

# Copyright and Fair Use

RENEE HOBBS

University of Rhode Island, USA

Human creativity is boundless and it shapes every aspect of social, cultural, and economic life. And although many people know that copyright law protects the professional media and entertainment industries, including book publishing, filmed entertainment, music, and video games, many do not understand how important copyright law is to creativity, education, the arts, and culture. For creative people as well as teachers and students, copyright supports creative expression and the critical analysis of mass media, popular culture, and digital media. In many ways, media literacy would be impossible without the protections offered by copyright law.

Although people recognize that copyright protects the rights of creators, those rights are balanced against the rights of readers, viewers, and users of copyrighted materials, protecting the public interest in accessing creative work. Originating in 1710 when, in England, the Statute of Anne gave authors the legal right to disseminate their work for fixed terms, the copyright laws of each nation have served to protect and empower both authors and users. Copyright law protects all stakeholders in the circulation of ideas and information, as the purpose of copyright is to promote creativity and innovation by contributing to the spread of knowledge.

However, copyright laws vary from country to country, with some important general similarities but many unique and specific differences. There is no such thing as an international copyright that automatically protects an author's works throughout the entire world. Protection depends on the national laws of each country, and international agreements, treaties, and conventions have greatly simplified international copyright. Still, the World Intellectual Property Organization notes that, in some countries, copyright law protects authors in unique ways. For example, in European nations, authors hold *moral rights* that enable them to prevent distorted reproductions of the work. US copyright law does not include this specific provision. Although this encyclopedia entry primarily uses examples from US copyright law as it applies to the theory and practice of media literacy education, most conceptual and legal elements described here are relevant to the laws of other nations around the world.

## Author rights

An understanding of the scope of rights and responsibilities under copyright is essential knowledge for a media-literate individual. An author (and this term applies to all forms of human creative expression, including photographers, filmmakers, poets,

*The International Encyclopedia of Media Literacy*. Renee Hobbs and Paul Mihailidis (Editors-in-Chief),

Gianna Cappello, Maria Ranieri, and Benjamin Thevenin (Associate Editors).

© 2019 John Wiley & Sons, Inc. Published 2019 by John Wiley & Sons, Inc.

DOI: 10.1002/9781118978238.ieml0039

dancers, performers, teachers, musicians, architects, vidders, etc.) has legal rights and responsibilities under copyright. Copyright legislation is part of the wider body of law known as intellectual property (IP) which refers broadly to the creations of the human mind. Many forms of human creativity are copyrighted, including literary, artistic, and scientific works. Books, music, paintings, maps, lyrics, poems, illustrations, photos, sculptures, films, videos, computer programs, and databases—and more—are fully protected by copyright. Patent law protects inventions including scientific discoveries and industrial designs, and trademarks protect commercial names and other symbols involved in business.

Many people are not aware that copyright is declaratory. This means that a created work is automatically protected by copyright. As soon as the ink is dry on the drawing or you've pressed "save" on your computer, your work is protected by the full force of copyright law. There is no need to fill out paperwork or pay any fees. A work does not need to have the little copyright symbol (©) in order to be protected. Authors of any age are protected by copyright, which means that students' creative work is copyrighted.

Copyright law provides strong economic protection to copyright holders. In general, these rights include the ability to: (i) make copies of the work and (ii) distribute, sell, or lend them; (iii) perform or display the work; (iv) prepare adaptations or derivative works based upon the original work; and (v) authorize others to exercise any of these rights through licensing or sale. Authors are free to share their work with others, without payment or permission, if they choose. They can set up contracts called licensing agreements, which give users permission to use material with some limitations.

With this strong bundle of rights, under copyright law, the author of an original work also has the right to stop unauthorized persons from copying or otherwise using the work. But there are no copyright police; copyright holders themselves are responsible for identifying unauthorized uses, where a user is reproducing, distributing, or using without permission or payment. It's important to note that some unauthorized uses are legal and some are considered illegal, or an infringement of copyright law.

Copyright protects expressions, not ideas. Ideas cannot be copyrighted. Only particular expressions of ideas in fixed and tangible form can be copyrighted. For example, a stand-up comedy performance cannot be copyrighted, but an audio or video recording of that comedy performance is automatically copyrighted.

An author is anyone who creates writing, images, graphic designs, music, books, films, software, animations, podcasts, academic research, and many other forms of creative expression. In a knowledge economy, much creative work is copyrighted by the companies who pay people to create work, not the actual authors themselves. In "work for hire" arrangements, the author is not considered to be the individual who actually created the work. For example, when an author sends out a work to be translated into a foreign language, the author maintains copyright over the translated work. When writers are hired to produce writing, a contract or memorandum of understanding should specify whether the author or the company owns the copyright. Sadly, even in educational contexts, some teachers are considered to be in a "work for hire" relationship with their employers and, thus, the curriculum materials they create are not legally owned by them. An author may choose to transfer copyrights to another individual or institution in exchange for a royalty or other payment. As a result, an author may or may not be the

copyright holder. Although the terms author and copyright holder are sometimes used interchangeably, they are distinct (and sometimes) separate entities (Russell, 2004).

