

The Copyright Dilemma In Academia: A Prescription Plan To Reduce Litigation And Promote “Fair” Use

BY

Dr. Alexandrine Policar¹
Information Technology Department
University of Massachusetts Boston
Alexandrine.policar@umb.edu

Abstract

With globalization and distance learning, higher education institutions have expanded beyond the classroom to serve an international body of students. This new academic landscape requires the adoption of innovative technological tools such as Learning Management Systems (LMS), videoconferencing, and instant communication, as well as more access to digital materials to carry out its mission and reach its global customers. With the increased restriction on fair-use set forth in the Digital Millennium Copyright Act (DMCA) of 1998, and the recent copyright requirements of the Higher Education Opportunity Act (HEOA) of 2008, American universities and colleges face the challenge of promoting fair dissemination of copyrighted information and policing its constituencies because of liability. What steps and initiatives should academe take to construct a win-win approach to copyright law that values both producers’ rights and consumers’ needs in order to reduce transaction costs and constraints in accessing digital copyrighted works for academic purposes?

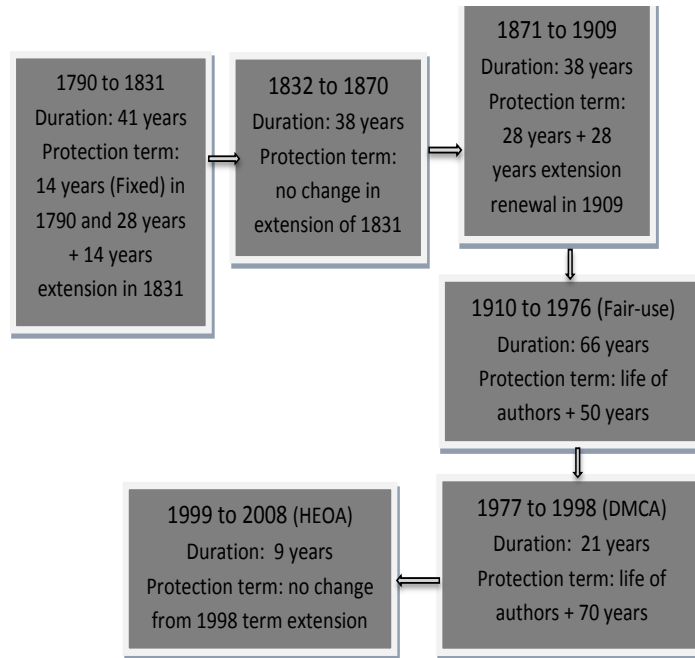
The Dilemma in Framing Copyright

U.S. copyright law changes infrequently. The irregularity causes some to believe that American copyright law is obsolete, unsuitable to resolve copyright issues in the digital and global environment. The figure above illustrates the evolution of copyright in the U.S and depicts the length of time it took to

¹ Alexandrine Policar administers applications systems at UMass Boston. Her research interests are in law and policy in relation to online education, intellectual property, cyber security, social and organizational change. She holds a Master of Business Administration, Master of Science in Information Technology, and a Doctorate Degree in Law and Policy.

amend the law from 1790 to the passage of the DMCA in 1998, recently enhanced by the 2008 Higher Education Opportunity Act (HEOA).

Evolution of copyright law in the United States: Major changes in term extension



For years, a multitude of various strategies, legal and policy actions have tried to address the copyright issue in America. Legislations increasing penalties for infringers have passed. Theoreticians continually debate the subject and propose a plethora of perspectives. The RIAA and MPAA tirelessly file lawsuits over peer-to-peer (p2p) file-sharing of music and video. All of these actions and strategies have failed and seem to be counter-productive; people continue to copy software, download and share copyrighted materials and contents unabated.

There are two prominent views in the debate over copyright and fair-use: those who argue the private property paradigm of copyright versus those who advocate it as a common good. Richard A. Posner (2002, 2005), a judge on the U.S. Court of Appeals for the Seventh Circuit and a Professor at the University of Chicago Law School, claims that intellectual property, America's largest export, is the cornerstone for the rise of the country's information economy. He argues that the occurrence of legal changes in copyright are the result of the emergence of new technologies especially computer software

used over the Internet, giving high monopoly and power to producers/creators at the detriment of consumers. Hal R. Varian (2006), a legal scholar and professor of law, acknowledges that copyright has become a significant public policy issue in recent years with the remarkable growth of the World Wide Web (Internet). For author David D. Friedman (2001:128-129), the long term copyright protection “creates a form of property that is easy to define, cheap to enforce, relatively easy to transact over, and subject to no rent-seeking problem.”

