

**Before the
U.S. DEPARTMENT OF COMMERCE
Washington, DC 20230**

In Response to)
)
Inquiry on Copyright Policy, Creativity,)
)
and Innovation in the Internet Economy)

Docket No. 100910448-0448-01

COMMENTS OF MEDIA EDUCATION LAB

Professor Renee Hobbs, Founder

Media Education Lab
Temple University
Philadelphia, PA

Danielle O. Combes
Jennie L. Croyle

Student Attorneys
Glushko-Samuelson Intellectual Property Law Clinic
Washington College of Law
American University
4800 Massachusetts Avenue, NW
Washington, DC 20008
(202)- 274-4148

November 19, 2010

Table of Contents

SUMMARY 1

COMMENTS OF MEDIA EDUCATION LAB 2

I. Education Fuels the Sustainability of the Internet Economy..... 2

II. A Balanced Online Copyright Policy is Vital to the Internet Economy 5

 a. Implementation of the DMCA Threatens the Doctrine of Fair Use in the Digital Environment..... 8

 b. Section 110 and the TEACH Act Must be Implemented to Meet the Online Needs of All Educators..... 9

IV. Conclusion 12

SUMMARY

“We have to educate our way to a better economy.”¹

Media Education Lab, founded by Professor Renee Hobbs, is committed to bridging the gaps between education, media, communications, and technology. As technological development continues to change the learning process, Media Education Lab works to educate and advocate on behalf of educators so that they may continue to develop a digitally competent citizenry. Digital and media literacy are critical to the development of the Internet economy and depend on online copyright policies structured to support the existing flexibility in copyright law.

Media Education Lab urges the Task Force to consider the strong relationship between the educators’ role as the cultivators of human capital and the impact of their work on the Internet economy. Specifically, educators require a balanced copyright policy that provides flexibility in the online environment. Any online copyright policy that circumscribes the flexibilities in copyright law directly undermines the advancement of innovation in the Internet economy and runs counter to the purpose of copyright law. In support of these views, Media Education Lab submits this Comment for consideration by the Internet Policy Task Force.

¹ Arne Duncan, Secretary of Education, Remarks on ABC’s “This Week” with Christiane Amanpour: Crisis in the Classroom (Aug. 15, 2010), (transcript available at www.abcnews.go.com/print?id=11506701).

**Before the
U.S. DEPARTMENT OF COMMERCE
Washington, DC 20230**

In Response to)
)
Inquiry on Copyright Policy, Creativity,) Docket No. 100910448-0448-01
)
and Innovation in the Internet Economy)

COMMENTS OF MEDIA EDUCATION LAB

Media Education Lab at Temple University is a program dedicated to improving media literacy and education through scholarship and community service. Working in partnership with K-12 schools, media companies, and community organizations, Media Education Lab employs an interdisciplinary approach that focuses on the intersection between communication, education, media, and technology. Through research, teacher education programs, curriculum development, and advocacy, Media Education Lab supports the development of innovation in K-12 and higher education. Media Education Lab works with educators to support innovative instructional practices that build knowledge and skills. For example, Media Education Lab creates curriculum materials and lesson plans that make use of short excerpts from mass media, popular culture and digital media texts—tools and technologies that support the development of learners’ communication and critical thinking skills. Because we care about the development of the knowledge economy, we submit this Comment for consideration by the Internet Policy Task Force.

I. Education Fuels the Sustainability of the Internet Economy

Education is the seedbed of innovation. Educators contribute to the life cycle of the Internet economy as the primary developers of human capital. Educators nurture and support the intellectual development of our future innovators, software engineers, small business

entrepreneurs, online journalists and informed citizens.² To equip learners with the knowledge and skills they need to be successful outside the classroom, educators employ copyrighted materials in all practices of teaching and learning. Learning in today's classroom involves substantial, active and hands-on use of information. For example, educators have a long-established tradition of freely sharing resources and materials. A wide variety of open-access portals for sharing scholarship are emerging in higher education as an alternative to a once-exclusive reliance on for-profit publishers.³ Educators and students increasingly rely on copyrighted materials available online, including print, images, videos, interactive media, and more.