The author is responsible for identifying potential copyright infringements. When an author discovers an unauthorized use of their materials, a legal process may be initiated. At the first stage of the process, a *cease-and-desist* letter may be sent. This letter demands that the user stop using the copyrighted content. If the user believes that his or her usage of copyrighted material is likely to be protected under the law, then lawyers representing the author and lawyers representing the user prepare evidence and develop legal arguments. Judges ultimately determine whether infringement has occurred, applying a legal rule of reason. If a judge determines that infringement has occurred, penalties for copyright may include fines from \$200 up to \$150 000 for each work infringed. In the United States, willful copyright infringement can even lead to imprisonment of up to 5 years.

Although copyright law is designed to protect authors for a limited time, in order that creative work circulates widely to benefit society, the law's terms have been extended since 1790 to protect authors (and their heirs) for a very long period after the work has been created (Hyde, 2010). For works created after 1978, a copyright lasts for the life of the author plus 70 years after the author's death. If the work is a joint work with multiple authors, the term lasts for 70 years after the last surviving author's death. Figure 1 shows how laws have extended copyright protections over time. For these reasons, lawyers say that copyright law is "long and strong."

Authors have built a flexible array of licensing models in order to prevent copyright law from stifling innovation. Lawrence Lessig (2004) spearheaded the development of a new model of licensing creative works called Creative Commons. Creative Commons promotes itself as a "best-of-both-worlds" way for creators to protect their works while encouraging certain uses of them.

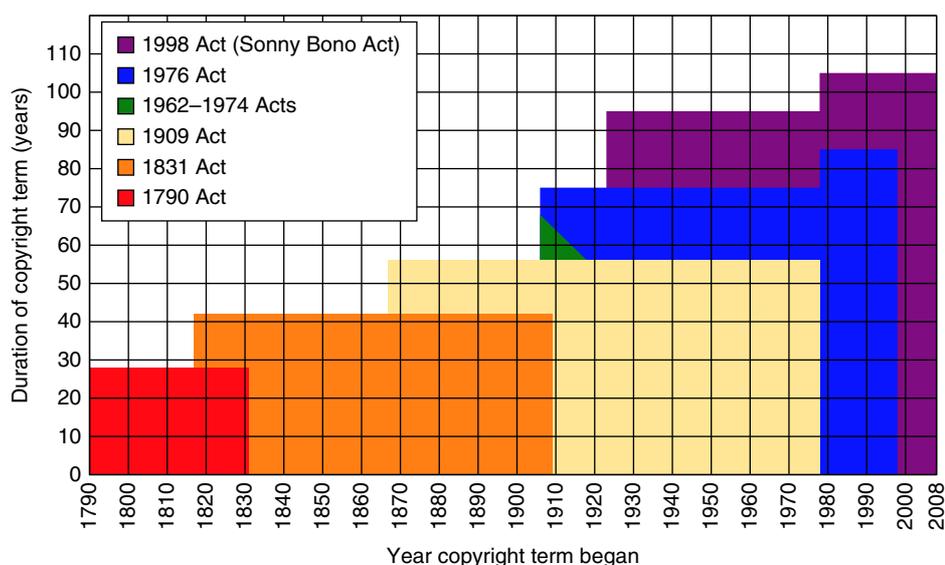


Figure 1 Term extensions to copyright in the United States.

The Creative Commons model allows creators to specify exactly how they want their work to be used by others; in other words, they can declare “some rights reserved.” Creative Commons was developed in order to counteract the problems with the current copyright system; namely, the fact that large copyright holders were exercising a disproportionate amount of power that made it hard for new content creators to distribute their work. Lessig has publicly condemned the “permission culture” that is evident in the current copyright system.

As the value of intellectual property grew to be the second-largest export sector in the United States, a shift in attitudes about copyright became noticeable. By the early 1990s, a culture of fear was well in place and social norms had developed in the worlds of music, publishing, and film that payment and permission was needed for even the tiniest use of a clip, quotation, or excerpt. Educators who had previously never thought twice to use a newspaper article, book chapter, or off-air recording in the classroom became more uncertain about the right to use such content. In his 2004 book *Free Culture* (published under a Creative Commons license and available free online), he writes: “The law’s response to the Internet, when tied to changes in the technology of the Internet itself, has massively increased the effective regulation of creativity in America. To build upon or critique the culture around us one must ask, Oliver Twist-like, for permission first . . . Permission is, of course, often granted—but it is not often granted to the critical or the independent” (pp. 10–11).

In response, the Creative Commons license offers many alternatives to this permission culture with new types of licenses for creators who wish to share their work. There are different types of licenses that offer more or less freedom to users in sharing, repurposing, or revising their work. There are also searchable indexes for users who are looking to find work that is freely available. While Lessig and other scholars argue that Creative Commons provides a useful copyright alternative, the model has received some criticism. For example, some critics have argued that the Creative Commons model fuels the same corporate system as copyright. Others claim that Creative Commons is providing unnecessary licenses, and that some of the Creative Commons licensing options are incompatible with one another. Finally, others argue that Creative Commons licenses actually diminish users’ rights, by promoting a system of licensing options instead of the doctrine of fair use.

## User rights

In part because of the long and strong protection of owner rights, *limitations and exceptions* have always been a part of copyright law, providing the necessary balance to ensure that copyright law fulfill its mandate to promote creativity, innovation, and the spread of knowledge. Among the many exceptions, for example, librarians can make copies of works for archival purposes (Russell, 2004) and they can digitize films and videos under some conditions (Kemp, 2016). Users also have the right to resell, distribute, or even destroy a legally acquired copy, known as the *first sale* doctrine. It is beyond the scope of this entry to include all such limitations and exceptions, but the ones most relevant to media literacy and media education are described below.