The discourse over copyright presents a unique opportunity for American universities and colleges to influence copyright law as it affects higher education. Mark A. Lemley and R. Anthony Reese (2004) propose a middle ground approach that will help “reduce digital copyright without restricting innovation.” Instead of suing facilitators and individual infringers, copyright policies in p2p networks should discourage the flow of technological innovations by promoting cost-effective enforcement of copyright.

Action Plan to Reduce Copyright Litigation And Promote Fair-Use

In a study conducted by Alexandrine Policar (2011), the researcher used a mixed method approach to investigate the impact of copyright and fair-use laws on the use of digital information in higher education. This investigation provides statistical evidence that the higher education community supports a utilitarian perspective on fair-use and copyright. The majority of respondents consider copyright infringement to be good for society. In fact, 67% of respondents believe that copyright violation is morally right; 49% strongly believe in free access to copyrighted materials in academia; 46% consider file-sharing very important in teaching and learning; and thirteen out of the twenty-one interviewees (62%) support the “creative commons” idea to maximize digital creativity and innovation.

Policar recommends the Creation of an Independent National Copyright Consortium on Awareness and Formation (INCCAF to alleviate the cumbersome of fair-use and copyright legislation, spur innovation and knowledge creation, boost the public domain knowledge, increase funding for research, and expand the publication of scholarly works.

The Independent National Copyright Consortium on Awareness and Formation (INCCAF) Initiative

The mission of the Independent National Copyright Consortium on Awareness and Formation (INCCAF) will be to advocate for new and effective copyright and fair-use law aiming to improve societal welfare.

As producers of knowledge and consumers of copyrighted works, academic scholars are the most suitable to lead this initiative. This consortium shall consist of various copyright stakeholders such as copyright owners, creators, producers, copyright licenses office,² the MPAA, the RIIA, the Internet Services Providers (ISPs), recognized profit and non-profit organizations involved in copyright, and so forth. The use of existing national databases on American higher education institutions will be of great importance in providing information on academic constituencies, intellectual property resources, and network infrastructures.³ Additionally, the consortium shall have a broad representation among all fifty states in the U.S.

This centralized body of copyright stakeholders will have the responsibility to review and revise current copyright and fair-use legislation to alleviate the confusion that consumers encounter regarding copyrighted works. The INCCAF shall develop centralized databases to collect and manage copyright and fair-use litigation and complains. To achieve this goal, the INCCAF should conduct national surveys to gather empirical data from constituents of higher education institutions, the RIAA, the MPAA, copyright license offices, the American Association of University Professors (AAUP), the American Council on Education (ACE), and EDUCAUSE, in order to measure their perspectives on fair-use, copyright violation, and file-sharing. The data gathered will provide information that will translate into a prescription plan to lawmakers and policymakers.

² These copyright licenses office included Copyright Clearance Center (CCC) and other organizations that provide copyright clearance functions in the U.S.

³ Some examples of national database on higher education institutions in the USU.S. are: Integrated data and institutions members of Integrated Postsecondary Education Data Systems (IPEDS), Carnegie classification institutions of higher education, EDUCAUSE Core Data Service.

In addition, the INCAAF should seek the participation and viewpoint of Internet Services Providers (ISP) over copyright and fair-use might be instrumental because of their role as providers of Internet connection to consumers. The collaboration with ISPs that have the power to send “take down notices” and “cease and desist” letters to customers or to disconnect them from the Internet, will provide the INCAAF with data over file-sharing complaints.

The INCCAF shall propose new standards and guidelines for legal reform in fair-use and copyright. This provides a unique opportunity to take further the idea of “free culture” and “creative commons” by Lawrence Lessig (2004, 2008) to identify what type of works should be included in the “commons” and what works should be excluded in order to promote the free flow of information with respect of copyright holders’ rights. The “creative commons” licensing eliminates the middle-man between authors and consumers and letting them decide whom, how, and for what purpose their works should be accessed. Other viewpoints favored eradicating fair-use law instead of changing the legal rules that will bring incentives to those willing to share. This resonates with the “compulsory license” proposal by Professor William Fisher (2004) in his book *Promises to Keep*.

