Lessons in Copyright Activism: K-12 Education and the DMCA 1201 Exemption Rulemaking Process

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ABSTRACT

Digital learning is being transformed by changes in copyright law. This article discusses the author’s personal journey as a copyright education activist through two rounds of rulemaking proceedings before the Copyright Office concerning the anti-circumvention provisions of one part of the copyright law, the Digital Millennium Copyright Act (DMCA), which is the law that exempts YouTube and other ISPs from liability from copyright claims and criminalizes the circumvention of digital rights management (DRM) software that protects DVDs from being copied. Every three years, petitioners can claim their rights have been compromised by the current law; the Copyright Office pores over the petitions, weighs the pros and cons, and then offers recommendations to the Librarian of Congress, who ultimately grants or denies the exemptions. The author was successful in expanding the rights of K-12 teachers to legally “rip” DVDs by using the Section 1201 rulemaking process, which is one of the only significant ways that educators can expand their rights to use copyrighted material for teaching and learning purposes. By asserting the rights of K-12 educators to circumvent encryption to make fair use of copy-protected DVDs and online digital media for teaching and learning, the law begins to move beyond the needs of large-scale content owners to include the rights of educators and students.

KEYWORDS

Copyright, Digital Learning, Digital Millennium Copyright Act (DMCA), Education, Fair Use, Law, Learning, Teaching

INTRODUCTION

Teachers and learners have always used bits of copyrighted materials in the process of learning and teaching. Many teachers collect, compile, use, and save media texts that work well in the classroom to address particular types of learning objectives, whether that be to better teach principles of multiplication, cell mitosis or the history of the French revolution. Research with European elementary and secondary teachers finds that the most commonly valued resources include publishers’
open educational materials, educational materials created by colleagues, news and current events, scientific reports and visual materials -- pictures, videos, images, drawings and illustrations (Halme & Somervuori, 2012), and it is likely that American teachers have similar priorities. The use of resources including movie DVDs, digital media and the Internet is now normative current practice in education from K-12 to higher education. But does their acquisition and use qualify as legal practice under copyright law?

It is ironic that at a time when online digital technologies are enabling educators to create and share an ever-widening array of texts, sounds, still and moving images, music, and graphic art, there has been a rise in the climate of confusion and fear among educators concerning the use of copyrighted materials as tools for teaching. Sadly, much of the language about “sharing” and “stealing” found in mainstream media has left educators, artists, school librarians, technology specialists, youth media leaders and others confused and fearful (Hobbs, Jaszi & Aufderheide, 2009). And because fear tends to stifle innovation, those who promote the use of digital media as tools for teaching and learning take notice of these developments and aim to address them.

Some educators want to do more than use copyrighted material as a vehicle for transmitting content. They may want students to critique or comment on excerpted media texts as a literacy practice; to memorialize their personal encounters with media texts, or use film clips as a stimulus for charged discussions about how technology and media affect cultural participation, identity development, social power, and political or economic agency. To create and share ideas with colleagues, some educators want to create curriculum materials that employ excerpts from 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 (Hobbs, 2011).

In the United States, citizens have substantial legal rights as both creators and as users of copyrighted materials for teaching and learning. Under the law, creators are entitled to the full force of copyright law as soon as the original works of authors are produced in fixed and tangible form. Although some educators have signed contracts to work in institutions where their creative work has been declared a work-for-hire arrangement, most educators are legally entitled to claim copyright of their own creative work—lesson plans, activities, etc. (Russell, 2012). And as users of the copyrighted works of others, the fair use doctrine, enshrined in Section 107 of the Copyright Law of 1976, permits people to use copyrighted materials without payment or permission under some circumstances, depending on the specific context and situation of the use. Determinations as to whether the copying or reproduction of the original works of others is a violation of copyright begins with the act’s broad exemption that “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research is not an infringement of copyright” (Copyright Act, § 107). While the doctrine of fair use allows for the use of copyright protected material for a wide range of purposes, courts generally consider four fair use factors: the purpose and character of the use, including whether it is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used; and the effect of the use upon the potential market for or value of the copyrighted work. (Copyright Act, § 102).

Like many media literacy educators, I make considerable use of copyrighted materials under the doctrine of fair use. To build learners’ critical thinking, creativity, collaborative, and communication skills, I use copyrighted materials tend from mass media, digital media and popular culture, including those owned by Viacom, Disney, News Corporation, YouTube, Time Warner and others. In general, I use copyrighted content to illustrate key concepts of media literacy. I help students to deconstruct and critically analyze media messages; to recognize and examine specific production techniques employed in moving image media; to explore economic, political, or social issues or the cultural values depicted in the representations; or as part of the process of building skills and knowledge through
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