First, let us consider why users' rights are protected under copyright law. Protecting users ensures the continuation of authorship, because all authors draw upon preexisting works in the process of creating new ones. In US copyright law, this protection comes from the doctrine of fair use, Section 107 of the 1976 Copyright Act, which enables creative people to use copyrighted content in their own creative work if they meet the fair use standard applying a four-factor analysis, considering the author's purpose in using the copyrighted material, the nature of the copyrighted work, the amount used, and the potential effect of the particular use on the market.

Explicitly stated in the law, "the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." Some people mistakenly believe that only these named uses are fair use exceptions, but courts have found a wide variety of other uses to be fair uses by applying the rule of reason and considering the context and situation of the use.

An important case articulating the benefits of fair use to authorship was *Campbell v. Acuff-Rose Music, Inc.*, where the copyright holder for the well-known Roy Orbison song "Pretty Woman" sued Luther Campbell and his rap group 2 Live Crew for their identically named song. The rap song drew upon the lyrics and melody of the original in a parody version of the song. Campbell had asked for permission to make transformative use of the song and although they were refused, they produced the song anyway. In deciding the infringement case, the Supreme Court recognized Campbell's use as a fair use, noting that of course, as a genre, parody needs to mimic an original to make its point. The Court also explained that fair use exemptions are essential for future authorship, in order to prevent copyright law from stifling the very creativity which the law is designed to promote.

The flexibility of the doctrine of fair use can be applied to new forms of expression and communication as they arise. For example, noncommercial user-generated content is becoming a more and more important part of contemporary culture, but few countries have a specific exception to allow remixes and mash-ups, even though this is a now common form of creative expression. The doctrine of fair use is easily applied to these media forms and any other forms and genres that develop as a result of human creativity in the future.

Obviously, then, limitations and exceptions to copyright law are important to promote social, educational, and cultural goals. Most countries have copyright rules that enable the use of copyrighted materials in the course of face-to-face teaching in non-profit educational institutions. Special formats of works can be created so that disabled persons can have access to them.

Educators have broad protection to use any copyrighted work in face-to-face teaching and learning contexts. Under US copyright law, Section 110(a) of the Copyright Act of 1976 enables educators to use any copyrighted content in face-to-face teaching and learning contexts and even empowers them to make copies for classroom use. A more recently created law, Section 110(b), which is sometimes called the "Teach Act," includes educational use provisions for distance learning (Crews, 2002). Although this law was designed to support online learning, it defined the concept so narrowly that the numerous provisions and highly detailed limitations have not proven to be relevant

to the fast-changing innovations in educational technology or the variety of learning environments that now exist. As a result, when it comes to the use of new forms of audiovisual distribution like streaming, some institutions of higher education engaged in online learning have preferred to use the more flexible fair use standard instead (Adams & Holland, 2017).

Section 107 of the Copyright Law is the doctrine of fair use, and it protects all users, not just educators. Because fair use is contextual and situational and relatively simple to apply, fair use is a concept that ordinary people can understand. Instead of having to read a long list of exceptions to find one that arguably applies to the specific activity in which they are engaged, people can apply fair use reasoning to their particular situation through asking some basic questions. This is especially important in supporting certain forms of creative expression, including appropriation, fanfiction, mash-ups and remixes, and other cultural practices where copyrighted material is reused.

In recent years, the concept of *transformativeness* has been particularly useful to educators with interests in media education. In an influential law review article, Judge Pierre Leval (1990) introduced the concept, which is not explicitly mentioned in the Copyright Act, as a way to assess the first statutory fair use factor, the purpose and character of the use. To be transformative, Leval noted, the use must contribute to new work and must use copyrighted material in a different manner or for a different purpose from the original. If the new work adds value to the original—“if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society” (p. 1111).

To apply the transformativeness standard, when people create work using the copyrighted work of others, they can ask themselves the following.

1. Did my use of the copyrighted work “transform” the original by using it for a new purpose or in a new context?
2. Did I use only the amount needed to accomplish my purpose in ways that could not be a substitute for the original?

Although transformativeness is an important concept, it isn't the whole story when it comes to the doctrine of fair use. Copying is a time-honored method of learning and it's an important part of the creative process. Many Enlightenment-era writers learned to compose original sentences by first copying sentences directly, and then modifying their content while preserving the structure. Elementary educators recognize that copying can also support a writer's skills by allowing opportunity for careful analysis and close imitation of the text. As learners study the text, they “try it out” by modeling their creative work upon the work of the author. For example, a learner may focus on a genre like “blackout poetry,” reading the poetry of Austin Kleon, who creates poems by taking newspaper articles and removing words using a black magic marker. The words he does not erase become poetic expression. By copying this approach to composing poetry, student learning occurs.

Copying as an exception to copyright law also fosters the public interest in gaining access to information, which is a prerequisite for the democratic process of

self-governance. Tushnet (2004) points out that copying serves a broad variety of First Amendment goals. She points out, “Copies can still serve free speech purposes when their culture-altering and culture-constituting effects aren’t distilled into some new derivative work but remain in a viewer’s mind or appear in her conversation—when their power derives from their content and not from a second comer’s modifications.” And consider this point by legal scholar Pamela Samuelson (2015): “Whenever an author forgoes the opportunity to reuse portions of another author’s work out of fear that the use might be challenged as infringing, there is a loss not only to that author, but also to the public. The public cannot benefit from the insights that the second author’s reuse of a first author’s work would have enabled. There is, moreover, some loss to freedom of expression and to access to information when lawful reuses are forgone. Losses to the public may be more substantial when news is not reported or publications on matters of public concern are suppressed because of copyright concerns.”

