining Digital Media.*

the Internet. The file is transmitted in small packets, or data stream, to the end user, playing in sequence as it is decoded.<sup>13</sup> This type of technology is beneficial to the user since the download wait is eliminated before the content is displayed, and also reduces the amount of network traffic. Broadband connections offer high-speed connections that mean a video can be viewed without delay, and the playing time can be of any length.<sup>14</sup> Since the file remains on the server, there is less concern over alteration and misuse.<sup>15</sup> Common commercial media players include QuickTime, RealPlayer, and Windows Media Player. These types of software incorporate film, video, audio, animation, and other multi-media elements for digital transmission, and may be imbedded in websites. The primary problems with web-based streaming media are that it requires high bandwidth consumption, thus slowing down the network, and that the performance can be poor due to network fluctuations.<sup>16</sup>

**Copyright and Digitization.** Since conversion software that allow for analogue to digital transformation in many formats and file types is readily available to the consumer, copyright law continuously adapts to new technology. Increasingly, copyright issues arise from the consumer's use and digital transformation of media. End users cite Fair Use upon conversion, while copyright holders allege infringement. In regards to digital media, sound recording copyright holders are given exclusive rights to perform their works via digital transmissions in addition to controlling the reproduction, derivative works, distribution, display, and public performance<sup>17</sup>. At this time, only sound recordings are granted digital transmission copyright protection.

Audio webcasts fall under a public performance copyright laws. Most audio webcasts stream to the end user. This type of broadcast is temporary and does not copy the performance file permanently to the hard drive. Webcasts fall under subscription or non-subscription formats. Subscription formats include cable and satellite digital audio services, whereas non-subscription formats are not user interactive. Both formats must pay royalty fees set by the Copyright Royalty Board. However, non-subscription formats may apply for a statutory license if they meet three criteria: (1) it is not interactive, (2) it cannot switch channels on the receiving device, and (3) includes copyright information of the sound recording.<sup>18</sup> The webcaster cannot publish work titles in advance of the broadcast. The webcast also must be for entertainment purposes

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Website. Retrieved 1 December 2007 from [http://fdmec.org/defining\\_dm.html](http://fdmec.org/defining_dm.html)

<sup>13</sup> SearchVoIP.com. (2005). What is Streaming Video? – a definition from Whatis.com.

Website. Retrieved December 1, 2007 from

[http://searchvoip.techtarget.com/sDefinition/0,,sid66\\_gci213055,00.html](http://searchvoip.techtarget.com/sDefinition/0,,sid66_gci213055,00.html)

<sup>14</sup> Web Server vs. Streaming Server. Microsoft Website. Retrieved December 7, 2007 from

<http://www.microsoft.com/windows/windowsmedia/compare/webservvstreamsrv.aspx>

<sup>15</sup> Parker, J. (2007). Streaming Frequently Asked Questions. Vanderbilt University Website. Retrieved November 20, 2007 from

<http://www.vanderbilt.edu/spiders/streaming.html>

<sup>16</sup> Streaming Media With CacheFlow. ZDNet Website. Retrieved November 28, 2007 from <http://whitepapers.zdnet.co.uk/0,1000000651,260000395p,00.htm>

<sup>17</sup> 17 U.S.C. § 106

<sup>18</sup> 17 U.S.C. § 114 (d)(2)(A) (i-iii)

only, and cannot promote goods or services.<sup>19</sup> On 2 March 2007, the Copyright Royalty Board set yearly royalty rate increases through 2010 from 0.07¢ to 0.19¢ per streamed song.<sup>20</sup> The yearly non-commercial webcast minimum fee is \$500, and increases to commercial rates if they exceed the maximum set listener level.

