

School Law Matters

MARCH 2014



A NEWSLETTER FROM THE LAW FIRM OF FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.

Route to: Board Personnel Instruction PPS Business Other: _____

SPECIAL REPORT NEWSLETTER

Copyright Law and the Internet: Let the Educator Beware!

A number of our clients recently received “cease and desist letters” from an organization representing the copyright owners of images that were placed on teachers’ classroom websites allegedly in violation of copyright law. These letters represent the first stage of possible copyright infringement litigation. There is a great deal of ambiguity (and outright misinformation) about copyright protection of information found on the internet. Accordingly, this special report “School Law Matters” is designed to give you a better understanding of copyright law as it relates to the use of information and images found on the Internet.

Legal Framework

The application of copyright law to materials found on the Internet can be extremely confusing and often counterintuitive. This is, in large part, a result of our government trying to apply legal principles that are hundreds of years old and exclusively intended for use with printed (and/or performance-based) works to a new variety of technology-based works that are readily available in a medium (i.e., the Internet) that few people fully understand. Actions by Congress to revise/amend the law to account for the new technology have been slow to develop.

Currently, the best information we have available for understanding the application of copyright law to the Internet is: 1) the Copyright Act itself; 2) “Fair Use” Doctrine and case law interpreting it; and 3) the United States Copyright Office circular (No. 21) entitled, “Reproduction of Copyrighted Works by Educators and Librarians”. The following is a brief description of each of

these listed resources and any relevant principles that can be gleaned from them.

Copyright Act

Many people mistakenly assume that if information appears on the Internet, it can be used freely; especially if the information does not include a copyright notice or symbol. The general rule of the Copyright Act, as set forth in 17 USC Section 102, is:

Copyright protection ...[applies to] original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- literary works;
- musical works, including any accompanying words;
- dramatic works, including any accompanying music;
- pantomimes and choreographic works;
- pictorial, graphic, and sculptural works;
- motion pictures and other audiovisual works;
- sound recordings; and
- architectural works.

In other words, to be protected by the Copyright Act, a work need only be an “original work of authorship” fixed in a tangible medium of expression. 17 USC §102. A copyright notice (“©”) on

a work is **not** necessary to provide copyright protection. Thus, any original work of the types listed above found on the Internet are protected by the copyright laws regardless of whether copyright notices are present.

As you may have noticed, this presents the first problem of applying copyright law to the Internet. A website, for example, does not fit neatly into the list of works described in Section 102. Moreover, the content of most websites is constantly changing and thus not necessarily “fixed” as would be a printed book or poem. However, the U.S. Copyright office has addressed this clumsy application of the law by noting that while the website as a whole cannot be copyrighted, “[t]he original authorship appearing on a website may be protected by copyright. This includes writings, artwork, photographs, and other forms of authorship protected by copyright.” (See <http://www.copyright.gov/help/faq/faq-protect.html>.)

The bottom line is that educators must assume that **every** work found on the Internet is protected by copyright, whether it is a lesson plan found on a website like blackboard.com or a poem found in an individual’s blog or a video found on youtube.com.

While it is true that some information on the Internet is **claimed** to be in the

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“public domain,” meaning it is not protected by copyright laws, it is often very difficult – if not impossible – to verify this claim. Given the ease with which people can upload and download information on the Internet, a document, image, video, or other form of authorship can be easily “pirated” by anyone and placed on virtually any website claiming (falsely) to be copyright free. Unfortunately, educators cannot simply rely on those claims. Under the law, an individual is still liable for copyright infringement for reproducing or distributing a work that he/she mistakenly believes to be in the public domain. It is only when it can be verified (definitively) that the information is in the public domain that educators should feel free to reproduce, distribute or otherwise use the work. Otherwise, as explained further below, use of the item found on the Internet (including even downloading it) requires careful investigation and consideration.