Thus, copyright limitations and exceptions are essential for the free expression of ideas. The strong value placed on the public interest also explains why courts have ruled that data mining of copyrighted works can be considered to be a fair use. Data mining occurs after copyrighted works have been digitized and indexed, and are then analyzed by specialized software programs. In one case, high school students sued a software company for infringement because the company made copies of their term papers and processed the copies using a computer program designed to detect plagiarism. The court ruled that the digitization of high school papers was a fair use, because the copying and processing of the papers was for the purpose of assessing whether the papers were original or plagiarized, thus promoting a public interest in education and scholarship.

Limitations and exceptions to copyright law also protect personal autonomy and individual rights. Copying for personal use is protected under fair use. In *Sony Corporation of America v. Universal City Studios*, the question was whether Betamax video tape recorders could be sold to the public, since they could enable people to make copies of Hollywood movies that were aired on broadcast television. The Supreme Court ruled that time-shift copying of television programs qualified as fair use. Private noncommercial copying should be presumed to be fair, the courts declared.

Over time, it is evident that the Sony decision had many important benefits to advance technological innovation. For example, the case helped establish a *safe harbor* for technologies that provide substantial access to noninfringing uses of copyrighted material. A safe harbor insulates a technology creator from infringement lawsuits. Such protection has been an important shield against liability for the makers of many forms of information technologies and digital platforms like Facebook and YouTube. The Sony case also laid the legal groundwork to enable the mass digitization of books from research library collections to make a full-text searchable database available on the Internet.

## **Communities of practice advance user rights**

Educators and learners have broad rights to use copyrighted content for educational purposes, but for many the topic of copyright can be “scary,” and often it simply comes

from simply not knowing one's rights and responsibilities under the law. Today, some educators want to do more than use copyrighted material as a vehicle for transmitting content in face-to-face learning environments. They may want students to critique or comment on excerpted media texts as a media literacy practice. They may want students to memorialize their personal encounters with media texts, as a way to promote personal reflection or increase awareness of media's role in daily life. They may want to use film clips as a stimulus for charged discussions about how technology and media affects cultural participation or identity development, or reproduces social and political power. Today, learners themselves can express their learning in a wide variety of ways, using images, language, sound, and multimedia to create infographics, podcasts, blogs, vlogs, and screencasts, just to name a few (Hobbs, 2017).

To create and share ideas with colleagues, some educators want to create curriculum materials that employ excerpts, clips, and examples of copyrighted works. To promote professional development, others want to distribute samples of student work to inspire and motivate educators and show what students can do in various types of learning environments.

But without a solid understanding of how fair use applies to this work, all these valuable instructional practices are less likely to occur. In some schools and communities, a culture of copyright confusion can limit the practice of media literacy education. Fear, uncertainty, and doubt about what is legal have increased due to the ease of online copying and downloading as well as the drumbeat of fear-inducing messages from the film, music, and publishing industries. These industries even created curriculum materials designed to introduce copyright law to learners where they equated all forms of copying with stealing and simultaneously either ignored fair use or claimed that it was vague and unreliable (Hobbs, 2010).

When fear of copyright infringement was affecting the quality of documentary filmmakers work, they decided to take action. As a result of the high costs and complicated process of clearing rights to use copyrighted images, texts, or sounds in their work, documentary filmmakers were avoiding making films that addressed certain topics. They also changed sound, images, and locations in order to avoid copyright problems. Each facet of documentary production comes with its own hurdles: images, text, art, graphics, and music are copyrighted by the original creators; soundtracks are copyrighted separately from the film; and promotional materials can be copyrighted and trademarked at both the federal and state levels. At American University in Washington, DC, Patricia Aufderheide and Peter Jaszi helped filmmakers develop their own clearly articulated consensus about what is fair and reasonable under the law, in a document called the *Documentary Filmmakers' Statement of Best Practices*, which articulated the ways that documentary filmmakers needed to apply fair use to create nonfiction films.

To address the copyright confusion within the community, media literacy activists and educators then began exploring copyright education with the support of a collaboration between Peter Jaszi, Patricia Aufderheide, and Renee Hobbs, then at Temple University. Together, they worked with the community to develop a "best practices" model for media literacy educators in 2007, with support from the John D. and Catherine T. MacArthur Foundation. Groups of educators from higher education, K-12 (primary and secondary) settings, and youth media organizations in 10 cities across

**Table 1** Five principles from the *Code of Best Practices in Fair Use for Media Literacy Education*.

---

Educators can:

1. make copies of newspaper articles, TV shows, and other copyrighted works, and use them and keep them for educational use;
2. create curriculum materials and scholarship with copyrighted materials embedded; and
3. share, sell, and distribute curriculum materials with copyrighted materials embedded.

