

How Media Literacy Educators Reclaimed Copyright and Fair Use

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Keywords

fair use
copyright
digital media
communication
education
media literacy
law
policy

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doi: 10.1162/ijlm_a_00026

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Volume 1, Number 3

Abstract

Media literacy educators make active use of copyrighted works in the practice of teaching and learning. They frequently use popular culture, mass media, digital media, or other artifacts that are not traditionally defined as “educational media.” In part because of several well-publicized cases in which severe penalties have been directed at individuals involved in file-sharing and because of the rise of licensed online multimedia products marketed directly to schools, a climate of fear about potential liability concerning the unlicensed use of copyrighted materials in education has been increasing among educators in higher education and K-12 schools. In response, media literacy educators in the United States are asserting their fair use rights. This paper describes the development of the *Code of Best Practices in Fair Use for Media Literacy Education*, which was created to articulate the consensus that exists among educators about the application of fair use to the practice of media literacy education. This code was developed through two research methods: interviews with 60 educators; and intensive four-hour focus groups with 150 K-12, university, and youth media educators in ten cities across the United States. The *Code of Best Practices in Fair Use for Media Literacy Education* identifies five principles that guide educators’ decisionmaking about the application of fair use in education, including the use of copyrighted materials in teaching, the development and distribution of curriculum materials, student use of copyrighted materials in their own academic and creative work, and dissemination of student work.

Introduction

The rapidly increasing flood of mass media and popular culture, as well as the Internet and other information technologies, has inspired a host of educational innovations. Outside of school, young people are increasingly involved in cultural production that involves the remixing, reworking, and appropriation of mass media, popular culture, and digital materials. Online user-generated content makes visible the practice of media analysis and media composition by ordinary citizens, who create new media texts to satisfy their creative, social, emotional, and intellectual needs (Lessig 2004; Jenkins 2006b). These practices call into question a key cultural and economic assumption of the 20th century: the idea that innovation and creativity are the result of market-based reward systems. Numerous examples of these nonmarket forms of information and entertainment exist, including Wikipedia, open-source software, and all manner of user-generated content, such as videos found on YouTube and other websites. These and other online resources lend vitality to contemporary education, the arts, community activism, and civic participation.

Copyright law is a topic of significance to educators and those engaged in creative practices. The U.S. Constitution declares that copyright's purpose is to promote creativity and the spread of knowledge and innovation. Copyright law protects both the rights of owners and the rights of users who benefit from access to creative works. In the United States, the debates leading up to the Copyright Act of 1976 "reflect the traditional rhetoric of purpose in American copyright—that is, the notion that copyright is, or should be, an incentive to the creation and dissemination of new works to the public" (Jaszi 1996, p. 301). However, when the terms of copyright were extended in 1998, the argument for granting increased protection to owners was based largely on promoting the interests of American corporations in the international marketplace. Proponents claimed that the law would bring U.S. law into conformity with the developing norms of the European Union. The changes to copyright law reflected the "increasingly dominant thesis that property and markets are the roots of all growth and productivity" (Benkler 2006, p. 461). But the restructuring of U.S. copyright law has had the cumulative effect of privileging the interests of "content providers" over users, "putting at risk the principle of

assured public access to the fruits of creativity which traditionally has been one of the pillars of our copyright system" (Jaszi 1996, p. 300).

Various provisions of copyright law affect educators' use of copyrighted materials, creating obstacles that may limit the full potential of digital technology (Fisher and McGeeveran 2006). Some educators are familiar with a new model of licensing creative works called Creative Commons, developed by Lawrence Lessig, who has publicly condemned the "permission culture" that is evident in the current copyright system. In his book *Free Culture* Lessig (2004, p. 10) 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." Creative Commons is touted as a best-of-both-worlds approach because it allows creators to specify exactly how they want their work to be used by others. However, critics have pointed out some flaws in this model. For example, Moller (2006) argues 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. Promoting such licensing options may, over time, diminish the viability of the doctrine of fair use (Elkin-Koren 2005). However, Creative Commons is "fair use friendly" because it specifically acknowledges that fair use is not excluded by its licenses. But at a practical level, Creative Commons does not address the needs of the many educators who make active use of mass media content from companies like Disney, News Corporation, and Viacom in their own creative work and in the classroom.

Media literacy educators, in particular, use teaching and learning practices involving the use, display, and manipulation of copyrighted materials from mass media, popular culture, and digital media (Hobbs 2007). Learners may use copyrighted materials for completing class assignments or in composing their own creative and academic work. Among some sectors of the community, support for fair use is becoming conceptualized as a civil rights issue (Postigo 2008). Media literacy educators have a special interest in preserving their ability to use copyrighted materials freely, without payment or permission.

Employing the "best practices" model developed by Aufderheide and Jaszi (2004; see also Aufderheide 2007), we helped media literacy educators in the

United States to come together to create the *Code of Best Practices in Fair Use for Media Literacy Education* (American University Center for Social Media, Media Education Lab at Temple University, and Washington College of Law, Program on Intellectual Property and the Public Interest 2008), which defines how copyright and fair use apply to their (and their students') work. (The project was supported by the John D. and Catherine T. MacArthur Foundation.) In this paper, we describe the theoretical rationale, history, and research process that led to the creation of this work. We review some of the knowledge and beliefs that exist among educators concerning legal issues around the use of copyrighted materials from mass media and popular culture. Finally, we review the process and results of our work, concluding with a description of the resulting five principles of fair use for media literacy education.

Media Literacy Educators Depend on the Use of Copyrighted Materials

Across North America and in many Western European and some Asian countries, media literacy educators work in a variety of educational environments to develop students' critical thinking about mass media and popular culture and to strengthen communication skills (Buckingham and Domaille 2002). Media literacy educators work at the college and university level, in high schools and elementary schools, with parents, and in tertiary education environments such as youth development or youth media production programs and media access centers. In K-12 education settings in the United States, media literacy education is often integrated into English, social studies, journalism, the fine and performing arts, and health education. Media literacy educators explore the genres of news, advertising, reality shows, comedies, sports programs, music videos, websites, video games, and documentaries. They teach media production skills along with critical thinking by assigning students to produce new work that sometimes comments on or draws upon existing cultural products. In general, media literacy educators make near-continual use of copyrighted works from contemporary mass media and popular culture in their work as teachers, scholars, and community activists.

