The fair use doctrine: History, application, and implications for (new media) writing teachers

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Abstract

Writing teachers have always had to contend with plagiarism. However, the technology of the Internet and the thorny issues of copyright law complicate how we teach legal and ethical use of others’ materials in the networked classroom. Our pedagogy and curriculum choices and our students’ writing practices are shaped by a legal infrastructure that includes the fair use doctrine. Our understanding and knowledge of the fair use doctrine should become second nature to us. Critical awareness of fair use, the four-factor test, and how to conduct appropriate analyses when using others’ materials must become part of the everyday digital writing/new media classroom curriculum. To this end, the author summarizes the salient points of law and practice of fair use and demonstrates, in small ways, how the fair use doctrine can inform the teaching of writing in digital contexts. As teachers, researchers, and experts of writing, the discourse of fair use must be considered in addition to the discourse of plagiarism.

Keywords: Fair use; The four-factor test; Plagiarism; Copyright; Moral rights; Public domain; Pedagogy; Infrastructure; Napster; Grokster; Sony; Technology; Intellectual property; History; Digital writing; New media; Alphabetic text

This paper tries to make a small start to increased understanding of the fair use doctrine as it impacts teaching writing. While always important, fair use was not at the center of composing before digital technologies and networked environments shaped teaching. It is now. Prior to the rise of connectivity and new media texts, writing teachers did not have to consider reactions of the public at large, media conglomerates, or copyright holders anywhere across the globe when composition students crafted assignments. For the most part, teachers did not consider whether their use of chalkboards, overheads, or paper syllabi distributed to students and contained within the classroom’s four walls might be infringing on someone else’s copyrights. Classroom instruction and presentation is no longer limited to the classroom’s four walls (Kent-Drury, 1998). The TEACH Act largely preserves the safety of the non-networked classroom space from copyright infringement liability—but this safety is
lessened in virtual teaching environments (Logie, 2006; Reyman, 2006), and when teaching materials and student texts are posted on the World Wide Web (WWW), copyright/fair use are fully applicable: There is no exception in copyright for WWW educational composing environments other than the fair use doctrine. Fair use becomes central not only because of the rise of networked writing spaces. New media composing practices have challenged and even replaced traditional notions of “writing” (Heins & Beckles, 2005; Westbrook, 2006). When writing classrooms focused solely on alphabetic text, fair use issues were almost irrelevant. The doctrine has received broadly dispersed media attention during the last decade largely in legal contexts of more visible “popular” works such as visual art, movies, and music (Heins & Beckles, 2005; Westbrook, 2006). However, classroom-copying practices involving alphabetic text have also challenged the fair use doctrine.¹ High-profile lawsuits had students at the center at Princeton University, Michigan Technology University, and Rensselaer Polytechnic Institute for copyright infringement via music-filesharing (Yu, 2003). Following the lawsuits and their settlements, the recording industry used web crawlers to find “infringing” content and

¹ Some lower court cases have dealt directly with determinations of fair use in an educational-photocopying (alphabetic text) context:

- **Macmillan v. King (1914):** A tutor created an outline, incorporating quotations and following the organization of a Harvard University professor’s economics textbook. The publisher, Macmillan, brought suit. The court held, although the use was noncommercial, that it was an infringement, not falling under fair use protection.

- **Wihtol v. Crow (1962):** Forty-eight (48) copies of Crow’s musical arrangement were distributed to his music students. However, Crow’s arrangement was adapted from an existing musical composition. Crow was sued. The court held that copying a song without permission was not fair use.

- **Encyclopedia Britannica Educational Corp. v. Crooks (1982):** The court held that the practice of a nonprofit educational services cooperative in taping educational, state-funded television programs for collection and nonprofit, scholastic viewing later was not a fair use.

- **Marcus v. Rowley (1983):** In this case, a home economics teacher was sued for making “fifteen copies of an eleven page excerpt of a thirty-five page cake decorating booklet for her students” (Bartow, 1998, p. 11). The court held this was not fair use, noting the material was used over several academic years, the excerpts did not give credit to the original author, the original copyright was not copied, and significant portions of the book were copied.

- **Basic Books v. Gnomon Corp (Brandfonbrener, 1986):** Gnomon was a photocopying company located near college campuses. When sued in 1980 by the publisher, it agreed to settle in return for maintaining requirements that no course packs would be copied unless accompanied by written permission of the copyright holder or a statement from the faculty member certifying the copies were in compliance with Guidelines.