Comprised of many simultaneous users, streaming video media presents many copyright citations. First is the work's creator. He or she possesses exclusive rights as provided by the law. The work is uploaded to a media server in preparation for transmission via an Internet service provider. The end user connects to the server through the network and streams or downloads the digital content. Should the content's copyright be falsified or without knowledge of the creator, the Internet service provider is protected under the DMCA, Public Law 105-304 Section 512. This applies when the service provider only allows for the transmission or temporary storage of the infringed work. The service provider may not alter or manipulate the data in any form. The five qualifications provided by for this protection are:

- (1) The Transmission of the material was initiated by or at the direction of a person other than the service provider;
- (2) The transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;
- (3) The service provider does not select the recipients of the material except as an automatic response to the request of another person;
- (4) No copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and
- (5) The material is transmitted through the system or network without modification of its content.<sup>21</sup>

The popular public video sharing service, YouTube, successfully used this statute in defense of a 2006 lawsuit filed by Robert Tur in California District Court, Central District of California.<sup>22</sup> YouTube provides instructions in how to notify their company of copyright

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<sup>19</sup> 17 U.S.C. § 114 (j)(6)

<sup>20</sup> U.S. Copyright Royalty Board. (2007). *In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2005-1 CRB DTRA, DETERMINATION OF RATES AND TERMS*. Retrieved December 8, 2007 from <http://www.loc.gov/crb/proceedings/2005-1/rates-terms2005-1.pdf>

<sup>21</sup> 17 U.S.C. § 512 (c)

<sup>22</sup> Robert Tur d/ba/ Los Angeles News Service v. YouTube, Inc. US District Court for the Central District of California, Case N. CV 06-4436-GAF (FNOX)

infringements<sup>23</sup> and an informational user's copyright tips page<sup>24</sup> to deter unauthorized use of works.

**Fair Use, Libraries, and Schools.** Libraries and educators use digital media for distance and eLearning. Governed through fair use<sup>25</sup> and the TEACH Act<sup>26</sup>, schools, universities, and libraries utilize digital works to facilitate learning and research. In face-to-face learning, fair use of digital media (computer programs, audio-visual materials, photocopies, etc.) is straight forward, protected by the Copyright Act of 1976, Section 110(1). The complexity occurs in digital media (streaming audio or video, PDF files, etc.) transmission since it can be transmitted, accessed, and manipulated by any number of people at any digital access point. In order to be covered under fair use for educational use, the performance or display of works must meet the following criteria:

- (1) The work is presented under the supervision of an instructor in an accredited non-profit educational institution.
- (2) The work is related to the material within the scope of the class.
- (3) The transmission of the work is limited to enrolled students of that class.
- (4) The educational institution provides and promotes copyright information to instructors, staff members, and students.
- (5) The educational institution implements protection measures for digital media access, retention, and unauthorized dissemination of media.<sup>27</sup>

The main concern is that digital media is used only for the class length, and not saved for later access. Copyrighted works are only used in part, and the TEACH Act does not allow for full digitization of books, videos, journals, or other works without the copyright holder's consent. It also provides for the digitization of analogue works so long as the work in question is not readily available. The Consortium of College & University Media Centers published *Fair Use Guidelines for Educational Multimedia*, in which it recommends limiting usage of a copyrighted work to 10% or less<sup>28</sup>.

## Explanation of Derivative Works

**What are derivative works?** Copyright protection includes safeguards from having a work copied in its artistic "expression", but does not extend to the underlying idea itself. The

<sup>23</sup> YouTube. (2007). Copyright Infringement Notification. Website. Accessed December 1, 2007 from [http://www.youtube.com/t/dmca\\_policy](http://www.youtube.com/t/dmca_policy)

<sup>24</sup> YouTube. (2007). Copyright Tips. Website. Accessed December 1, 2007 from [http://www.youtube.com/t/howto\\_copyright](http://www.youtube.com/t/howto_copyright)

<sup>25</sup> 17 U.S.C. § 107

<sup>26</sup> H.R. 2215 (2002)

<sup>27</sup> 17 U.S.C. § 110 (2)(A-D)