Section 106 of the Act states that, apart from certain limited exceptions (including Fair Use, which is discussed in detail below) the owner of copyright under this title has the **exclusive right** to decide how his/her work will be reproduced, distributed, displayed or performed in public. Applied to the Internet setting, this means that no one is permitted to reproduce, distribute, or display to/perform for the public, any copyrighted work found on the Internet, unless the owner of the copyright grants permission, either through a license (for which royalties are often demanded) or some other explicit authorization.

This includes all works whether emailed, found on websites, shared on peer-to-peer file sharing networks, etc. It is true that whenever an author of an original work posts that work on the Internet, the author impliedly grants permission (i.e., an implied limited license) to read, download, print out, forward, and even use it as the basis for other works to some degree. However, the boundaries of such implied licenses are vague and therefore should be carefully scrutinized before they are relied upon. Moreover,

knowing with certainty that the author of the work (or other copyright owner) placed the work on the Internet can oftentimes be next to impossible. In other words, if the work was placed on the Internet without proper authorization no implied license exists to download, print out, or otherwise use the work.

Educators should take note that obtaining permission from a copyright owner is one of the few ways of knowing beyond any doubt that they are not infringing on another’s copyright. However, this requires locating the owner, making the request, explaining how you plan to use the work, agreeing to the terms of the use including any royalty or licensing fee to be paid, etc. This process can be quite time-consuming and often extremely costly. Moreover, in the end, there is no guarantee that the copyright owner will allow the use requested.

Fortunately for educators, there is an exception to the general rule that no one is permitted to reproduce, distribute, or display to/perform for the public, any copyrighted work found on the Internet, unless the owner of the copyright grants permission; the exception is known as the “Fair Use Doctrine.” However, it must be remembered that this exception only applies to portions of lawfully-acquired copyrighted works.

Fair Use Doctrine

Under the Fair Use Doctrine, lawfully-obtained copyrighted works can be copied and reproduced for purposes such as “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” (17 USC Section 107.) Section 107 states that in order to determine whether the use made of a work in any particular case is a “fair use,” the following four factors must be considered:

- The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.

Because copyright law does not specify exactly how to apply these factors, it can lead to a great deal of uncertainty about whether specific uses are “fair.” There are no simple “black and white” rules. No one should assume that a particular use falls under the fair use exception simply because it is for educational purposes or because the work is properly cited or because access to the materials is restricted to students in a class. To establish the strongest basis for fair use, educators must first be sure that they lawfully obtain the information found on the Internet. As discussed above, they need to know that the copyright owner or other authorized individual placed the work on the Internet. Then, they must balance the four factors listed above and the “fairness” of the overall circumstances.

“Reproduction of Copyrighted Works by Educators and Librarians”

The United States Copyright Office published a circular (No. 21) entitled, “Reproduction of Copyrighted Works by Educators and Librarians” (see copy of circular enclosed) which provides guidelines for reproducing and distributing copyrighted works without committing copyright infringements. It should be noted, however, that these guidelines do not have the force or effect of law. Rather, they should be viewed as conservative, best practices for avoiding violations of copyright law. That being said, educators should be aware that these guidelines may – in their attempt to assure compliance – be more restrictive than what Fair Use would actually permit. For example, these guidelines recom-

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mend the following limitations on reproduction and distribution of copyrighted materials in the school setting:

Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; provided that:

- A The copying meets the tests of brevity and spontaneity as defined below and,
- B Meets the cumulative effect test as defined below and,
- C Each copy includes a notice of copyright

Definitions

Brevity

....

- iii Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

Here again, the antiquated legal framework makes it difficult to apply the standards set forth in the Circular. For example, we know generally that a teacher may make a copy of a single illustration from a book or periodical and distribute that to his/her students provided that the "spontaneity" and "cumulative effect" tests are met and the illustration includes a notice of copyright. However, it is unclear from the Guidelines whether the same standard should be applied to an image found online and, if so, how it would be applied.