For many media literacy educators, texts can include copyrighted work of all sorts, including print media, music, images, and digital materials taken

from popular culture, including video games, movies, and television; mass media such as magazines; and non-mass media Internet sources such as YouTube videos, Facebook pages, and blogs. Media educators' use of media texts is distinct from traditionally understood "educational usage," where informational, nonfiction, or educational media are used solely for the transmission of information or for entertainment purposes (Hobbs 2005). Media literacy educators often use texts in ways that promote active inquiry, discussion, the research process, and the development of communication skills. Instructional practices vary widely but often include the use of texts to illustrate ideas, the close analysis or deconstruction of a text as an object of analysis, comparison-contrast, research activities, simulation/role-playing, and the use of texts as objects for remixing, sampling, and appropriation activities within the context of learning media composition processes and creating actual productions (Buckingham 2003).

Some examples of contemporary media literacy education practices reveal educators' significant reliance on the use of copyrighted materials. Michael Robb Grieco, a college teacher, uses clips from the film *High Fidelity* (dir. Stephen Frears, 2000) to discuss and analyze students' relationships with popular music, exploring music as a marker of cultural and personal identity and using music to explore concepts such as discourse communities, representation, technology, and taste cultures. Rhys Daunic works with elementary school children in New York City, developing child-created public service announcements that are linked to the school's science curriculum, where students select an issue, gather and analyze information, write scripts, and compose simple iMovie videos by matching their recorded spoken performances to a series of images they have selected and sequenced from sources including those retrieved using Google Images (<http://images.google.com/>). Social studies high school teacher Spiro Bolos at New Trier Township High School north of Chicago uses a series of Hollywood DVD clips in order to illustrate the concept of racial tokenism in drama. Racial or other minorities are often marginalized through visual and narrative presentation: In viewing and discussion experiences, high school students discover that although African-American actors may be given characters that are occupationally prestigious or morally superior, they are severely limited in screen time or plot and character development. Finally, to help

teachers explore media representations of the Middle East, Cyndy Scheibe, director of Project Look Sharp, a media literacy initiative at Ithaca College, has created online curriculum materials that include complete *Newsweek* covers, clips from the Disney film *Aladdin* (dir. Ron Clements and John Musker, 1992), and other copyrighted material. All these practices are part of media literacy education—and all depend upon the ability to display, use, quote from, remix, and manipulate existing copyrighted works from mass media and popular culture.

In the United States, restrictive institutional policies about the use of audiovisual and digital technologies have multiplied in recent years (Hobbs 2006; Frey 2008). In Germany, France, and other nations, concerns about copyright and resulting oversight practices are fewer because of less overall integration of the use of computers in the classroom and the lack of institutional gatekeepers such as library media specialists (Grafe 2009). In some U.S. schools, audiovisual materials must pass a screening and review process before they can be shown in a classroom, and computer software must be approved by a software review board. Internet filtering is common in most districts in the United States, even though research has shown that it impedes the educational process by restricting access to web pages relevant to the required curriculum (Electronic Frontier Foundation 2003).

As a result of increased pressure to conform to various district- or university-level policies regarding the use of digital media, educators experience increased anxiety and confusion about copyright and fair use. Nonetheless, many teachers insist on using copyrighted materials for teaching and learning. We encountered teachers who describe their deliberate efforts to “fly under the radar screen” or who claim willingness to violate school policy (as understood) in order to meet the educational needs of their students. The increased climate of fear has emerged from interpretations of various “educational use guidelines” for multimedia, music, and photocopying. These guidelines appear to define the appropriate ways that video, print, and audio media texts can be used and shared as part of teaching, learning, and research.

User Rights under the Doctrine of Fair Use

In the United States, copyright is a legal structure that prompts “the development and distribution of human creativity” (Madison 2006, p. 178). Copyright

law enables owners to exploit the value of their work in the marketplace; it also allows users the privilege of using copyrighted materials without payment or permission under some conditions. Rather than narrowly specifying acceptable exemptions, U.S. copyright law sets forth a number of broad considerations that courts and other decisionmakers should take into account in deciding whether, on balance, a particular unlicensed use of copyrighted material should be permitted rather than forbidden. The fair use privilege articulated in Section 107 of the Copyright Act of 1976 creates a kind of situational public domain (Hobbs, Jaszi, and Aufderheide 2007). Fair use is an “equitable rule of reason,” and so each case must be decided on its own facts, using criteria that, “though in no case definitive or determinative, provide some gauge” for consideration, including four factors: the purpose of the use; the nature of the work; the amount of the use; and the effect of the use on the potential market (Joyce et al. 2003, p. 840).

The statute identifies activities such as criticism, comment, teaching (including multiple copies for classroom use), scholarship, and research as illustrative examples of fair use. The flexibility of the doctrine is one of its great strengths, but this flexibility also can be a source of frustration to would-be users who seek absolute certainty that they are not breaking the law. Fortunately, Fisher and McGeveran (2006, p. 52) explain that “the statute itself goes out of its way to signal that educational uses are especially likely to constitute fair uses.”