Digital and media literacy educators, in particular, use teaching practices that display and manipulate copyrighted materials from mass media, popular culture, and digital sources. Learners use copyrighted materials for completing class assignments or in composing their own creative and academic work. Moreover, educators are increasingly using the Internet as a platform from which to create learning environments, supporting students' intellectual development by using copyrighted materials to build reading comprehension and analysis skills. Students create online content to express their understanding of the new material and share it in order to get feedback from family and peers. Because they aim to create the most effective learning experience possible, digital and media literacy educators have a special interest in preserving their, and that of their students, ability to use copyrighted materials appropriately.

Digital and media literacy educators support the continued development of the creative

² See Gary Becker, *Human Capital*, in CONCISE ENCYCLOPEDIA OF ECONOMICS 248-51 (David R. Henderson ed., 2007), available at <http://www.econlib.org/library/Enc/HumanCapital.html>.

³ Dennis Carter, *Universities Commit to Open-Access Journal Movement*, E-SCHOOL NEWS, Oct. 25, 2010, available at <http://www.eschoolnews.com/2010/10/25/universities-commit-to-open-access-journal-movement/2/>.

class, which includes, without limitation: engineers, educators, scientists, computer programmers, and researchers as well as artists, authors, designers, and media workers. Comprising about 12% of the U.S. workforce, the innovations of the creative class generate commercial products and services that pervade every sector of the economy.⁴ This workforce is made up of lifelong learners who continually acquire new knowledge, skills and competencies.⁵ Increasingly, this knowledge is cultivated through engagement with ideas and information circulating online.

Today, all people need to achieve digital and media competency to effectively participate as citizens in the Internet economy. As an example, to apply for jobs online, people need to access relevant information, search databases and complete online applications. When people seek health information online, they must be able to distinguish between a marketing ploy for nutritional supplements and information based on proven research. Online educational opportunities require an understanding of how knowledge is constructed, how it represents reality and how it articulates a point of view.⁶ Recognizing these needs, the U.S. Department of Education's 2010 technology plan notes:

“Whether the domain is English language arts, mathematics, sciences, social studies, history, art or music, 21st century competencies and expertise such as critical thinking, complex problem-solving, collaboration and multimedia

⁴ See generally RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS* (2002).

⁵ See Mitch McCrimmon, *Leadership for the Creative Class*, MANAGEMENT-ISSUES (Dec. 3, 2009), <http://www.creativeclass.com/rfcgdb/articles/Leadership%20for%20the%20creative%20class.pdf> (comparing the impact of the cotton gin on the workforce during the industrial revolution with the shift in the economy brought on by telecommunications and computers).

⁶ See generally RENEE HOBBS, *THE ASPEN INSTITUTE COMMUNICATIONS AND SOCIETY PROGRAM, DIGITAL AND MEDIA LITERACY: A PLAN OF ACTION* viii (2010).

communication . . . are necessary to become expert learners, which we all must be if we are to adapt to our rapidly changing world.”⁷

It is only by creating the most educated citizens possible that we can sustain the Internet economy.

II. A Balanced Online Copyright Policy is Vital to the Internet Economy

An effective online copyright policy must be both robust and flexible. A balanced policy must respect the rights of both copyright holders and Internet users. This balance is vitally important to sustain and support the development of the Internet economy. The Framers of our Constitution envisioned a copyright system that would spur innovation, creativity and the spread of knowledge and discourse. While they allowed Congress to provide certain exclusive rights to copyright holders, the Framers also took care to limit the duration of those rights.⁸ As copyright law has developed, limitations and exceptions have emerged based largely on the Framers’ recognition that balance and flexibility are essential to achieving the Framers’ constitutional goals.

The fair use doctrine is an engine of creativity because it allows people to use copyrighted material to create new ideas and information. The impact of this doctrine has given our nation a competitive edge in the international marketplace.⁹ As Congress has increased the

⁷ OFFICE OF EDUCATIONAL TECHNOLOGY, U.S. DEPARTMENT OF EDUCATION, *TRANSFORMING AMERICAN EDUCATION: LEARNING POWERED BY TECHNOLOGY* vi (2010); RENEE HOBBS, *supra* note 6, at viii.