Nevertheless, educators should be encouraged to follow the guidelines contained in Circular 21 (whenever they can

be applied) to avoid copyright infringement problems.

There are other guidelines (e.g., "Fair Use Guidelines for Educational Multimedia" published in 1996 by a Congressional subcommittee, and "Final Report to the Commissioner on the Conclusion of the Conference on Fair Use" published in 1998 by a Presidentially-appointed taskforce) which have led to generally-accepted standards in the educational community as to what portions of online material can be used within the framework of Fair Use. Again, these guidelines do not have the force or effect of law. Following these rules does not guarantee that the use will be considered fair by a court. Likewise, not following these rules does not automatically mean that a copyright infringement has occurred. In any event, these guidelines suggest that when an educator balances the four factors of Fair Use, they should limit the portion of the work they use as follows:

| <u>Media</u> | <u>Portion for Fair Use</u> |
|----------------------------|--|
| Video | Up to 10% or 3 minutes, whichever is less. |
| Text material | Up to 10% or 1000 words, whichever is less |
| Music, Lyrics, Music Video | Up to 10%, but no more than 30 seconds. |
| Illustrations, Photographs | No more than 5 from an artist, photographer, or no more than 10% or 15 works from a published collective work. |

Penalties for Copyright Infringement

According to the U.S. Copyright office's website, the following penalties apply to Internet-related infringement:

Uploading or downloading works protected by copyright without the authority of the copyright owner is an infringement of the copyright owner's exclusive rights of reproduction and/or distribution. Anyone found to have infringed a copyrighted work may be liable for statutory damages up to \$30,000 for each work infringed and, if willful infringement is proven by the copyright owner, that amount may be increased up to \$150,000 for each work infringed. In addition, an infringer of a work may also be liable for the attorney's fees incurred by the copyright owner to enforce his or her rights. (<http://www.copyright.gov/help/faq/faq-digital.html>)

Given the harsh penalties associated with copyright infringement, educators should take great care in evaluating the use of images and other information found on the Internet. We recommend working closely with your IT professionals, librarians and attorneys in preventing inadvertent violations of copyright law. Also, all notices of possible copyright violations (e.g., cease and desist letters) received must be treated seriously and addressed with your school attorney.

If you have any questions with regard to the foregoing, please do not hesitate to contact us.

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Ferrara Fiorenza Law Firm School Law Briefing



DATE & TIME

Wednesday,
April 30, 2014

Continental Breakfast

8:30 a.m. — 9 a.m.

Program

9 a.m. – 11 a.m.

LOCATION

St. Lawrence-Lewis
BOCES
Conference Room
40 West Main Street
Canton, New York

YOU'RE INVITED

You're invited to the Ferrara, Fiorenza Law Firm's latest School Law Briefing on Wednesday, April 30, 2014 from 9 a.m. – 11 a.m. This is a value-added service we offer to our clients, at different locations throughout upstate New York, at least twice a year. The St. Lawrence-Lewis BOCES has graciously authorized us to use their conference room located at 40 West Main Street, Canton, New York. The topics to be addressed include the following:

- **Crisis Management: Board and Media Communications**
- **Student and Staff Technology Issues Including Copyright, Fair Use and the Internet**

This presentation is for Board Members, Superintendents and other school administrators. While registration is free, space is limited. Accordingly, please register (as described below) no later than April 28, 2014, indicating whether you, or any other officials from your district, will be able to join us.

REGISTRATION

There is **NO REGISTRATION FEE** for attending the program. However, space is limited and registration is necessary. Please register at our website www.ferrarafirm.com. Simply click on "School Law Briefing (Canton)" from the Events Calendar on the far right column on our Firm's home page, then click on "Register Now" and complete the online form. Click Submit and you're registered.

You may also register by telephone (as indicated below) by providing your name, the name of your school district or organization and the names of all participants who will be attending.

To Register:

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or

Call: 315.437.7600