<sup>28</sup> Educational Multimedia Fair Use Guidelines Development Committee. (2006). Fair Use Guidelines for Educational Multimedia. Retrieved December 8, 2007 from <http://ccumc.org/system/files/MMFUGuides.pdf>

protection covers not only exact copies, but also new works that are “substantially similar.” The copyright owner has five exclusive rights in the copyrighted work: Right of Reproduction, Right of Modification, Right of Distribution, Right of Public Performance, Right of Public Display. Those who violate these rights are guilty of copyright infringement.<sup>29</sup>

The Right of Modification gives the copyright holder the sole legal right to create derivative work from the original. Others may legally use copyrighted material by being given authorization by the copyright holder such as through licensing, or due to provisions in the Copyright Law specifying uses not requiring permission. These provisions, termed Fair Use, are for the purposes of criticism, parody and satire, teaching, news, and review. Despite common belief, Fair Use does not extend to any use solely because it is non-commercial.

A derivative work, having its basis in a previously existing work, can include: “translation, musical arrangements, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’”<sup>30</sup>

There is a gray area between creating a derivative work and reproducing a work, however, the copy made does not have to be exact in order to infringe on a copyright. Otherwise, one would only have to make minute changes to a book, or change several notes in a piece of music to circumvent copyright laws. There is no set percentage or measurement of how much of the original used constitutes infringement, but rather the courts look at whether or not the derivative work is “substantially similar” to the original. The defining question for derivative work is if it involves “recasting, transforming or adapting of the original work, often to a new form.”<sup>31</sup> Finally, basing their work on one or more extant works, the creator of a derivative work may only apply for copyright protection with permission from the holder(s) of the copyright on the original work or works.<sup>32</sup>

Due to the technical structure of computers, all digital information requires making a copy in order to access and view it. Documents, images, and files of all types are copied into the computer’s memory and then again onto the video display when they are accessed. In addition, if a file is transferred via the Internet, other computers may have copied it as it is being sent. This copying process is inherently different than in traditional media. One does not make a copy in order to read a book, watch a film, or listen to music.<sup>33</sup>

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<sup>29</sup> Brinson, D. and Radcliffe, M. (1994). Intellectual Property Law Primer for Multimedia Developers. Timestream Website. Retrieved December 3, 2007 from <http://www.timestream.com/stuff/neatstuff/mmlaw.html>

<sup>30</sup> Hollaar, L. (2002). An Overview of Copyright. Digital-Law-Online Website. Retrieved December 9, 2007, from <http://digital-law-online.info/lpdi1.0/treatise6.html>

<sup>31</sup> 17 U.S.C. § 106

<sup>32</sup> F ulks, M. (n.d.). Copyright Law in the Digital Age. Apogee Photo Magazine. Retrieved December 1, 2007 from <http://www.apogeephoto.com/mag1-6/mag1-6mf.shtml>

<sup>33</sup> Committee on Intellectual Property Rights in the Emerging Information Infrastructure,

Derivative works in the Digital Age differ from traditional derivative works in both the ease of access to original works, and the potential for dissemination. Copying has become inexpensive with advances in digital storage, and the digital copies can duplicate the quality of the original, unlike older technologies. Also, in contrast to analog forms such as paintings, sculptures, and printed books, a physical object is not necessary. In the digital format, content is separate from medium, so that exact copies can be made in a range of media. These copies can then be manipulated with relatively inexpensive software programs, adding or subtracting from the original easily.<sup>34</sup>

In the past, derivative work by artists like Marcel Duchamp were briefly displayed to elicit public comment, but in contemporary life with the advent of digital indexing and cross-referencing capabilities, entire online communities are being created through access to the Internet. Websites such as deviantArt.com<sup>35</sup> display derivative images from contributors worldwide. The trends of Sampling (in music) and Remixing (using film and other media), both forms of derivative work, have become a cultural phenomenon according to Stanford Professor Lawrence Lessig.<sup>36</sup> Another example of trends producing derivative work is called Altered Books, which can be produced in either digital or analog form. Furthermore, if Duchamp were alive today, he would have the option of layering changes over the unaltered original work, or co-mingling the alterations with the original, thus creating debate on what changes to the copyright laws will be made because of changing technology.<sup>37</sup>