Around the world, laws governing the legal use of copyrighted materials in education are far from uniform. Some countries have specific exemptions for certain educational uses; some discriminate between analog and digital; some do not. For example, no European country has a general fair use exception. The challenge for international educators will be to see how successfully the freedoms that are being identified in the United States can be transposed to foreign contexts where laws provide for more or less generous special exceptions for education. Writes Jaszi (2005, p. 4):

In Europe we see the rise of an approach to copyright limitations, based squarely on a human right of access to information. This approach has the potential to bear significant doctrinal fruit in years to come. . . . Thus, for example, Article 27.2 of the Universal

Declaration of Human Rights sets out that “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is an author”; and Article 15.1. of the International Covenant on Economic, Social and Cultural Rights provides that “[t]he States Parties to the present Covenant recognize the right of everyone: (a) to take part in cultural life (b) to enjoy the benefits of scientific progress and its applications (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Notably, and unfortunately from a public interest perspective focused on information use rights, these traditional formulations emphasize the human right of intellectual property ownership, rather than rights of access.

In the United States, when a fair use case comes before the courts today, it often involves one commercial company suing another commercial company for the unlicensed use of a copyrighted work. No educator has ever been sued for using a copyrighted work for educational purposes, although educators have received threatening cease-and-desist letters, which unlike an actual lawsuit are cheap and easy to produce. Today, courts’ analyses of fair use issues tend to center on one question: whether the unlicensed use in question is “transformative,” in the sense that it adds value to the copyrighted material and employs it for a purpose different from that for which it originally was intended. The courts consider transformativeness a good thing: By promoting creativity and innovation, it supports the purpose of copyright as articulated by the Constitution. Transformativeness can involve modifying material and/or putting material in a new context (Hobbs, Jaszi, and Aufderheide 2007). Transformativeness is not absolutely necessary for a finding of fair use. But the goal of copyright is generally furthered by the creation of transformative works (Joyce et al. 2003).

Media literacy educators transform copyrighted works by placing works of popular culture and mass media into an educational context and using these materials for a new purpose: to build students’ critical thinking and communication skills. In order to

offer professional development programs to educators and build scholarship about the pedagogy of media literacy, it is necessary to include illustrative examples of copyrighted works that are used as part of classroom lessons. Educators also need to be able to share excerpts of media texts on a limited basis to individuals or small groups of students, colleagues, researchers, or other educators. Students themselves need to be able to use, sample, and manipulate copyrighted works in learning various skills associated with media literacy, including the exploration of image-language relationships, point of view, and framing. In particular, remix practice is a dimension of teaching media literacy that depends upon students’ ability to transform the meaning of an existing text by manipulating the form, structure, and/or content to explore how meaning is shaped through symbol systems that operate in a complex cultural, historical, political, and economic context (Jenkins 2006a). Outside of classroom practice, students have their own fair use rights as they develop and disseminate creative works that make transformative use of copyrighted materials of all kinds.

Why “Best Practices” Matter for Copyright and Fair Use

Fair use is not an add-on or an afterthought to copyright law; it is an inherent part of the law because society benefits both from the copyright holder’s ability to exploit his or her work in the marketplace and from the user’s ability to use the copyrighted work without payment or permission under some circumstances. As Madison (2006, p. 179) explains, “Something that we recognize as a social practice, such as criticism and scholarship based on copyrighted material, exists and is valued precisely because it is not of the market. Fair use is an individual use that is credibly tied to some larger, identifiable social practice.”

The doctrine of fair use has to be understood in the context of existing patterns and practices of the particular use of copyrighted materials, which will vary depending on the norms of a particular user community. Art historians will make use of copyrighted materials in ways that are different from the work of documentary filmmakers, who will use materials differently from educators, students, or artists. This line of reasoning reflects a view that user communities can establish for themselves a reasoned, self-reflective understanding of how fair use applies to their

social and creative practices, because “the goal of fair use is, has been, and should be to promote the same creative ends that copyright as a whole serves” by recognizing that creativity thrives in a large number of situations that are outside the marketplace model of intellectual property (Madison 2006, p. 195).

Aufderheide and Jaszi (2004) worked with documentary filmmakers to uncover the ways in which documentarians have been affected by intellectual property laws, both as users of other creators’ copyrighted material and as copyright holders themselves. This report, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*, demonstrated the chilling effects of “rights clearance culture.” 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 (Aufderheide and Jaszi 2004, pp. 6–7).

Finding that documentary filmmakers suffered from an overly strict interpretation of intellectual property and copyright law, Aufderheide and Jaszi (2004, p. 4) met with documentarians to help them assert their own intellectual property rights and push for a “balanced general account of intellectual property.” Under the philosophy that creative communities need to come to their own clearly articulated consensus (or “best practices”) about what is fair and reasonable under the law, they created the *Documentary Filmmakers’ Statement of Best Practices in Fair Use* (American University Center for Social Media, Association of Independent Video and Filmmakers, and Washington College of Law, Program on Intellectual Property and the Public Interest 2005). Since its publication, the statement has proved to be a tool for the documentary filmmaker community in clarifying and asserting their fair use rights.

Using Jaszi and Aufderheide’s work with documentary filmmakers as a model, and with support from the John D. and Catherine T. MacArthur Foundation, we wanted to better understand the rights and responsibilities of media literacy educators, including those who work in K-12, higher education, and youth media settings, under the fair use doctrine.

Research Process

To develop the *Code of Best Practices in Fair Use for Media Literacy Education* (hereinafter referred to as the

Code), our research process included two phases. In the first stage, we identified the existing knowledge and attitudes of media literacy educators about copyright and fair use by conducting intensive individual interviews. We interviewed a diverse selection of 63 media literacy educators, including K-12 classroom teachers, university faculty, and community media literacy activists, about their understanding of fair use and copyright law. Interview subjects were recruited through national membership organizations, including the Alliance for a Media Literate America, the Action Coalition for Media Education, the Student Television Network, the National Council of Teachers of English (NCTE), the National Alliance for Media Arts and Culture, and Youth Media Reporter. Researchers conducted open-ended, long-form interviews of at least 45 minutes, usually by phone, with educators who were identified as participating in programs that help children, young people, and adults develop critical thinking and communication skills. We sampled to include a balance of educators working in K-12, higher education, and nonprofit organizations. We also interviewed individuals who provide teacher education; create curriculum materials, videos, or multimedia tools and resource materials for educators; and maintain networks and associations to promote media literacy. We interviewed both seasoned veterans of more than 20 years of media literacy teaching and educators with 3–20 years of experience.