- **Harper & Row v. Tyco Copy (Brandfonbrener, 1986):** A 1981 settlement similar to Basic Books was reached.

- **Addison-Wesley Publishing Co. v. New York University (Brandfonbrener, 1986):** Nine New York University Professors and a photocopy shop were sued by the Association of American Publishers (AAP, the same trade organization behind Basic Books, above) for course packet copying. The case was settled when the University agreed to adopt Guidelines, and if faculty didn’t follow the guidelines, they were to be personally liable. After this case was settled, the AAP broadcasted its terms and pressured other universities to adopt similar policies. This campaign was widely successful (Bartow, 1998).

- **Basic Books Inc. v. Kinko’s Graphics Corp. (1991):** Eight academic publishers sued Kinko’s for producing course packets for faculty members at the New School for Social Research, New York University, and Columbia University. The court held this was not fair use. While all factors were considered, that the use was deemed commercial and nontransformative outweighed other factors.

- **Princeton University Press v. Michigan Document Servs., Inc. (1996):** Princeton University Press, Macmillan, and St. Martin’s Press sued the photocopy shop, Michigan Document Services (MDS). The court reached a decision similar to the Kinko case, finding MDS’s copying to be a willful infringement. Damages against MDS were $30,000 statutory damages, $326,318.52 attorney’s fees, and injunctive relief.
subsequently sent countless cease-and-desist letters (Yu, 2003). Such a letter was wrongly sent to retired Professor Peter Usher, Pennsylvania State University, for the posting of a MP3 sound file which turned out to be an a cappella recording of a group of Penn State astronomers about gamma rays. The letter was withdrawn.² In another recent case, a Google search prompted a lawsuit against an Oakland University professor and his student about content posted to a class web site (Ben-Tech, 2005; Rife, 2007). Networked writing environments, digital technologies, along with the advent of new media student-created texts, have made “classroom” writing more visible to the outside world than it ever has been.

Previous to these developments, if students borrowed someone else’s alphabetic material and incorporated it into their own compositions, plagiarism issues were central (i.e., using without attributing, properly paraphrasing, quoting, punctuating, proper APA or MLA format, and so on). In general, writing teachers did not need to consider how copyright/fair use were shaping student composing choices.

Recent research indicates that this issue has become germane to the writing classroom. Steve Westbrook (2006) argued that copyright law is shaping practice whether we acknowledge it or not. In his research, he used a case study involving a student whose multimedia piece was unable to be published since the requisite permissions were denied by the copyright holder. Pointing to the missing student piece in his College English article, Westbrook wrote, “the problem of copyright affects us and our writing students personally on the level of daily practice and, to some degree, underwrites the fundamental norms of our enterprise. . . . In brief, copyright law is our problem because it has the power to silence our students and us” (pp. 477–478). One pilot study found students’ knowledge, or lack thereof, along with their certainty/uncertainty of copyright/fair use shaped their new media composing choices in the networked classroom (Rife & Hart-Davidson, 2006). A larger study found that artists and scholars are circumscribed in their composing choices because of lack of knowledge about fair use combined with fear of legal repercussions (Heins & Beckles, 2005). “[A]rtists, scholars, Web publishers, and many others are aware of fair use and sometimes rely on it. But many have only a vague sense of what it means, or mistakenly believe that the law imposes numerical limits on the amount of material they can borrow” (Heins & Beckles, p. 54).³ Martine Courant Rife and William Hart-Davidson’s (2006) study validated Marjorie Heins and Tricia Beckles’ in that it found students think fair use is important but (mainly) misunderstand it. This vague understanding clearly impacted student writing. Unbeknown to her teacher, one student purchased every image she used when creating new media class assignments. Fearful of copyright infringement liability, another student took almost every picture used on her web site with her own camera.⁴ Writing

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² In this case, the university knew its rights. However, according to Heins and Beckles (2005), because many artists and scholars do not know their rights, they are afraid to resist cease and desist letters. Their usual reaction is to take down whatever material is alleged to infringe.

³ See also Herrington (1998) where a connection is made between free speech and the fair use doctrine. An understanding of fair use is critical to digital composers because such an understanding and exercise of fair use will preserve “free speech.”