⁸ U.S. CONST. art 1, § 8, cl. 8; *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (citing *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 558 (1985)).

⁹ Educators, creators, students, and consumers "need access to copyrighted material in order to make their own contributions to culture and economic progress. See *Hearing on Fair Use: Its Effects on Consumers and Industry Before the H. Comm. on Energy and Commerce*, 109th Cong. 4 (2005) (statement of Professor Peter Jaszi, Washington College of Law of American University) (crediting the success of traditional copyright law with the fact that it balanced strong protection with privileges favoring educators).

protections provided to copyright holders over time, the United States Supreme Court has also reaffirmed doctrines like fair use and constitutional thresholds like “originality.”¹⁰

Arguments in favor of increased copyright protection as a driver for economic activity often overlook the flexibility that exists in copyright law today and that fuels creativity and innovation. In the United States, industries that rely on fair use and other copyright exceptions contributed 16.2% of the total U.S. gross domestic product in 2007.¹¹ Many sectors of our economy depend on or benefit from doctrines like fair use, including educational institutions, software developers, Internet search and web hosting providers and the manufacturers of technologies that allow individual copying of copyrighted material. Even the success of the motion picture and computer software industries depend, in part, on their ability to copy and reuse elements from existing works.¹² The education industries *alone* contribute \$1.3 billion dollars, or 6%, to the \$2.2 trillion that fair use industries contribute to the GDP.¹³

A variety of economic models now operate to supply a diverse range of products and services, particularly by monetizing educational materials. For example, educational videos have been monetized by companies like Discovery School, which sell schools online licenses to access streaming video content. This was not always the case. Cable in the Classroom, a non-profit program supported by the cable television industry, provided free educational materials to educators and students in American schools. Now, many media companies are recognizing and

¹⁰ *See, e.g.*, Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991) (citing Harper & Row, Publishers v. Nation Enterprises, 471 U.S. 556-57 (1985) (noting that copyright encourages "others to build freely upon the ideas and information conveyed by a work," while also granting authors rights to their works)).

¹¹ THOMAS ROGERS & ANDREWS SZAMOSSZEGI, COMPUTER & COMM'NS INDUS. ASSOC., FAIR USE IN THE U.S. ECONOMY, 6, 22 (2010), *available at* <http://www.cciagnet.org/CCIA/files/ccLibraryFiles/Filename/000000000354/fair-use-study-final.pdf>.

¹² *See Hearing on Fair Use, supra* note 9, at 7.

¹³ ROGERS & SZAMOSSZEGI, *supra* note 11, at 6, 22.

developing the profit potential in the field of K-12 education. As a result, educators represent the largest purchasers of copyright licenses in the United States.¹⁴

Education has thrived on non-market sharing models. Right now, the practices of non-market information production, including free creation and sharing of creative works and cooperative peer production, are becoming an ordinary part of life for many educators. The Internet makes low-cost production and exchange of information and culture easier for both students and teachers alike. The rise of peer-to-peer and non-market sharing among educators who use the Internet as a tool for teaching and learning is particularly a boon during the economic recession, which has negatively impacted local education budgets. These non-market innovations create and spur new forms of innovation that feed back into the marketplace.¹⁵

III. Online Copyright Policies Must Expand Existing Flexibilities in Copyright Law to Meet the Needs of All Educators

Aware of the need to bring digital and media literacy skills to all, the National Telecommunications and Information Administration (NTIA) is making a \$4 billion investment by supporting the Broadband Technology Opportunities Program (BTOP), which provides grants to support the deployment of broadband infrastructure, and to enhance and expand public computer centers to bring broadband access to all Americans. But access to technology alone is not enough; simply purchasing computers for schools and libraries does not teach students the skills they need to succeed. Education is in crisis: a report from the National Conference of State Legislatures shows that, over the next two years, states will be struggling with an estimated

¹⁴ See *Hearing on Fair Use*, *supra* note 9, at 7.

¹⁵ See generally YOCHAI BENKLER, *THE WEALTH OF NETWORKS* (2006).

\$97 billion budget shortfall.¹⁶ To promote a competitive creative class of citizens, investments in education are needed to help educators maintain the cycle of intellectual cultivation. In addition to money and broadband access, legal subsidies provide an invaluable investment to educators and the digitally savvy, media literate students they produce.