The interviews consisted of open-ended questions organized into three broad categories: (1) how teachers use copyrighted materials in the classroom or other educational settings for educational purposes; (2) how their students use copyrighted materials in their own creative work; and (3) how teachers use copyrighted materials in their curriculum development, materials production, or other creative work. Detailed descriptions of the interview responses were written and analyzed to discover the most common patterns and themes. Although interviewee participation is acknowledged, we promised not to identify comments with specific names in order to encourage full disclosure where interviewees faced ambiguity or uncertainty about whether their own practices fell within the law. From these interviews, we created a series of hypothetical scenarios that reflected the most frequently mentioned challenges, questions, or concerns about how copyright applied to their work.

In the second stage of this work, our goal was to determine what points of consensus existed among

media literacy educators about how copyright and fair use applied to their work. Because media literacy educators are copyright holders as well as users, they have a robust appreciation for the rights of both owners and users in the copyright equation. We convened several four-hour focus groups of media literacy educators to participate in this process. Nearly 150 individuals from ten U.S. cities—including New York, San Francisco, Philadelphia, Chicago, Boston, Austin, Ithaca, and Columbia, South Carolina—participated. Each group was first introduced to the general principles of copyright and fair use and then invited to consider several hypothetical scenarios pertaining to the use of copyrighted materials for classroom instruction, curriculum development, and student multimedia production. Table 1 offers an example of a hypothetical scenario used to promote discussion. Focus group participants' reflections were transcribed through a close note-taking process and reviewed for recurring themes. Some themes are described in the results presented below. The resulting *Code* addresses general practices that are of special importance to educators: using copyrighted materials within lessons; creating curriculum materials that incorporate copyrighted works; sharing curriculum materials; student use of copyrighted works; and developing audiences for student work.

The Educational Consequences of Copyright Confusion

Interviews reveal that copyright confusion among educators affects the quality of teaching and learning. Many media literacy educators were confused and overwhelmed by information (and misinformation) about copyright, and they dealt with it in a variety of ways, including hypercomplying with various copyright guidelines, refusing to share curriculum materials, or ignoring copyright altogether (Hobbs, Jaszi, and Aufderheide 2007). Media literacy educators engage

copyrighted works as users, creators, and teachers, and they share certain values, consistently expressed by interviewees, about the use of copyrighted material. Although they respect the rights of owners of intellectual property, they also believe that it is necessary to use copyrighted works for the purpose of strengthening students' critical thinking and communication skills. The entire cultural environment, they noted in interviews, is copyrighted. "Copyrighted materials are like our cultural landscape," said one teacher. This means that limiting access to copyrighted materials is limiting access to existing culture. "We should have access to our culture and be able to talk about it and comment on the world around us," said one media educator and video artist. Another teacher suggested, "By overprotecting owners, we run the risk of stifling the creative flow of cultural information." This was a common perspective. One teacher said, "Owners are overprotected at this point in time. The law is going over and above the original intent."

Restrictive Institutional Policies Have Multiplied

While a few media literacy educators claimed that no one had any influence on their decisions to use media in the classroom, most described the role of gatekeepers who influence their work. Gatekeepers mentioned by our interviewees included library media and technology specialists, distance learning coordinators, school administrators, webmasters, and even photocopy staff. Not surprisingly, gatekeepers intensify the climate of fear. Media literacy educators most often described librarians as those who had provided the most direct form of gatekeeping and control, often telling stories about librarians who had discouraged them from the use of copyrighted materials in the classroom. One teacher in our study explained, "Our librarian came in and told us that we were personally liable for copyright violations and our school would not protect us if there was a lawsuit." This would

Table 1 An Example of a Hypothetical Scenario Used in Focus Groups for Exploring Fair Use

Student Use of Copyrighted Materials

In Mrs. Johnson's Grade 4 class, students create PowerPoint slides using copyrighted images they gathered through Google to illustrate their reports on countries of the world. Mrs. Johnson likes to upload their completed slides to the school's public website so that parents can see their children's creative work. Another teacher tells her that students must get permission to use images in their own work. What action is fair and reasonable?

Her principal informs Mrs. Johnson that she must take down the Grade 4 Geography slides, even though her colleague, a Grade 8 teacher, has been allowed to post the work of students who created an iMovie video about stereotypes of teenagers in the media. This work weaves together students' spoken-word poetry with various clips from TV shows and movies and images of teen celebrities found online. Does this distinction make sense or not?

certainly have a dampening effect on teachers' creative use of media to promote critical thinking and communication skills. Librarians were often described as "sticklers" or "copyright police," and even the librarians who were interviewed for the study often described how they hated being seen as "enforcers."

Media specialists tend to be the enforcers because at many schools they are in charge of the acquisition of multimedia materials. As one educator put it, "If teachers do it on their own, part of their job goes away. There is some incentive for them to be copyright cops." In many schools—because of either fear or laziness—school administrators take the conservative view on copyright, choosing to err on the safe side. "It takes more energy and time to learn the rules than it does to play it safe," one educator told us. "The easy thing is to say, 'no.'"

Veteran teachers in our study talked about a past time when discussion of a teacher's choice of teaching materials was rare. One teacher explained, "Up until the late 1990s, there was no concern. We used copyrighted materials in whatever way we wanted to. I never thought much about it. We used popular music, clips from videos, films, whatever. Sometime in the late 1990s, we got the message: this will cease 100%." Today, in many schools, teachers must justify their use of video in the classroom, often through an elaborate formal process that involves several layers of approvals and reviews of the films or videotapes to be used. Such policies emerged in the 1990s after some startling examples of misuse of film and video came to light in school districts (Frey 2008). In many school districts, the principal or school district officials require that only videos supplied by or approved by the school's media committee be shown in classrooms. One educator explained that in his previous job he had an administrator whose interpretation of fair use was dramatically different than his own: "The administrator was paranoid. He limited the whole staff's work." A college professor described a policy at his institution where the provost issued an ultimatum: only DVDs owned by the college could be used in the classroom, and under no circumstances could faculty use VHS tapes, off-air broadcasts, or DVDs from other sources.

