

Technology and Classroom Instruction: The Tension Between Technological Measures To Protect Exclusive Ownership Rights And Fair Use

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At the 2008 NASSM Conference in Toronto, Drs Bruening, Borland, and Kane presented "Picture This: Using film to identify sport's theoretical underpinnings." Their presentation was designed to show how films could be used as a pedagogical technique to explore social theories in sport. While the presentation was met with enthusiasm, a question was raised that warranted further discussion and investigation. Several audience members asked about the legal use of film in the classroom. That is, which media formats or alterations are restricted from classroom use from a legal perspective? To many it remains unclear to which technologies, types of media, films, and web clips restrictions on use apply to. With the introduction of YouTube, Google Video, Hulu, and others, the legal use of media is often an area of uncertainty. Therefore, the purpose of this presentation is to provide an analysis of the law in its present form and the implications on the use of media in the classroom.

Exclusive ownership rights only exist because there are laws that provide for exclusive rights, define the boundaries of exclusive rights, and set forth enforcement mechanisms for the same. One could imagine a world where a person's book, for example, belonged to the public as a whole and anyone would be free to publish and sell that book as they please. In the opposite extreme, one could imagine a world where scientific knowledge belonged only to the person that possessed such knowledge and disclosure thereof would require a licensing fee. Although imperfect in certain respects, the law intentionally has been designed to balance the interests of unrestrained use and exclusive ownership to meet the needs of the public good and individual reward.

Copyright law, as codified by statute and interpreted by the courts, provides for and defines the boundaries of exclusive rights. An important exception to a copyright holder's exclusive rights under the Copyright Act of 1976 is what is commonly known as the "fair use doctrine." The United States Supreme Court has defined the fair use doctrine as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent" (*Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 552 1985). In general and in relevant part, the fair use doctrine says that it is not copyright infringement for educators to use and distribute multiple copies of copyrighted works for nonprofit educational purposes [Title 17, United States Code, section 107 (2008) Thomson Reuters/West]. The fair use doctrine is an example of where legislators have carefully balanced the public good with exclusive ownership rights.

This presentation will explore the applicability of the fair use doctrine in a world of new and ever-expanding technologies. While the fair use doctrine is as alive as ever, the enactment of the Digital Millennium Copyright Act (DMCA) in 1998 made it illegal for anyone to circumvent a technological measure or traffic a technology designed to circumvent a technological measure that controls access to a protected work [Title 17, United States Code, section 1201 (2008) Thomson Reuters/West]. In essence, an educator could show the movie "When We Were Kings" to his or her students and fast-forward to a particular scene but the teacher could not break the encryption code on the DVD in order to excerpt the scene without violating the DMCA. The issue is not whether the educator has the right to use the content of the copyrighted work, because he does pursuant to the fair use doctrine. The issue is the educator's circumvention of the technological measure, the encryption code, designed to protect the owner's exclusive rights. Fair use is not an exception, statutory or otherwise, to circumvention. One federal appellate court has indicated that it would not be a violation of the DMCA if the teacher were to excerpt the scene by filming a television playing the scene with a camcorder (see *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459 2d Cir. 2001).

In accordance with the foregoing, at this presentation we will discuss (a) the policy rationale underlying the Copyright Act of 1976 and the fair use doctrine as it applies to classroom use, (b) the history and purpose of the DMCA and its impact on media use in the classroom, (c) the provisions of the DMCA, including the narrow exemptions from anti-circumvention, and examples of enforcement under the DMCA, (d) the impact of the DMCA on the fair use doctrine and whether the enactment of the DMCA has had a negative impact on media use in the classroom, and (e) practical recommendations for the legal use of media for educational purposes.