For the last 35 years, education has been strongly, if indirectly, supported by the decision of Congress to include in the 1976 Copyright Act exceptions like the fair use doctrine and other limitations on exclusive rights for the use of copyrighted material in educational settings. In the same way that educators have adapted to technological change, copyright laws and the fair use exceptions must reflect the increased reliance on digital content. The Digital Millennium Copyright Act (DMCA),¹⁷ §110 of the Copyright Act,¹⁸ and the Technology, Education, and Copyright Harmonization (TEACH) Act¹⁹ are examples of well-meaning legislation that provide some flexibility to educators, but nevertheless fall short of their intended objectives.

a. Implementation of the DMCA Threatens the Doctrine of Fair Use in the Digital Environment

Although many educational institutions rely heavily on the DMCA as a liability-limiting tool, the counter-notification mechanism in the DMCA is cumbersome. The protection it gives to institutions, however, comes at a real cost to individuals. Specifically, in practice, §512 of the DMCA presents a potential danger. The counter-notification mechanism was intended as a tool for users to make lawful use of online content. Ordinary people making fair use of copyrighted materials in their own works have been stymied by the counter-notification process.

¹⁶ Dennis Pierce, E-School News, *Huge Challenges, Potential Opportunities*, in MONEY MATTERS: STRATEGIES AND SOLUTIONS SCHOOLS NEED RIGHT NOW (Gregg W. Downey ed., 2009), available at <http://www.eschoolnews.com/2009/11/25/moneyt-matters/>.

¹⁷ See, e.g., 17 U.S.C. § 512 (2006).

¹⁸ 17 U.S.C. § 110.

¹⁹ The TEACH Act is codified in various sections of the Copyright Act. See, e.g., 17 U.S.C. §§ 110(2)(B), 110(2)(C), 112(f).

All uses of copyrighted material in the digital environment do not constitute copyright infringement. Only a careful analysis of context and situation by a human being can determine whether a specific use of copyrighted materials is an infringement or a lawful use. For example, online copyright infringement detection software usurps consumers' ability to legally use copyrighted content for fair use purposes. Online infringement detection software notifies copyright holders of purportedly “illegal distribution” of their works on the Internet but does not evaluate the purpose of the use.²⁰ A proper fair use analysis, however, considers subjective factors that a computer cannot assess, like the nature and purpose of the use.²¹ Sadly, digital detection and automatic takedowns of copyrighted materials create real obstacles for educators who create curriculum materials to help learners critically analyze mass media, popular culture and digital media.

As one scholar put it, “[The] DMCA has turned out to offer a handy new way to hamper someone else’s speech.”²² But the underlying purpose of the DMCA was to create a safety net for people making lawful use of copyrighted material online. Because copyright policy should be designed to spur innovation and for socially beneficial purposes, Media Education Lab urges the Task Force to consider policies that better implement these fundamental purposes.

b. Section 110 and the TEACH Act Must be Implemented to Meet the Online Needs of All Educators

To some extent, educators can rely on §110 of the 1976 Copyright Act, which exempts certain performances and displays of copyrighted material from infringement where they take

²⁰ Press Release, Autonomy Inc., Autonomy’s Virage Automates Copyright Infringement Detection for Online Video (Apr. 5, 2007), *available at* <http://news.thomasnet.com/fullstory/Software-automates-copyright-infringement-detection-802684> (ACID software article).

²¹ 17 U.S.C. §107.

²² LEWIS HYDE, COMMON AS AIR: REVOLUTION, ART, AND OWNERSHIP (2010).

place in non-profit educational institutions.²³ This is especially beneficial to traditional classroom teachers because they are exempted from infringement claims when they incorporate the display or performance of copyrighted works into their daily curriculum. This means, for example, health teachers can show documentary films like *SuperSize Me*²⁴ to their students to educate them about the importance of dietary health and nutrition.