Teachers Develop Work-Around Strategies

As a result of the increasing scrutiny from gatekeepers, some media literacy educators have developed

work-around strategies. Some participants in our study described strategies to get around the limits placed on them by gatekeepers, especially when they believed these rules were wrong. At one high school, teachers occasionally use movies that they rent from Netflix or Blockbuster. The technology specialist asked them to sign a statement that they are legally liable for copyright violation. Instead of signing the statement, teachers bought their own DVD players for their own classrooms to avoid using school equipment. One college professor said that she usually defers to the judgment of the gatekeepers at her institution unless she finds some great resource at the 11th hour, some piece of media that is so appropriate and effective that she just decides to use it in the classroom regardless of the policies in place at her school.

Exemptions and Limitations

Many media literacy educators were confused about the various exemptions that are available to educators under copyright law. Most of the educators in our study were unaware of Section 110 of the 1976 Copyright Act, which protects teachers who are entitled to use legally acquired copies of films, television programs, music, and other copyrighted materials for face-to-face classroom instruction. The exemptions provided in the 1976 act initially covered certain "face-to-face" teaching activities such as screening films to stimulate classroom discussion. Section 110 applies strictly to educational institutions that are narrowly defined as such (Joyce et al. 2003). But media literacy occurs in non-face-to-face settings (e.g., over the Internet) and in nonprofit, nonaccredited settings where Section 110 may not be applicable. For example, media literacy programs now occur in community centers, settlement houses, workforce development programs, arts centers, local cable access centers, and other locations. In fact, much of the growth in media literacy has occurred in youth media production programs offered in nonschool settings supported by organizations such as the Open Society Institute and the Ford, Kellogg, and MacArthur Foundations (National Alliance of Media Arts and Culture 2003). Section 110 does not protect these educators.

In fact, recent congressional efforts to clarify copyright law have reduced the scope of the fair use doctrine. For example, the 2002 TEACH Act amended the law to incorporate some kinds of distance learning but created complex and narrow new rules about

how digital materials can be used. The law forces educational institutions that use digital materials to employ technological measures to prevent retention of the works for longer than a class session. Adding insult to injury, the law also establishes a narrow definition of what constitutes an educational setting. The TEACH Act applies only when the educational use of content is “an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution.” Further, the content must be for the sole use of “students officially enrolled in the course for which the transmission is made.” The references to class sessions, accredited institutions, and official enrollment make clear that legislators imagined the TEACH Act applying only to endeavors that resemble traditional classroom instruction in every possible way, except that they occur through digital technology such as the Internet (Fisher and McGeeveran 2006, p. 45). This creates concern among educators who use copyrighted materials to teach media literacy in nonprofit after-school organizations, summer camps, and other informal education settings.

The Digital Millennium Copyright Act is another example of a law that limits the scope of fair use rights regarding digital media. This law makes illegal the use of software to “rip” or circumvent the encryption codes on commercially produced DVDs. Because media literacy teachers and learners depend on film DVDs as a source of relevant quotations for use both in classrooms and for student media production assignments, this law has an extremely negative impact. The DVD encryption code effectively prevents media literacy teachers and learners from gaining access to media clips for various educational purposes. For example, teachers who want to sharpen comparison-contrast skills may want to analyze two different film adaptations of *Romeo and Juliet*. Or a teacher may want to conduct a historical analysis of media professionalism by showing and discussing a series of clips focused on the representation of newspaper editors using excerpts from *All the President's Men* (dir. Alan Pakula, 1976), *Absence of Malice* (dir. Sydney Pollack, 1981), and *The Paper* (dir. Ron Howard, 1994). Or a teacher may want to show film clips in an academic conference presentation to illustrate certain nuances of pedagogy and instruction concerning the use of film in education. Under the current law, all these examples of “ripping” DVDs are illegal.

Every three years, the Copyright Office of the Library of Congress considers exemptions to the law for groups or individuals who can prove that the law substantially and adversely affects their ability to make lawful, noninfringing uses of copyrighted works. These exemptions last for three years. In 2006, Peter DeCherney, a professor of film at the University of Pennsylvania, got an exemption on behalf of film professors nationwide, enabling them to rip audiovisual works included in the educational library of a college or university’s film or media studies department for the purpose of making compilations of portions of those works for educational use in the classroom (DeCherney 2007). Sadly, this exemption does not apply to media literacy educators, who may be teaching in college English, history, or fine arts classrooms, or in schools of education, or in K-12 settings, or in youth media or other nonprofit organizations. The exemption also does not apply to students who may want to use film excerpts to complete class assignments.

With the help of student attorneys at American University Washington College of Law, Renee Hobbs has submitted a petition to the Library of Congress Copyright Office requesting an exemption for teachers to circumvent the technological protection measures of DVDs that illustrate and/or relate to contemporary social issues, when used for the purpose of teaching the process of accessing, analyzing, evaluating, and communicating messages in different forms of media. This petition also requests an exemption for students to use DVD clips for specific educational assignments, including student media productions, because such use is an essential component of media literacy education. The creation of film clip compilations for educational use is legal under the doctrine of fair use. But DRM restrictions presently make it impossible for educators to make such use of copyrighted films.