⁴ Taking a picture of images rather than using someone else’s photographs might be a step toward a use that is a fair use. However, taking a photograph of someone else’s copyrighted material does nothing to preserve a fair use. Recently, a writing teacher used (on a web site) a photo of Martin Luther King Jr. with permission from the photographer. But the copyright holder of King’s estate sent a cease and desist letter requesting that the picture be
practices in networked environments have made an understanding of the fair use doctrine crucial.

With the simple act of composing a web page, posting a syllabus, learning module, project, linked file, streaming video, blog or wiki, authors nowadays display, copy, and distribute simultaneously. “New-media writing exerts pressure in ways that writing instruction typically has not” (DeVoss, Cushman, & Grabill, 2005, p. 14). As teachers encourage student web publishing and the use wikis and blogs in pedagogy, the question arises: Is this use a fair use? Are students and teacher protected from liability for cutting, pasting, remixing, and disseminating writing via networks: publishing on the Web? If not, are they making informed decisions and consciously taking known risks? Writing teachers must not only teach (and be aware of) the rules of anti-plagiarism (DeVoss & Rosati, 2002; Howard, 1995, 2000; Kitalong, 1998; Klausman, 1999; Robbins, 2003), they should also teach basic copyright/fair use (DeVoss & Porter, 2006a,b; Logie, 2006). To do otherwise allows students to make uninformed composing choices, choices possibly circumscribed by misinformation, fear, and uncertainty. Westbrook (2006) reminds us not to underestimate the power of fear.

John Logie (2006) pointed out that a 1790s U.S. view of copyright explicitly stated the “importance of scholarly access” (p. 1). Copyright law was originally invented to assist learning: “And we, as educators, have failed in our obligation to embed this simple fact in the public’s consciousness” (Logie, p. 1). To address this problem, Logie urged us to make “copyright a point of focus within [our] pedagogy” (p. 2). Fair use is a critical component of copyright and might be taught by first situating the doctrine within copyright law. We might further teach the doctrine by modeling fair use behavior and by demonstrating our own critical consciousness (and ability to learn) of the legal issues that shape writing practices in digital environments.

Digital writers’ reliance on fair use (tacit and explicit) has increased over the last decade, and composition/rhetoric scholars have generally addressed the increasingly complicated copyright issues that permeate practice.5 The robust annual workshop offered by the IP-caucus at the CCC’s addresses intellectual property issues as they impact teachers. Douglas Hesse’s (2005) CCC Chair’s Address, “Who Owns Writing?” stated: “To ask who owns writing is to ask most obviously about property rights. . . . Who owns the content and pedagogy of composition” (p. 337)? Since we have “the lens of research and reflective practice” (pp. 354–355), it would seem “those who teach writing must affirm that we, in fact, own it” (p. 338). But while plenty of texts and textbook chapters have been written on plagiarism and its requirement of attribution, few have focused on the fair use doctrine as an additional layer in need of attention as students are taught how to use others’ work.

1. Fair use and the four-factor test

Fair use, a doctrine of U.S. law situated within copyright, is an influence within the institutional and political arrangements, the infrastructure, that points to “the presence and operations of standards and classifications, which lean heavily on all writing practices” (DeVoss et al., 2005, p. 17). Fair use is carved out of the limited monopoly right to exclusive use offered by U.S. copyright protection. Copyright protects original, fixed works by giving the copyright holder the exclusive right to reproduce, perform/display, distribute, and create derivative works. Fair use is an escape clause from copyright’s exclusive use protection. Section 107, as part of the 1976 Copyright Act, defines fair use and sets forth what is commonly known as the four-factor test. Previous to this legislation, fair use was not clearly defined in any code—but was defined through extrapolating holdings and discussions in U.S. Case Law; Section107 contains the prose educators rely on when venturing into the digital writing realm with students:

§ 107. Limitations on exclusive rights: fair use
Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The four factors of the test as enumerated above are:

- the purpose and character of the use (research, criticism, parody, nontransformative, commercial, educational)
- the nature of the copyrighted work used (creative, factual)
- the amount and substantiality of the portion used
- the effect of use upon the potential market

These four factors are used by courts when making determinations on issues of infringement and are relevant to the composing of new media texts if one wants to attempt to legally use other’s materials. In order to use copyright protected materials legally, individuals must adhere to fair use guidelines or obtain permissions from the holder(s). If material is not copyright protected, fair use is inapplicable (discussed below). U.S. copyright law protects fixed works of all kinds, shapes, and sizes, whether published or unpublished (Title 17, Section 102), and per the 1976 Copyright Act, registration is not needed for effective copyright ownership.
According to the statute, a “fixed” work is a “tangible medium of expression” and “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration” (Section 101). (For example, an interpretative dance or a baseball game are not fixed but become fixed when videotaped or described in writing.)

