

COPYRIGHT AND FAIR USE:**BLIND MEN DESCRIBING THE ELEPHANT****Leo Wells**

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Abstract: The "fair use" of documents secured from the Internet for educational use has historical precedents dating back centuries. Indeed, the concepts of ownership of intellectual property have been sharply debated since the invention of movable print. Fair use can be defined based on the purpose, nature, and amount of material accessed, and on the economic impact of the use of the material. Various scholastic organizations have implemented policies to define fair use and to make the Internet useful to scholars, but fair to the authors of documents. New technologies are now available to ensure copyright compliance.

Much is written on the various laws and regulations concerning the educational "fair use" of copyrighted material from libraries, the Internet, and a host of other sources. From issues of historical precedents, to ownership of the source material, to recent statutes, to myth and innuendo, fair use is defused through different filters to be different things to different practitioners. Authors describing "fair use" will emphasize isolated aspects of this doctrine, similar to the poem of blind men describing different parts of an elephant (i.e., the tail is like a rope, the ear is like a fan, etc.). We notice what seems most obvious and visible from our limited perspectives.

The problem of copying the work of another author goes back a few hundred years. Goehner (1997) suggests that the very invention of the Gutenberg printing press created the opportunity to steal the written word, what with the newly-found ability to mass-produce documents.

McLaughlin (1999) suggests that recently enacted regulations are nothing new at all, but rather they are more in keeping with eighteenth century Germanic states that enacted laws to protect the author and publisher of a work. Apparently, the typical book or pamphlet would be copied again and again despite the author's wishes. McLaughlin cites eighteenth century philosopher Immanuel Kant who said, "...The counterfeiter undertakes the author's business, not only without any permission from the owner, but even contrary to it" (Kant, 1795).

The very act of accessing an Internet website causes a copy of the web page accessed to be placed on an end user's system (Lipinski, 1999; McLaughlin, 1999). This aspect of "fair use" allows for "browsing" in the digital environment, even with a copy in the computer's RAM (Lipinski, p. 13).

After describing the extent of the Copyright Act of 1976 and what constituted a copyrightable work, MacKnight (2000) defines four factors within the law which are ". . . not specific on what is or isn't 'fair use' " (p. 110).

The *purpose* of the extracted work, e. g. research, teaching, scholarship, has to be considered. The *nature* of the copyrighted work, whether it is creative, or factual, or whether it has been previously published determines its fair use. Unpublished materials and creative works are more likely to be denied fair use. The *amount* of the work extracted varies with the work. The *effect* on the potential market must not harm the author's opportunities for sale of the work.

A major state flagship university system has developed easily readable "rules of thumb" for not only determining the "fair use" of an Internet document, but also making "course packs," images, music, multimedia, distance learning, research copies of articles, and holding materials on "reserve" status in the library (University of Texas System, 2001).

Templeton (1998) lists his "top ten" myths about copyright on the Internet. Templeton's discussion about those "myths" indicates that even our e-mail is copyrightable. The inference is that although some works are copyrightable, the marketability of those works is virtually zero. What could we charge folks for reading our e-mail or Usenet postings? The "myth" of educators being immune from copyright is gone. The ideas that "they can't sue ME," and "I have rights" vanish when the reality is that litigation stemming from a copyright violation is CIVIL, rather than criminal, and the rules are startlingly different.

Financial issues dominate other authors' concerns over copyright and ownership of Internet products. Smith, Eddy, Richards, and Dixon (2000) insist that copyright law and litigation over intellectual property rights will be arenas of significant risk as educational institutions become providers of Internet education. They suggest that anti-trust regulations could be construed to include educational institutions "if they acted with commercial motive" (p. 6). Smith, et al. suggest that universities might be somewhat behind in the establishment of policies to address possible anti-trust litigation. (p. 11)

Admitted Luddite David Noble decries the proliferation of Internet courses for profit by universities (Noble, 2000). Noble insists that the professors (authors) who create courses (works) have a right to own their course material and that the university has no right to profit from the creative work of professors. Simpson and Turner (2001) report on methods one university has implemented on assigning ownership of intellectual material based on a professor's usage of university time, university resources, the professor's job description, and the number of students involved (University of North Texas, 2000).

Lipinski (1999) argues that "fair use" is also a key factor in distance education. He maintains that current laws be augmented to allow for the various problems related to distance education, e. g. access to materials. Moreover, the current laws correctly indemnify libraries, etc. from liability if they have taken some array of safeguards to prevent document piracy. Lipinski suggests that new technologies, such as watermarking documents, printing denial, and tracking be employed for copyright management.

The motivation for this present research stems from discussions among peers on just what "fair use" is, how it works, how it is implemented, and how much we can demand from both faculty and students as to compliance. Hopefully, this present paper will be expanded for greater depth. How we as practitioners, and our students, who will in turn influence even more students, deal with this will make the difference as we implement technologies and delivery systems yet to be conceived.

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