Confusion over Educational Use Guidelines

The interview data show a considerable level of confusion among educators about the meaning and significance of the educational use guidelines (Hobbs, Jaszi, and Aufderheide 2007). Educational use guidelines are the negotiated agreements between media companies and some educational groups that represent “rules of thumb” for assessing the fair use of various kinds of unauthorized uses of copyrighted

material. These include documents like the Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions, the Fair Use Guidelines for Educational Multimedia, or the Guidelines for the Educational Use of Music (for examples, see U.S. Copyright Office [n.d.]). These are not part of the law of copyright, but they are interpretations of the law that reflect the concerns of various user groups and industry representatives. One example is the “45 day” rule, which states that videotaped off-air programming must be erased after 45 days. Another example is the 10 percent rule, created by a negotiated process sponsored by the Consortium of College and University Media Centers (CCUMC). This guideline puts heavily quantified criteria in place of the fair use doctrine to imply that using more than 10 percent of a copyrighted work is presumptively unfair. This and the “45 day” rule do not have the force of law because “such easy-to-apply criteria do not reflect the reality of copyright doctrine” (Joyce et al. 2003, p. 911). As negotiated efforts among publishers, media conglomerates and industry organizations, and groups of educational organizations, educational use guidelines have had relatively little effect on judicial proceedings. However, they did influence the establishment of many (but not all) institutional policies by educational institutions (Crews 2001).

Although they were designed to provide additional clarity about copyright and fair use, the educational use guidelines actually may have led to increased confusion among educators. The documents created by these negotiated agreements give them “the appearance of positive law. These qualities are merely illusory, and consequently the guidelines have had a seriously detrimental effect. They interfere with an actual understanding of the law and erode confidence in the law as created by Congress and the courts” (Crews 2001, p. 601). Various sets of so-called educational fair use guidelines are too often misunderstood as authoritative statements of the doctrine’s “outer limits” rather than as what they really are: attempts to ease the plight of users by specifying relatively narrow safe harbors within fair use (Hobbs, Jaszi, and Aufderheide 2007). Educational institutions have crafted their own internal policies on the basis of this crucial misunderstanding. Websites and print materials for educators frequently add to the confusion.

All the educators we interviewed for our study were more or less aware of the educational use guidelines. Many believed that their colleagues were largely

unaware—often intentionally unaware—of educational use guidelines. Some of them also felt ill-informed on this matter. One educator said, “I’ve learned not to ask about it.” Another claimed, “You just don’t know what is OK and what is not.” Most of the educators in our study called the educational use guidelines “rules” and talked about them in ways that suggested they were codified as law. A number of educators were certain that these rules defined the *maximum extent* of their ability to use copyrighted materials in teaching.

The guidelines educators found particularly problematic were those that attempted to quantify the length and duration of a particular use of copyrighted materials. Educators had received conflicting messages about how (and whether) the concept of length and duration applies to their work in the classroom. One teacher was told that in order to avoid legal issues when students use copyrighted material in a student-produced video it was better to use three short 10-second clips than one long 30-second clip. For teachers and students involved in creating new materials that incorporated copyrighted material, many teachers believed that, as one teacher put it, “You can only use 10% of a film, TV show or song.” Others told us it was okay to use four sentences of print, and 60 seconds of video. Many media literacy educators were particularly dismissive of the 45-day rule. “I thought these rules were stupid,” exclaimed one media literacy educator. “Nobody ever did follow this guideline. Because when you found something good—you kept it.” Many media literacy educators talked about the use of off-air resources that were clearly beyond the 45-day limit, including TV Super Bowl commercials from the 1980s and 1990s, as well as coverage of the 1996, 2000, and 2004 presidential campaigns. Media literacy educators frequently gather off-air video and save excerpts or whole texts over long periods of time in order to be able to illustrate trends in social and historical context. When teachers make repeated use of a text over a period of time, they do so because they find value in the work as an educational tool. This educational practice—saving videos of great clips—is normative behavior among teachers of all subjects and levels.

What Proportion of a Text to Use

Media literacy educators must frequently make use of a whole media text in order to properly analyze it in context. They may digitize media texts so that

students can carefully observe, analyze, and manipulate images and sounds. For example, an English teacher teaching media literacy asked students to read Ken Kesey's novel, *One Flew over the Cuckoo's Nest*, and then the class viewed the 1975 film adaptation by director Milos Forman. In developing their knowledge and skills, students were expected to cut and paste excerpts of the film into a PowerPoint presentation to demonstrate their learning of key concepts. In another assignment, students developed a critical commentary by remixing clips; that is, using clips from the film combined with more recent and familiar films that explore life inside other sometimes repressive institutions (e.g., their school). Media literacy educators need to be able to offer students the opportunity to transform the texts of their culture—the mass media and popular culture works that are a key dimension of the transmission of culture—by quoting from their culture.

While media literacy educators often emphasize the importance of using shorter clips to promote active engagement and focused inquiry and discussion, they also assert the right to use copyrighted materials in their entirety when needed for instructional purposes. A number of media literacy educators use whole films, whole ads, whole newsmagazine episodes, and popular songs in their entirety when it is relevant to the theme, topic, or skills under development. For example, one medical school educator introduced media literacy to his medical students by playing the song "Alcohol" by country and western artist Brad Paisley when students were studying how music alters mood. Then he passes out the lyrics, and they discuss them. He explained, "The song is making fun of really traumatic things" like violence, marital breakup, unplanned pregnancies, and getting fired; it presents these things as humorous. Even though he is aware of the role of length of excerpt in assessing fair use, he said, "I think it's OK to use the whole song in its entirety, because we're not just using it to set a mood. We're using it to create an educational experience where the media literacy 'aha' moment can happen in a meaningful way."

Media literacy educators' dismissive attitude toward the educational use guidelines reflects parallel concerns developed by scholars and experts. If the educational community accepts educational use guidelines in policy statements, the concept of fair use will be weakened and narrowed, not strengthened. According to Crews (2001, p. 660), "When the

community actually uses the guidelines and adheres to them, they are reshaping the normative understanding of the law," sacrificing the flexible nature of the concept of fair use. He continues, "The fair use guidelines of the past have created a dangerous illusion; the community of owners and users ought to return to the factors of the statute and consider anew the role and structure of guidelines and the process of their development."