## New Technologies for Correct Attribution

**Watermarking.** A digital watermark may be applied over the top of a video image by utilizing certain encoding applications. The watermark is typically a product name or corporate logo added to streaming content, and can be adjusted for scale, position, edge gap, and opacity. They are employed as part of a Digital Rights Management system to record the name of the copyright owner, distributor, purchaser, or distribution chain. Watermarks are not difficult to remove, though removal sometimes affects the quality of the audio or video, and sometimes occurs while decompressing files.

**Metadata and DRM encoding.** Another way that content creators can restrict access to content is through the use of digital rights management, or DRM. DRM is an umbrella term

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National Research Council (2000). *The Digital Dilemma: Intellectual Property in the Information Age* Washington, D.C.: National Academies Press.

<sup>34</sup> 17 U.S.C. § 114 (j)(6)

<sup>35</sup> DeviantArt.com. (2007) Retrieved December 4, 2007 from <http://www.deviantart.com/>

<sup>36</sup> Lessig, L. How Creativity Is Being Strangled By The Law (Video) Ted Conferences Website. Retrieved December 1, 2007 from <http://www.ted.com/talks/view/id/187>

<sup>37</sup> Stern, R. (2001). L.H.O.O.Q. Internet-Related Derivative Work. George Washington University Law School. Retrieved December 3, 2007 from <http://docs.law.gwu.edu/facweb/claw/Lhooq0.htm>

covering various methods of restricting the uses of content based on encryption of data. It differs from a watermark in that it is not embedded in the video or audio file itself, but is a kind of digital tagging system.<sup>38</sup> DRM can be used to describe any number of methods that copyright holders can use to restrict the use of digital materials, including DVDs, music CDs, Internet music, and electronic documents. This may include technologies that limit the kinds of music players that will play legally downloaded Internet music tracks, or the types of programs that can be used to play certain DVDs. Many consumer rights' organizations are against the use of DRM, claiming that it limits the ways in which consumers can use legally obtained materials in violation of the doctrine of fair use.

**Creative Commons Licensing.** In an effort to introduce greater flexibility in the area of copyright protection, Lawrence Lessig, a Stanford University Law School professor, founded the non-profit organization Creative Commons (CC) in 2001.<sup>39</sup> It established a number of intellectual property licensing agreements made available to content creators so that they could choose to allow specified uses of their work. This falls somewhere between strict copyright and public domain. This allows content creators to decide what uses they wish to grant to the public, and allows the public to use the content for the stated purposes without the need to ask further permission. Under Creative Commons licensing, content creators can determine whether or not they want attribution for their work, whether their work can be used for commercial purposes, and whether or not they will allow derivative works. They can also state that anyone who uses their material for derivative works must include a similar Creative Commons license on that work. The service is free, and includes metatags for content that are readable by computer search engines, licensing descriptions in legal terms, and also in common terminology. Types of CC licenses: Public Domain, Sampling Plus, Founder's Copyright, CC-GNU GPL, CC-GNU LGPL, BSD, Wiki, and Music Sharing Founders License.