Learners can, under some circumstances:

1. use copyrighted works in creating new material;
  2. distribute their works digitally if they meet the transformativeness standard.
- 

the United States came together for day-long meetings to develop a set of consensus principles. The resulting document, the *Code of Best Practices in Fair Use for Media Literacy Education* (Media Education Lab, Program on Information Justice and Intellectual Property, Center for Media and Social Impact, 2007), was rigorously reviewed by a team of legal experts and adopted by several national membership organizations, including the National Association for Media Literacy Education (NAMLE), the Action Coalition for Media Education (ACME), the Visual Communication Studies Division of the International Communication Association (ICA), the Media Education Foundation, and the Association of College and Research Libraries (ACRL). Significantly, the 60 000-member National Council of Teachers of English (NCTE) also adopted the Code as its official policy in November 2008, replacing an earlier policy from 1980. Academic librarians have also been leaders in advancing their knowledge of copyright law and helping educators and learners to understand it (Disclafani & Hall, 2012).

The Code identifies five principles, each with limitations, representing the community's current consensus about acceptable practices for the fair use of copyrighted materials. As Table 1 shows, educators and learners have broad rights to copy, use, and share copyrighted materials for the purpose of media literacy education; they can sell and distribute works that contain copyrighted content.

At a time when online digital technologies are enabling educators and learners to create and share an ever widening array of texts, sounds, still and moving images, music, and graphic art, communities of practice have discovered how to work collaboratively to promote the use of digital media as tools for teaching and learning media literacy. Knowledge of the law and its application to digital learning have increased as a result of participation in communities of practice. With support from the Center for Media and Social Impact at American University, codes of best practice have been created with and for online video producers, academic librarians, dance educators, and many other creative communities.

The doctrine of fair use can only be applied by considering the social practices within creative communities. Artists, teachers, architects, TV producers, and poets all have social norms, established by the traditions within each professional group, for what's appropriate in using copyrighted materials. These social norms exist side by side with the marketplace model for disseminating information and entertainment. Because copyright law includes a provision for fair use that is flexible and contextual, it can be responsive to the social norms of many different creative communities. As Aufderheide

(2018) writes, “A proven way to lower perceived risk, bring risk assessment into the realm of reality, and permit educators, learners and creators to do their work has been to create codes of best practices in fair use at the level of professional practice. A community of practitioners expresses their collective judgment about appropriate interpretation of fair use given their cultural and creative practices.”

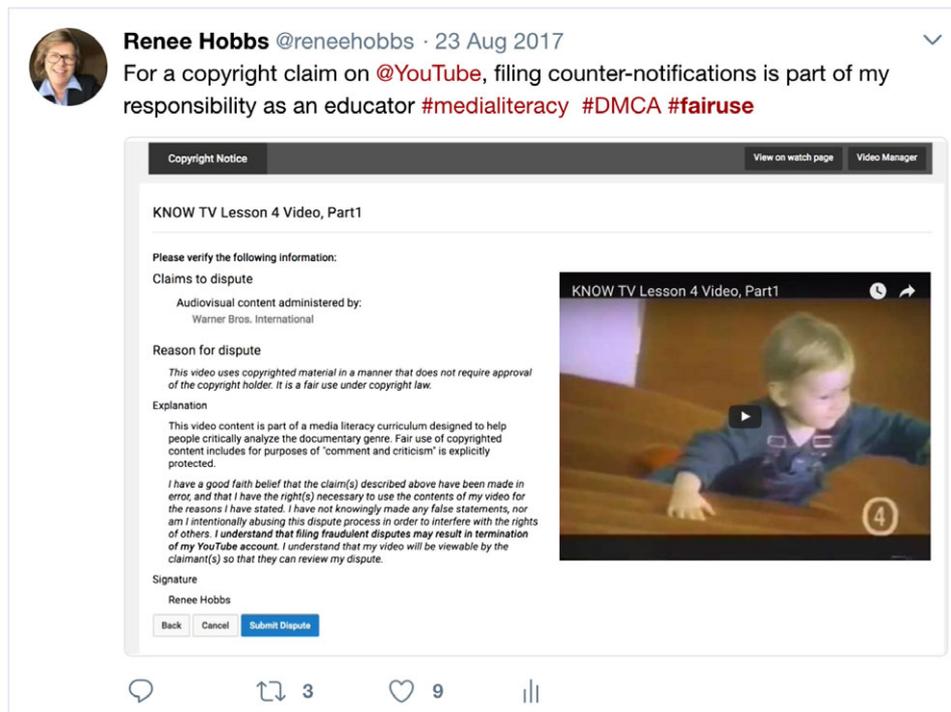
## **Takedown notices and ripping clips: Digital Millennium Copyright Act**

Technology changes the ways we use media and the law follows more slowly in its footsteps. Copyright issues enter into the online space in a variety of ways and they enter our living rooms, too. In this section we consider the Digital Millennium Copyright Act of 1998, the law that once made ripping DVDs (digital video discs) illegal and which also protects Internet service providers (ISPs) from copyright infringement via the automatic takedown process and criminalizing the sale of technologies designed to circumvent access control devices protecting copyrighted material from unauthorized copying or use.

Nearly every YouTuber is familiar with the practice of “takedowns.” If your video includes some copyrighted music or film clips, your video might get taken down. This is now called a Content ID claim, and they are issued automatically by the content companies that own music, movies, TV shows, video games, or other copyright-protected material. Content owners can block material, allow the video to remain live on YouTube, mute the music on your video, track the viewing statistics, or block your video from being seen on certain devices, apps, or websites. Most importantly, under the YouTube Terms of Service, they can even choose to monetize your content with ads. Advertising revenue earned from views on your creative work goes to the copyright owners of the claimed content.