In contrast to the "educational use" guidelines, which were the result of protracted negotiations between lawyers representing large media companies and lawyers representing some educational groups, the *Code* offers a different model for conceptualizing how fair use applies to the work of educators who use mass media, popular culture, and digital media for teaching and learning. Unlike the educational use guidelines, the *Code* reflects the views of practitioners, who are in the best position to describe the normative behaviors regarding various uses of copyrighted materials as tools for teaching critical analysis and media composition skills. Because educators understand how the use of copyrighted materials specifically applies to their work, the *Code* reflects the actual practices that are essential for media literacy education. Rather than a list of narrowly drawn and artificial "rules," the *Code* offers a descriptive set of principles (and limitations) regarding the use of copyrighted materials for media literacy education.

The Process of Developing Principles

An example of the reasoning process participants in our focus groups used in assessing fair use as it relates to specific instructional practices helps to illustrate how the *Code* was developed. Table 2 provides a summary of the five principles of the *Code*. Hypothetical scenarios were used to identify and understand the practice norms that exist among educators as they reasoned through a series of examples. These practice norms represent the core of the five principles identified in the *Code*.

Table 1 showed an example of one of the hypothetical scenarios we used with participants to stimulate discussion and debate. This particular hypothetical case concerns student use of images for two different instructional purposes. One teacher has designed a student media production activity in the context of a lesson on grade 4 geography, where students use copyrighted images they find on the

Table 2 Principles of the *Code of Best Practices in Fair Use for Media Literacy Education*

Principle	Rationale
1. Employing Copyrighted Material in Media Literacy Lessons	Under fair use, educators using the concepts and techniques of media literacy can choose illustrative material from the full range of copyrighted sources and make them available for learning in class, in workshops, in informal mentoring and teaching settings, and on school-related websites.
2. Employing Copyrighted Material in Preparing Curriculum Materials	Under fair use, educators using the concepts and techniques of media literacy can integrate copyrighted material into curriculum materials, including books, workbooks, podcasts, DVD compilations, videos, websites, and other materials designed for learning.
3. Sharing Media Literacy Curriculum Materials	Educators using concepts and techniques of media literacy should be able to share with one another effective examples of teaching about media and meaning, including lessons and resource materials. If curriculum developers are making sound decisions on fair use when they create their materials, then their work should be able to be seen, used, and even purchased by anyone—fair use applies to commercial materials as well as to those produced outside the marketplace model.
4. Student Use of Copyrighted Materials in Their Own Academic Work	Because media literacy education cannot thrive unless learners themselves have the opportunity to learn about how media functions at the most practical level, learners should be able to incorporate, modify, and re-present media objects in their own classroom work.
5. Developing Audiences for Student Work	Educators should work with learners to make a reasoned decision about distribution that reflects sound pedagogy and ethical values. In some cases, widespread distribution of students' work (e.g., via the Internet) is appropriate. If student work that incorporates, modifies, and re-presents existing media content meets the transformativeness standard, it can be distributed to wide audiences under the doctrine of fair use.

Internet to create multimedia projects. Another teacher uses a production activity that concerns the use of video clips from popular movies and TV shows, where grade 8 students weave spoken word poetry with the clips to create short iMovie productions exploring the issue of media's stereotypes of teenagers. In these cases, should students claim fair use, ask for permission, or pay a license fee?

We asked teachers if they thought students needed to ask permission to use the images in their geography projects, if they made a distinction between the two types of projects in terms of fair use, and if the student productions should be shared on the school's website. Teachers in the focus groups recognized that permissions were needed only when the doctrine of fair use did not apply to the particular use of copyrighted works. For most in-class student productions, such as the grade 4 example, permissions would not be necessary because the use in question was likely to be a fair use. When determining whether permission was needed for the grade 8 project, educa-

tors believed that the work's essential purpose, as a work of critical commentary, clearly entitled it to the protection of fair use—even when the work was to be displayed publicly on the school's website—thus negating the need for permissions clearance. Educators viewed the process of seeking permissions for student media productions with levels of ambivalence that varied depending on their professional orientation. Some teachers, particularly those at the college level, described the permissions process as normative for professional media production and considered most applications of the process as smooth and uneventful. Others described the process with disdain, noting that student permissions requests were often ignored by copyright holders, resulting in confusion about whether a use was possible in light of the lack of response.

As part of the focus group discussion, educators came to understand that claiming fair use means recognizing when permissions are (and are not) necessary and that part of the problem was the culture

of uncertainty and fear that in many educational institutions had contributed to a tendency to believe that permissions are *always* required when using copyrighted works. Because many educators had themselves used copyrighted materials without permission, they sometimes had a misplaced feeling of guilt, leading them either to be silent about both fair use and permissions or to encourage hypercompliance. Participants acknowledged that permissions might be appropriate when student work is designed to be widely shared and when a student is not making transformative use of copyrighted materials, as when popular music is used in a video to exploit the popularity of a music artist or to establish a mood. In these cases, educators should model the permissions process, helping students to distinguish between “material that should be licensed, material that is in the public domain or otherwise openly available, and copyrighted material that is subject to fair use” (American University Center for Social Media, Media Education Lab at Temple University, and Washington College of Law 2008, p. 14).

When asked to consider a distinction between the two activities described in table 1, focus group participants uniformly pointed out that students strengthen media literacy skills in both activities by creating messages and using symbolic forms such as language, images, sound, and digital media to express and share meaning. Both practices make transformative use of copyrighted materials. Transformative work uses copyrighted materials but adds something new, with a further purpose or different character, altering the original with new expression, meaning, or message. Transformative uses are considered to be legal under the doctrine of fair use when they are appropriate in amount.