## Debate over fair use, derivative works, and streaming resources

**Copyright, Streaming, and Safe Harbor Debate.** The clash of copyright issues and video streaming technology can be seen in recent court cases. A video software and hosting company called DivX has taken pre-emptive legal action against Universal Music Group (UMG) by claiming in a lawsuit that the Safe Harbor provisions of the DMCA protect its activities. In its complaint to DivX, UMG stated that the other company was "knowingly involved in the infringement of UMG's copyrighted materials, and exploits that widespread infringement for its own commercial gain." Both companies suggest that the other is looking for an "unwarranted windfall", and as of September 2007, the suit was still to be decided. If the court decides in

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<sup>38</sup> Wikipedia. Digital Rights Management. Retrieved December 10, 2007 from [http://en.wikipedia.org/wiki/Digital\\_rights\\_management](http://en.wikipedia.org/wiki/Digital_rights_management)

<sup>39</sup> Creative Commons Website. (n.d.) Retrieved December 2, 2007, from <http://creativecommons.org>

DivX's favor, it could reinforce the DMCA's notice and takedown requirements, and have a fundamental effect on video hosting services such as YouTube and DivX's Stage 6.<sup>40</sup>

**Legal Precedents.** There have been many important court cases regarding fair use in the areas of research, reproduction, multimedia production, and Web development, among others.<sup>41</sup> As noted previously, each case is different and the four factors may have different weight in each case; therefore, legal precedents are of limited use when attempting to determine what falls under the rubric of fair use. For example, in the case of *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. N.Y. 1998), it was decided that the movie company's use of a picture copying the style of a famous Annie Leibovitz photograph was fair use, as it was considered a transformative use intended to invoke a comedic reaction. On the other hand, in the case of *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706 (S.D. N.Y. 1987), it was decided that Columbia Picture's movie poster which copied the style of a *New Yorker* cover created by the plaintiff was not fair use, stating that the use was not transformative since it did not create a parody, but rather, copied the *New Yorker* style.<sup>42</sup>

Two Internet cases involving the Church of Scientology illustrate how the four factors are used in determining fairness of use. In one, entire texts from several Church works were posted to the Internet without the permission of the Church, and this was found to be copyright infringement as the texts were copied in full.<sup>43</sup> In the second case, an author with *The Washington Post* used some excerpts from Church writings in an article without permission. This was considered to be fair, as the excerpts were used for the purpose of commentary, and the portions used were relatively small.<sup>44</sup>

**Recent and Pending Legislation.** There are many bills under consideration which aim to clarify or modify the terms of Title 17, the DMCA, and the TEACH Act, among others. This list is by no means comprehensive, but rather, is intended to act as a sampling of some pending legislation. H.R. 3155 – Intellectual Property Enhanced Criminal Enforcement Act of 2007, sponsored by Rep. Steven Chabot (R, OH-1), seeks to amend Titles 17 and 18 of U.S. Code by doubling existing penalties and allowing people to be charged with criminal copyright infringement even if such infringement has not actually taken place.<sup>45</sup> Instead, merely

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<sup>40</sup> Anderson, N. (2007). DivX sues Universal over DMCA takedowns, Universal says: Stop ripping us. Arstechnica Website. Retrieved December 8, 2007, from <http://news.arstechnica.com/news.ars/post/20070909-divx-preemptively-files-lawsuit-against-universal-update.html>

<sup>41</sup> Copyright Management Center of Indiana and Purdue Universities. (2006). Categories of key court case summaries on fair use. Retrieved December 7, 2007, from <http://www.copyright.iupui.edu/FUcategor.htm>

<sup>42</sup> Stanford Copyright and Fair Use Center. (2007). Summaries of Fair Use Cases. In *Copyright and Fair Use Overview*. (Chapter 9, Section C.) Retrieved December 8, 2007, from [http://fairuse.stanford.edu/Copyright\\_and\\_Fair\\_Use\\_Overview/chapter9/9-c.html](http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-c.html)

<sup>43</sup> *Religious Technology Center v. Lerma*, 40 U.S.P.Q. 2d 1569 (E.D. Va. 1996).

<sup>44</sup> *Religious Technology Center v. Pagliarina*, 908 F. Supp 1353 (E.D. Va. 1995).