Where did Content ID come from and how does it help Google (owner of YouTube)? When Congress crafted legislation in order to harmonize US copyright with the World Intellectual Property Organization (WIPO), they granted special protections to copyright holders, far more protection than the WIPO required. The 1998 Digital Millennium Copyright Act created protections for those companies and businesses who find themselves accused of infringement; in this case, the platform companies like Google and Facebook. The safe harbor provision of the law allows platforms to avoid culpability for copyright violations by third parties. Content owners may legally use automatic takedown software to search for and find content across the Internet that may be infringing and send withdrawal requests to platform companies, which must automatically take down content under the law (Cobia, 2008). Thus, digital rights management (DRM) software handles copyright matters automatically.

But many fair uses of copyrighted content cannot be determined through DRM tools because of the flexibility of fair use, and its sensitivity to context and situation. Media-literate individuals know how to analyze whether a particular use of copyrighted material is a fair use. They understand the concept of transformativeness and can conduct a four-factor analysis with sensitivity to context and situation. Those on YouTube also know how to file a counternotification when their work has received



**Figure 2** The counternotification process shared on Twitter.

copyright claim. By completing an online form, you offer reasons why your use of copyrighted content is a fair use, and within 48 hours a decision is made and in many cases the video is restored.

In 2017, Renee Hobbs uploaded a short video to YouTube which included an excerpt from a Discovery Channel documentary about human development. She wanted to demonstrate the practice of critical analysis of media. To explore the concept of point of view, the video uses her voice-over to introduce a media literacy activity where students are divided into two teams: one team writes a voice-over from the point of view of the baby, while the other team writes the voice-over from the point of view of the parent. Figure 2 shows what a completed YouTube counternotification looks like when completed. Media literacy educators are expected to be familiar with the process of filing takedown counternotifications and should help learners understand how to use the process when needed.

Copyright law continues to change in response to changing technologies and cultural norms, and the content industries have used their political and economic power to restructure the technological landscape in relation to copying media. Gillespie (2007) has chronicled the early history of DRM, which involves a complex balancing act between businesses, government, and citizens through laws, licenses, and cultural ideas. He explains how DVD players and other technology are built without the capacity to make copies, thanks to an act from Congress. By making copying technically impossible, the music and movie industries have used pressure and the force of law to impose strong and complex limitations on manufacturers. Hollywood movies on

DVD are encrypted with a code that prevents them from being copied. The Content Scrambling System (CSS) licensing ensures that the manufacturers of playback devices prevent copying, creating a system of “lock and license.”

If you’re old enough to remember renting VHS (Video Home System) tapes at Blockbuster, you may remember the warnings placed at the front of the videos and shown right before the film began: they had official-looking logos and warned of a \$250 000 fine for unauthorized copying. These warnings were intended to deter those who might violate copyright law. But warnings can be ignored and codes and locks can be broken. Bypassing the copy-protection systems on DVDs (called “ripping”) has been around for a long time. In 1999, hackers in Norway developed DeCSS, enabling people to “rip” copy-protected DVDs. Since then, thousands of other hackers have continued to develop special software to bypass encryption.

Why do people want to break encryption? After people buy a DVD, they sometimes want to make a back-up copy to watch at their summer house at the lake. They might want to make a copy to watch on a tablet or other digital device. They might want to upload a copy of the digital file to a peer-to-peer network to share with a brother or sister stationed at a military base in Afghanistan.

When the DMCA (Digital Millennium Copyright Act) law was passed, it struck a serious blow to the principle of fair use. Although the law makes ripping illegal, it has been controversial since its passage (Morris, Butler, & Band, 2018). In some cases, of course, copying an encrypted digital file may be legal according to fair use. But because the law unfairly criminalizes the legal fair use of copyrighted material, there is a special provision in the law to address fair use concerns. This special provision grants the Librarian of Congress the authority to exempt users who are, or are likely to be in the succeeding 3-year period, adversely affected in their ability to make noninfringing uses of a particular class of copyrighted works (Morris et al., 2018). To accomplish this, Section 1201 of the law mandates a rulemaking process that was expressly implemented to ensure that the public has the continued ability to engage in noninfringing uses of copyrighted works. So every 3 years, the US Copyright Office considers exemptions to the law for groups or individuals who can prove that the law adversely affects their ability to make lawful, noninfringing uses of copyrighted works. As part of the rulemaking process, the Copyright Office puts the burden on exemption seekers, requiring them to bring evidence of how the law limits their need to bypass DRM software. In general, the process begins with the submission of petitions detailing only the scope of the exemption requested. The Copyright Office groups the petitions into distinct classes and invites public comments on the proposed exemption classes through a Notice of Proposed Rulemaking. Supporters and opponents both provide written comments with legal and evidentiary facts in three rounds of comments, followed by public hearings.

In 2006, Professor Peter DeCherney of the University of Pennsylvania and his colleagues successfully argued before the US Copyright Office that film professors should be entitled to an anti-circumvention exemption. He showed that when teachers select clips by directly using a DVD, the players are slow to load content. Some DVDs automatically play trailers for other movies every time they are played. Some DVDs can’t be easily cued up, which means teachers have to skim through all the chapters to find the precise scene they need. When teachers use multiple DVDs to show clips in class, this

practice is time-consuming and often ineffective, which may lead to nonoptimal use of video in the classroom. DeCherney argued that possible alternatives to circumvention, such as using VHS cassettes, recording with a digital video recorder, or playing individual DVDs in succession, were inadequate instructional practices (DeCherney, 2012). For these reasons, the Register of Copyright granted the exemption to film professors to rip videos of audiovisual works included in the departmental library of a college or university's film or media studies program. Thanks to DeCherney's advocacy, the Copyright Office established the first ever educational exception to the DMCA's anti-circumvention provisions.