The INCAAF shall design and implement programs and initiatives aiming to promote awareness and formation on fair-use and copyright. Such initiatives might start with campaign using social media or other mediums to raise awareness on the need for legal change in copyright and fair-use. Any initiative or program should include periodical assessment and evaluation to measure the impact of these initiatives/programs on the production of scholarly works, funding, research, and innovation. The adoption of cost effectiveness (benefit cost analysis), efficiency, and sustainability can be used as benchmarks for successes and failures. These tools will provide indicators (qualitative and quantitative) to measure durability of the effects of adopted programs/initiatives.

1) Develop A Partnership with the U.S. Copyright Office

This partnership is contingent upon the creation of the INCCAF. Instead of bringing complaints, concerns, and proposed actions plan for change directly to Congress, the INCCAF should collaborate with

the U.S. Copyright Office. Both parties will sign the petition, and the copyright office will present INCCAF's recommendations to lawmakers in Capitol Hill who have the jurisdiction to amend legislation and enact legal rules.

However, when there is no agreement between INCCAF and the U.S. Copyright Office, the INCCAF will itself submit its petitions for improving copyright and fair-use legislation to Congress, which will have the responsibility to accept or reject the recommended legal changes.

2) Partnership with World Intellectual Property Office (WIPO)

With distance learning and online education expanding, higher education institutions face the challenges on how to deal with its international customers in relation to digital copyright infringement. American universities and colleges should adopt policies, for example, preventing an international student enrolled in online courses from using the campus networks to violate copyright.

In order to develop awareness for internationalization and globalization of legal regulation of copyright, the INCCAF should partner with the World Intellectual Property Organization (WIPO), whose aim is to promote and protect intellectual property throughout the world, and other recognized international organizations involved in copyright issues.

Conclusion

The centralization and monopoly of authorship is only valid for personal economic gain; not for symmetrical information and societal welfare according to William Patry (2009). More legislation and litigation is not the solution to copyright infringement. The time has come for higher education institutions to pool their resources and capabilities and have a greater impact in reforming copyright. It is time to take advantage of this "window of opportunity" created by the Internet to reconsider fair-use in this digital world of instant communication. To resolve the fight over accessibility and usage and improve universal access to information, Varian (2005) promotes the realization of two legal reforms: "a complete copyright registry for acquiring reproduction rights, and a legal safe harbor for orphan works."

REFERENCE

- Fisher, William W. 2004. *Promises To Keep: Technology, Law, And The Future Of Entertainment*: Stanford University Press.
- Friedman, David D. 2001. *Law's Order: What Economics Has To Do With Law And Why It Matters*: Princeton Univ Pr.
- Lemley, Mark A. And R. Anthony Reese. 2004. Reducing Digital Copyright Infringement Without Restricting Innovation. *Stanford Law Review* 56, No. 6: 1345-1434.
- Lessig, Lawrence. 2004. *Free Culture: How Big Media Uses Technology And The Law To Lock Down Culture And Control Creativity*: Penguin.
- . 2008. *Remix: Making Art And Commerce Thrive In The Hybrid Economy*: Penguin Pr.
- Patry, W. 2009. *Moral Panics And The Copyright Wars*: Oxford University Press, USA.
- Polcar, Alexandrine. 2011. Anti-Circumvention Of The Digital Millennium Copyright Act (Dmca) And Its Impact On Fair-Use In Academia: An Empirical Analysis. Doctorate In Law And Policy Doctoral, Northeastern University.
- Posner, Richard A. 2002. The Law And Economics Of Intellectual Property. *Daedalus* 131, No. 2: 5-12.
- . 2005. Intellectual Property: The Law And Economics Approach. *The Journal Of Economic Perspectives* 19, No. 2: 57-73.
- Varian, Hal R. 2005. Universal Access To Information. *Communications Of The ACM* 48, No. 10: 2.
- . 2006. Copyright Term Extension And Orphan Works. *Industrial And Corporate Change* 15, No. 6: 965.