<sup>45</sup> Open Congress. (2007). *H.R. 3155 – Intellectual Property Enhanced Criminal Enforcement*

attempting to, for example, download a song on a peer-to-peer network, or installing a DVD-ripping device on one's computer, could count the same as successfully doing so. However, this would not apply to civil cases, only criminal cases where the retail value of the infringed upon material is over \$1,000 and the purpose is for commercial financial gain. This bill has yet to be voted on. Another bill, S. 1353 entitled the Internet Radio Equality Act of 2007, was introduced by Sen. Ron Wyden (D, OR), and is intended to nullify the earlier decisions of the Copyright Royalty Judges with respect to webcasting and to modify the basis for making such judgments.<sup>46</sup> In other words, this bill aims to protect Internet radio by reversing an earlier decision which aimed to, in the words of the bill's sponsors, "dramatically increase royalties and apply what we see as unfounded minimum rates threatens to devastate the Internet radio industry."<sup>47</sup> This bill parallels H.R. 2060, introduced April 26, 2007 by Rep. Jay Inslee (D, WA-1) and co-sponsored by 141 colleagues.<sup>48</sup>

**Effects of Current Technologies on Fair Use.** There are a variety of current technological issues that challenge traditional views of fair use, including blogging, social networking sites such as Myspace and Facebook, digital rights management (DRM), and attribution. Blogs and social networking sites allow users to easily share items of interest, whether they are news articles, images, music, or film clips. Many of the materials being shared may be copyrighted, and in many cases, the materials are being shared and used without permission from the copyright holder. The very nature of the Internet – that it is interactive and user-driven – means that some copyrights will most certainly be infringed upon.

## Potential Outlook for Legislators

**How are consumers affected?** New media affects consumers in several important ways. Content is now accessible in digitized form in an unprecedented variety. With improvements to computer hardware, broadband connections, and software tools, the public has a greater range of choices in such areas as entertainment, distance education, creative expression, and interaction with the press, to name a few. However, to take advantage of much of the available content in newer formats, consumers require connections speeds through cable or broadband networks. They also need to upgrade computer hardware and software to accommodate the new media. And though new opportunities exist for publishing in updated formats, like videocasting and podcasting, copyright restrictions must still be taken into account.

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*Act of 2007.* Retrieved December 7, 2007, from <http://www.opencongress.org/bill/110-h3155/show>

<sup>46</sup> Open Congress. (2007). *S.1353 – Internet Radio Equality Act of 2007*. Retrieved December 7, 2007, from <http://www.opencongress.org/bill/110-s1353/show>

<sup>47</sup> Wyden, D. (2007). *Wyden, Brownback Call CRB Rates for Webcasters "Unfounded."* Retrieved December 7, 2007, from <http://wyden.senate.gov/newsroom/record.cfm?id=280586>

<sup>48</sup> Open Congress. (2007). *H.R. 2060 – Internet Radio Equality Act*. Retrieved December 7, 2007, from <http://www.opencongress.org/bill/110-h2060/show>

**How are media companies and other creators affected?** For their part, corporate content publishers wish to control access, the content, and the network itself. It is argued by proponents of copyright reform that new media have brought about changing modes of artistic expression which will be inhibited by legislation which publishers favor, extending copyright protection and time limits. While artists, authors, and musicians are given new tools for creation, they also face new problems due to the ease of digitally copying and/or making changes to their original work. The World Wide Web has established a global network for marketing, publishing, and distributing content, which is not governed by U.S. law alone, thereby complicating copyright enforcement. It may be that both consumers and media companies can at least agree on Mark Twain's observation, "Only one thing is impossible to God: to find any sense to any copyright law on this planet."<sup>49</sup>

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<sup>49</sup> Amigot, M. Oline Video Predictions for 2008. IBL News Website. Retrieved November 28, 2007 from <http://www.iblnews.com/story.php?id=32699>

## Further Reading

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Intellectual Property and High Technology Technical Amendments Act of 2002, Division C, Title III, Subtitle B of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758, 1901, enacted November 2, 2002.

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