At the same time, the language in §110(1) places strong emphasis on the need for instruction to take place in a classroom and requires face-to-face teaching as a stipulation for the full benefits of the exemption. Section 110(1) does not consider activities like online discussion forums or programs like Blackboard where educators post digital content to supplement classroom instruction. Today, it is extremely common for teachers to support classroom instruction with a supervised online learning community and this technological direction was not contemplated by §110(1). Educators increasingly rely on portals like Curriki²⁵ to bring together a community of K-12 educators, learners and experts who work together to create quality materials that will benefit teachers and students around the world. Such online education portals are popular among the more than three million K-12 educators working in American public, parochial and private schools. The free online content available at sites like these is also advantageous because of the ease of access, the ability to search for materials and the flexibility of digital media. Sites like these, though populated by members of the education community, receive no recognition in §110.

The TEACH Act of 2002 was an effort by Congress to remedy the limited reach of §110.

²³ 17 U.S.C. §110(1).

²⁴ *Supersize Me: A Film of Epic Portions* (A Morgan Spurlock documentary film released Jan. 17, 2004).

²⁵ Curriki is an online project started by Sun Microsystems that allows educators to share lesson plans and other educational materials worldwide. See CURRIKI, <http://www.curriki.org> (last visited Nov. 18, 2010).

The TEACH Act amended §110 to give educators more guidance with regard to copyright exceptions and online learning to respond to the increased demand for online degree programs. However, in practice, the TEACH Act narrows the §110 exceptions by limiting their applicability to regionally accredited non-profit educational institutions.²⁶ The requirements of the TEACH Act exclude media literacy educators and after-school and museum education programs. The TEACH Act attempts to complement §110 but is so narrowly drawn that educators must still be able to rely on fair use. While the TEACH Act gives school districts and universities the authority to use digital copyrighted material in their online educational programs, the Act does not add much value to expanding traditional K-12 education outside of the classroom.

The §110 limitations and the exclusivity of the TEACH Act limit media literacy education and the development of digital competency. Media literacy and digital competency are the foundation for building a creative and knowledge-based workforce.²⁷ Most people are not able to afford an education at a premier institution and online learning gives them an opportunity to develop the skills and competencies they need to be successful in the knowledge economy. The TEACH Act stymies educators that use digital content for teaching and learning because of its narrow requirements and prohibitions. The TEACH Act is well meaning; however, its construction does not support the development of online learning and may be a

²⁶ The TEACH Act also limits the use to a specified number of enrolled students and creates elaborate rules for how digital materials are to be stored and archived. *See* Copyright Clearance Center, Inc., *The TEACH Act: New Roles, Rules, and Responsibilities for Academic Institutions*, <http://www.copyright.com/media/pdfs/CR-Teach-Act.pdf>.

²⁷ Rick Stephens, Vice President of Human Resources for Boeing, claims that candidates from U.S. schools are not qualified job candidates because they do not possess the skills to compete in the international technology and digital environment. *See generally* Rick Stephens & Elane V. Scott, *Ensuring Workforce Skills of the Future: The Birth to Workplace Pipeline* (2003), http://www.cpec.ca.gov/completereports/externaldocuments/birth_to_work_pipelinev50.pdf.

perceived barrier in the continued robust experimentation and exploration in the online distance learning environment.

Both the TEACH Act and the DMCA are legal subsidies that, if properly implemented and construed, could be assets to educators using copyrighted material in the online environment. A balanced copyright policy is one that is construed broadly to benefit educators and is implemented effectively. As legal subsidies, the flexibilities of copyright law are invaluable to educators in the analog world and constraining this investment in the online environment runs counter to the Framers' intent for copyright law.

IV. Conclusion

Any future online copyright policy must make substantial provision for the fair and lawful use of copyrighted materials. Online copyright policies that impair educators' lawful use of digital copyrighted material directly undermines educators' ability to develop competitive human capital, which is needed to sustain future innovation. In particular, teachers and learners must be able to rely on the flexibilities in copyright law in order to use, share, modify and repurpose copyrighted material for learning in an increasingly technology dependent world. Educators' capacity to develop new human capital, and thus, the future contributions of the creative class to the Internet economy, depend on their ability to rely on exceptions and limitations to copyright law as both consumers and producers in the digital environment. In the words of Secretary of Education, Arne Duncan, "We have to educate our way to a better economy."²⁸

²⁸ Duncan, *supra* note 1.