Because the field of rhetoric/composition is only beginning to develop a theory of use that negotiates the intersection of the fair use doctrine and traditional notions of plagiarism (DeVoss & Porter, 2006a,b; Rife & DeVoss, in press), it is important to first understand and differentiate between fair use and plagiarism. While copyright/fair use and plagiarism are separate concepts, some of the concerns of plagiarism intersect with issues and concerns of copyright protection/fair use. Rebecca Moore Howard (1995) pointed out that composition studies “presents anything but a unified front on issues of plagiarism” (p. 795). While some theorize that the term itself may be obsolete, the proliferation of services such as turnitin.com and plagiarism.org indicate that the concept of plagiarism is alive and well.6 It is reasonable to say that the boilerplate definition of plagiarism includes the taking of someone else’s words, texts, or ideas without giving credit. Whether such activity is named patchwriting, patchwork plagiarism, direct plagiarism, paraphrase plagiarism, or unintentional plagiarism (Howard, 2000; Klausman, 1999), it all fits (loosely) under that very general, simplified definition. Credit and maintaining the integrity of another’s work are of utmost importance to most theories of plagiarism. In contrast, giving credit is virtually irrelevant to a fair use determination under Section 107. None of the four factors require or consider attribution. Copyright protection as well does not give holders the right to attribution. This is very clear in U.S. law. Copyright infringement occurs if a new work is substantially similar to a copyrighted work and the author of the new work had access to the copyrighted work. Even if attribution is given, copyright infringement can still occur unless the use is “fair.” In contrast, the legal doctrine of moral rights,7 like the ethics of plagiarism, requires attribution. The United States does not directly recognize moral rights in its intellectual property regime except with respect to the limited application of the U.S. Visual Artists Rights Act of 1990 (Title 17, Section 106A). Moral rights are tied in with a jurisdiction’s cultural history as well as its theoretical basis for intellectual property laws. Moral rights have historically been important in France because France’s copyright regime emerged post the 1789 revolution when the rights of authors were conflated with the “rights of man” (Ricketson, 1986, p. 517). But while moral rights aspects of some copyright regimes intersect with plagiarism’s requirement of attribution, the concept of plagiarism largely lives outside the law.8 This does no mean there are not serious repercussions in the right context for acts of plagiarism. Howard (2000) rightly described a charge of plagiarism as akin to the academic death penalty. Unlike copyright, plagiarism

6 Charlie Lowe has assembled a robust bibliography of texts that discuss the pros and cons of plagiarism-detection services available at the CCCC-IP Caucus site <http://ccccip.org/pds> (Plagiarism Detection, 2006).

7 In some European countries, along with Canada and other countries, the right to integrity (change, transformation, extreme criticism), publication (disclosure), and attribution (paternity) in a composition or creation is protected under the legal doctrine of moral rights. This is a separate protection than copyright but overlaps copyright in that it generally protects texts.

8 For detailed discussions of the intersection of law and plagiarism, along with elaborative lists of legal cases involving plagiarism, I recommend the following four law review articles for a start: Durscht (1996); Stearns (1992); Billings (2003); Green (2002).
protects expressions and ideas; copyright protects just expression. U.S. copyright law explicitly states: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work” (Section 102(b), Title 17 USC). This is referred to as copyright’s idea/expression dichotomy.

Of course, ideas and expression tend to blend, so these definitions are not bright line, or clear-cut. Like plagiarism, patent and trade secret law protect ideas (procedures, process, system, and methods of operation) but not in the same way. Patent, trade secret, and copyright law are not concerned with attribution as is plagiarism, and while fair use applies to copyright protected works, plagiarism applies to all works. Fair use and non-plagiarizing use are both concerned with how to use others’ work, but the two concepts approach this use differently, at times intersecting. Plagiarism and fair use are similar in that they must be considered in terms of rhetoric and interpretation.