Through advocacy that follows the paradigm established by DeCherney, media literacy educators have expanded fair use to include the right to rip copy-protected movies and media through Section 1201 of the Digital Millennium Copyright Act of 1998. Because many elementary and secondary educators and learners depend on clips from film DVDs for use in both classroom teaching and student media production assignments, the law has had a negative impact on digital learning and, in particular, has discouraged educators from using film as a teaching resource. Few educators still use VHS tapes, as this equipment has become obsolete. Many have migrated their clip compilations to disk, while others use YouTube video clips, uploaded by others. But these are often of poor visual and sound quality, making it difficult to do the kind of close analysis required for media literacy education. In 2009, Renee Hobbs formally petitioned the Copyright Office to expand the law to include K-12 teachers and students as well as those who engage in media literacy education in libraries, museums, and other settings, but her petition was unsuccessful. In 2012, her second petition was successful and the law specified that college faculty as well as K-12 teachers may "rip" video from copy-protected DVDs or works distributed by online services for purposes of comment or criticism in noncommercial videos, documentary films, nonfiction multimedia e-books offering film analysis, and for certain educational uses. In 2015, her third petition enabled K-12 students to earn the right to legally create copies of copy-protected works using screen-capture technology (Hobbs, 2016). Continued advocacy may be needed to ensure that these fair uses of copyrighted material are available to educators and learners in the future.

## The future of copyright

Rapid cultural changes resulting from widespread access to the Internet and other information technologies are opening up space for a vigorous discussion about the role of copyright and fair use in contemporary society.

But copyright law may not be meaningful or relevant if the free and open circulation of human creativity generates more financial rewards and social benefits than the practice of restricting access. Some creative people are choosing not to participate in the copyright system, a practice which developed in the 1980s and has become known as *copyleft*. Because there are licensing models like the open source movement, Creative Commons licenses, and the General Public License (GPL), contributors can share their contributions freely with others, enabling them to reuse and adapt them,

sometimes with specific conditions, such as requiring that subsequent users also share their work freely.

Creative works are developed by people from all walks of life. At the same time, large technology platforms, media companies, and independent artists who are trying to make a living from their creative work are asserting their rights to control information and profit from it (Hyde, 2010). What are the implications for the future of copyright?

Some people believe that copyright law is currently interfering with innovation and the spread of knowledge and that removing the law would yield economic and social benefits. Legal scholar Yochai Benkler writes about the future of copyright in a networked society. He believes that nonproprietary information production (that is, the creation of information that is unencumbered by ownership rights) may be superior to the traditional industrial model that emphasizes exclusive rights. The economic model of information as a commodity, which copyright law embodies, might not be the best fit in the age of the Internet.

After all, as we have seen in this entry, information is a special kind of property. It's not like other kinds of property, because if one person consumes it, there is no effect on whether or not another person can consume it as well. Benkler (2006) argues that the current economic model of classifying intellectual property as a marketable product is inefficient. Right now, the current market system attempts to put a price on these resources and thereby restricts access to them. Those with an economic interest in controlling the production and dissemination of information and entertainment are trying to clamp down on people who wish to freely share information, culture, and knowledge.

The current copyright system attempts to make access to creative works more difficult and expensive for the general public to obtain. This may simply not be efficient from an economic standpoint or a cultural one. A nonproprietary production system that encourages the free flow of information, knowledge, and culture would intensify the spread of knowledge and innovation. After all, the cost of creating new material is typically much lower in a production model that relies on sharing information.

The Internet itself continues to be built upon the tremendous growth in the number of successful collaborative, peer production projects where creative products are developed outside of the traditional economic system. Open source software, social sharing, and other forms of peer production are widespread today. However, industries with an economic interest in maintaining the proprietary model of information dissemination (for example, Hollywood and the music industry) are working toward more restrictive copyright legislation that could shut down many peer production and information-sharing projects.

Perhaps copyright laws themselves are real obstacles to the free flow of information or perhaps the law will continue to evolve to better balance the rights of owners and users in ways that advance creativity, innovation, and the spread of knowledge. In a world in which information consumers are now users and creators themselves, knowledge of the changing nature of copyright law is a vital component of being a media-literate citizen.