Media literacy educators’ use of copyrighted materials is inherently transformative because the uses of copyrighted content are not for the same intrinsic purpose as the one the copyright owner intended. Rather, the copyrighted content is either used (1) to illustrate key concepts of media literacy; (2) to deconstruct and critically analyze media messages; (3) to identify specific production techniques employed in commercial motion pictures or TV shows; (4) to explore economic, political, and social contexts or cultural values depicted in copyrighted content; or (5) as part of the process of building skills and knowledge through the creation of student-produced works to demonstrate those ideas and techniques.

In learning to select appropriate still images or film/video excerpts, students learn how juxtaposition and sequence shape meaning. In their use of presentation software or video editing tools, they discover how the technology tool itself shapes the kind of message that can be created. Most participants in our study agreed that both activities represented a form of media literacy education in which the fair use of copyrighted materials was appropriate and justified. A few focus group participants believed that the doctrine of fair use protected only the student-produced work that involved grade 8 students in critically analyzing media’s stereotypes of teens, and not productions where younger students used images to illustrate their learning of geography. For example, one individual pointed out that the language of Section 107 of the copyright law specifically states that “comment and criticism” are examples of fair use. Does this mean that only student-produced works that have as their purpose comment and criticism are entitled to the fair use provision? Most educators in the focus group pointed out that students include excerpts from copyrighted material in their own creative work for many purposes, including to inform, to persuade, for comment and criticism, for illustration, to stimulate discussion, or in incidental or accidental ways (for example, when they make a video capturing a scene from everyday life where copyrighted music is playing). However, focus group participants pointed out that students should be able to understand and demonstrate, in a manner appropriate to their developmental level, how their use of a copyrighted work adds value or repurposes the original.

Educators in all focus groups insisted that material that is incorporated under fair use should be properly attributed wherever possible, although they acknowledged that attribution is an ethical (not legal) dimension of authorship and that teachers must be free to determine when and how to require attribution in student productions, based on their judgment of the developmental level of the learner and the purpose of the assignment. Sometimes teachers will require attribution in student creative and academic work, but not in all cases. For example, in response to one focus group participant who talked about the need to establish rigid rules prescribing attribution for each and every use of copyrighted work in student media productions, another educator pointed out that for most of the 20th century students could sometimes demonstrate their knowledge by creating a

print poster board with text and images cut out from magazines and newspapers. Would an educator be expected to require attribution for every such assignment? How onerous and developmentally inappropriate to require young children to write detailed citation lists for this type of assignment! Teachers clearly explained the need to be free to determine when attribution is (and is not) an appropriate component of any particular learning activity.

Finally, educators in our focus groups pointed out that students should be encouraged to make their own careful assessments of fair use, especially when sharing their work with audiences outside the classroom. Rigid “do and don’t” lists are not appropriate because they discourage students from reasoning through the process themselves. As stated in the *Code* (American University Center for Social Media, Media Education Lab at Temple University, and Washington College of Law, Program on Intellectual Property and the Public Interest 2008, pp. 11–12),

Although some student media productions are simply learning exercises designed to develop knowledge and skills, media literacy educators often design assignments so that students have the opportunity to distribute their work. Educators should work with learners to make a reasoned decision about distribution that reflects sound pedagogy and ethical values. In some cases, widespread distribution of students’ work (via the Internet, for example) is appropriate. If student work that incorporates, modifies and re-presents existing media content meets the transformativeness standard, it can be distributed to wide audiences under the doctrine of fair use.

The *Code* articulates how media literacy educators, as a community of users, interpret the doctrine of fair use as it applies to their work; it is an educational tool to diminish copyright confusion among educators. The *Code* may also be useful in persuading gatekeepers, including school leaders, librarians, and publishers, to accept well-founded assertions of fair use. We anticipate that the *Code* will promote revisions to policies regarding the use of copyrighted materials in education, as evidenced by the NCTE, the 50,000-member organization that adopted the *Code* as their official fair use policy, replacing a document from 1980. We expect the *Code* will discourage copyright owners from threatening or bringing lawsuits and, in

the unlikely event that such suits are brought, will provide the defendant with a basis on which to show that her or his uses were both objectively reasonable and undertaken in good faith.

Conclusion

Many educators and scholars are reflecting upon a cultural environment that is rapidly changing in response to the creation and exchange of information, knowledge, and culture. Law and regulation form one important domain on which decisions about the shape of the dynamic and rapidly evolving information economy will depend. But balancing the rights of authors and users has ethical as well as legal dimensions. As Jenkins (2006a, p. 17) writes,

One important goal of media education should be to encourage young people to become more reflective about the ethical choices they make as participants and communicators and the impact they have on others. We may, in the short run, have to accept that cyberspace’s ethical norms are in flux: we are taking part in a prolonged experiment in what happens when one lowers the barriers of entry into a communication landscape. For the present moment, asking and working through questions of ethical practices may be more valuable than the answers produced because the process will help everyone to recognize and articulate the different assumptions that guide their behavior.

Media literacy educators are well placed to be the point of the spear among the larger community of educators in asserting fair use rights. Media literacy educators make active, transformative use of mass media and popular culture texts for the purpose of building students’ critical thinking and communication skills. They experience restrictive interpretations of copyright in the context of their institutions and yet reject many “educational use” guidelines as too narrowly drawn and not reflective of contemporary or normative educational practice. As they see it, the guidelines do not reflect the genuine flexibility of copyright law and tend to foster a highly restrictive view of fair use. Copyright owners have overstated the extent of their rights as owners under copyright law. This is not to say that media literacy educators do not respect the rights of copyright holders or the educational

resource market. In fact, many media literacy educators are creators of materials (and copyright owners) themselves. Media literacy educators deeply respect the fact that some educational resources are created within a marketplace model. Yet they believe that the fair use of copyrighted works inherently benefits society more than it hurts copyright holders.

In their daily work with learners, media literacy educators see firsthand the high levels of creativity and innovation among youth, whose creative work represents a vital nonmarket force in terms of the rapid technological changes now underway. Because media texts are now a central part of the cultural environment, fair use rights must be asserted so that copyright can serve its intended purpose: to promote the spread of knowledge and creativity.

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