SEE ALSO: Authorship and Participatory Culture; Digital Media and Information Rights; Media Access and Activism; Open Educational Resources; Policy Issues in European Media Literacy; Press Freedom for Student Journalists; Remix Culture

## References

---

- Adams, T., & Holland, C. (2017). Streaming media in an uncertain legal environment: A model policy and best practices for academic libraries. *Journal of Copyright in Education and Librarianship*, 1(2), 1–32. doi: 10.17161/jcel.v1i2.6550
- Aufderheide, P. (2018). Codes of best practices in fair use: Game changers in copyright education. In R. Hobbs (Ed.), *The Routledge companion to media education, copyright, and fair use* (pp. 109–116). New York, NY: Routledge.
- Aufderheide, P., Hobbs, R., & Jaszi, P. (2007). *The cost of copyright confusion for media literacy*. Retrieved from [https://www.macfound.org/media/article\\_pdfs/MEDIALITERACYREPORT.PDF](https://www.macfound.org/media/article_pdfs/MEDIALITERACYREPORT.PDF)
- Benkler, Y. (2006). *The wealth of networks: How social production transforms markets and freedom*. New Haven, CT: Yale University Press.
- Cobia, J. (2008). The Digital Millennium Copyright Act takedown notice procedure: Misuses, abuses, and shortcomings of the process. *Minnesota Journal of Law, Science & Technology*, 10(1), 387–411. Retrieved from <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1205&context=mjlst>
- Crews, K.D. (2002). New copyright law for distance education: The meaning and importance of the TEACH Act. Copyright Management Center at Indiana University—Purdue University-Indianapolis. Retrieved from <https://alair.ala.org/handle/11213/9244>
- DeCherney, P. (2012). *Hollywood's copyright wars: From Edison to the Internet*. New York, NY: Columbia University Press.
- Disclafani, C.B., & Hall, R. (2012). Stop saying no: Start empowering copyright role models. *Journal of Library & Information Services in Distance Learning*, 6(3–4), 251–264. doi: 10.1080/1533290X.2012.705151
- Gillespie, T. (2007). *Wired shut: Copyright and the shape of digital culture*. Cambridge, MA: MIT Press.
- Hobbs, R. (2010). *Copyright clarity: How fair use supports digital learning*. Thousand Oaks, CA: Corwin Press.
- Hobbs, R. (2016). Lessons in copyright activism: K-12 education and the DMCA 1201 exemption rulemaking process. *International Journal of Information and Communication Technology Education*, 12(1), 50–63. doi: 10.4018/IJICTE.2016010105
- Hobbs, R. (2017). *Create to learn*. Hoboken, NJ: John Wiley & Sons, Inc.
- Hyde, L. (2010). *Common as air: Revolution, art, and ownership*. New York, NY: Farrar, Strauss and Giroux.
- Kemp, J. (2016). Feature topic interviews: Media librarianship Q & A with Deg Farrelly. *Against the Grain*, 25(5), 11. Retrieved from <https://docs.lib.purdue.edu/cgi/viewcontent.cgi?referer=https://www.google.co.uk/&httpsredir=1&article=6607&context=atg>
- Lessig, L. (2004). *Free culture*. New York, NY: Penguin Books.
- Leval, P.N. (1990). Toward a fair use standard. *Harvard Law Review*, 103(5), 1105–1136. Retrieved from [https://www.law.berkeley.edu/files/Leval\\_-\\_Fair\\_Use.pdf](https://www.law.berkeley.edu/files/Leval_-_Fair_Use.pdf)
- Media Education Lab, Program on Information Justice and Intellectual Property, Center for Media and Social Impact. (2007). *Code of best practices in fair use for media literacy education*. Washington, DC: Center for Media and Social Impact.
- Morris, C., Butler, B., & Band, J. (2018). Circumventing barriers to education: Educational exemptions in the triennial rulemaking of the Digital Millennium Copyright Act. In R. Hobbs (Ed.), *The Routledge companion to media education, copyright, and fair use* (pp. 52–64). New York, NY: Routledge.
- Russell, C. (2004). *Complete copyright: An everyday guide for librarians*. Chicago, IL: American Library Association.

- Samuelson, P. (2017). Justifications for copyright limitations and exceptions. In R. Okediji (Ed.), *Copyright law in an age of limitations and exceptions*. New York, NY: Cambridge University Press. Retrieved from [https://www.law.berkeley.edu/files/Justifications\\_for\\_Copyright\\_Limitations\\_and\\_Exceptions\\_-\\_Pamuela\\_Samuelson.pdf](https://www.law.berkeley.edu/files/Justifications_for_Copyright_Limitations_and_Exceptions_-_Pamuela_Samuelson.pdf)
- Tushnet, R. (2004). Copy this essay: How fair use doctrine harms free speech and how copying serves it. *Yale Law Journal*, 114, 535–590. Retrieved from <http://digitalcommons.law.yale.edu/ylj/vol114/iss3/2/>

### Further reading

---

- Aufderheide, P., & Jaszi, P. (2011). *Reclaiming fair use: How to put balance back in copyright*. Chicago, IL: University of Chicago Press.
- Benkler, Y. (2006). *The wealth of networks: How social production transforms markets and freedom*. New Haven, CT: Yale University Press.
- Hobbs, R. (Ed.). (2018). *The Routledge companion to media education, copyright, and fair use*. New York, NY: Routledge.
- Lessig, L. (2008). *Remix: Making art and commerce thrive in the hybrid economy*. New York, NY: Penguin Books.
- World Intellectual Property Organization. (2016). Understanding copyright and related rights. Retrieved from [http://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_909\\_2016.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf)

**Renee Hobbs** is a professor of communication studies and Director of the Media Education Lab at the Harrington School of Communication and Media at the University of Rhode Island. Her research examines the conditions of media literacy education in elementary and secondary schools. She petitioned the US Copyright Office four times as part of the DMCA 1201 Triennial Review process. She has authored eight books and over 150 scholarly and professional articles. She has offered professional development programs in media literacy on four continents. She is the founding editor of the *Journal of Media Literacy Education*, an open-access, peer-review journal sponsored by the National Association for Media Literacy Education.