A single new media composition could easily require multiple attributions via citations as well as multiple fair use analyses. A common new media class assignment requires students to visually and/or digitally reinterpret a poem. If a student prepares and publishes to her web space a five-minute movie where she incorporates a poem written in 1982, numerous images from the Web, and several song clips she edits together (assuming all materials are copyrighted by others and none are available through licensing), the student (if wishing to act legally) would make multiple fair use determinations. She would need to run the four-factor test on her creation holistically and then on the individual components of her creation. Did she fairly use the music clips, the poem, the images? Of course the student is free to not conduct this analysis, to take the chance of getting caught (or not). Perhaps she is an extreme copyright leftist and decides she will do as she pleases regardless of the law. Siva Vaidhyanathan (2004) argued, “Only the anarchists—those who directly challenge the foundations of copyright—have strengthened the ability to acquire and use elements of culture” (p. 95). But as Daniel DeVoss, Ellen Cushman, and Jeff Grabill (2005) have argued: “If students are to be effective and critical new-media composers, they should be equipped with ways in which they can consider and push at practices and standards in strategic ways” (p. 16). Yes, anarchy is, of course, always an option. But I argue equipping students and giving them strategies should be the goals of new media pedagogy—such goals allow students to consciously and knowingly push at boundaries/legal-infrastructural framework.

A copy leftist/anarchist stance can be legitimate if well reasoned and well informed, but a discussion of such political action is not germane to this paper. However, I will briefly mention what is at stake if a digital compositionist fails to conduct a fair use analysis or otherwise fails to act strategically during the remixing (digital writing) process. What is at stake for students who cannot conduct a fair use analysis? Copyright holders do and will continue to sue individuals (Heins & Beckles, 2005; Westbrook, 2006; Yu, 2003). Those who unknowingly infringe can be liable for attorney’s fees and damages. If the infringement is willful (the compositionist knew she was infringing but did it anyway), the court can award up to $150,000 for each act of willful infringement. Our informed ability to engage in an educated fair use analysis gives the

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9 If the student was creating this composition for f2f classroom use only, she would be relatively safe under the TEACH Act (Section 110, Title 17, USC).
court the ability to refuse to award any damages pursuant to the copyright law’s “good faith fair use defense” (Title 17, Section 504(c)(2)). A digital compositionist (or any other writer) qualifies for the defense if she reasonably believes that a particular use was a fair use under Section 107 and she is “an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who . . . infringed by reproducing the work in copies or phonorecords.” How this defense might apply to specific facts is not clear since according to a recent white paper published by The Berkman Center for Internet & Society at Harvard Law School the issue has not appeared in any reported decision (Fisher & McGeveran, 2006). While the “good faith fair use defense” explicitly applies to us as teachers, it is questionable whether it applies implicitly to our students. Are students “agents” of the institution? If not, they in fact have less protection than we do; therefore, it seems to me that our duty of care to teach them how to properly avoid copyright liability is equal to or greater than our duty to protect ourselves from personal copyright liability.

Because teachers and students are stakeholders in the copyright regime—because digital writing is disseminated by computers and over networks and involves cutting, pasting, and remixing—most of the time when composing and teaching digital writing, fair use determinations are required. But in some cases, fair use analysis is not necessary.

2. When is fair use inapplicable?

If one wants to act legally, a fair use determination is necessary when using others’ work unless that work is unregulated (in the public domain, unoriginal or trite, authored by the U.S. Government, a de minimis use, used with license/permission). Fair use is irrelevant when copyright is not protecting a particular work. Understanding when use is unregulated is important politically because before the Internet much more use was unregulated than is presently the case. Prior to the Internet, the act of reading did not trigger copyright issues (Lessig, 2004b). But now reading online may trigger copyright protection; the texts are copied and distributed via the act of reading. Reading is then a “use.” What Lawrence Lessig has argued is that fair use’s “thin” protection was acceptable when most use was unregulated, but now that most use is regulated, fair use cannot bear such a burden (Lessig, 2004a, p. 145). I will return to Lessig’s “cannot-bear-the-burden” fair use position; in the meantime, knowing when a use is unregulated and therefore not within the protections of copyright law is important politically because this knowledge allows increased self-determination over making decisions about the “old” texts used to create new texts. Knowledge and understanding gives composers and teachers the power to strategically push at the legal infrastructure impacting pedagogy and writing practices. When texts are freely available, those rights should be exercised. To not do so is to risk losing current rights (Bartow, 1998).

A fair use determination is unnecessary when works are in the public domain. Lolly Gasaway (2003) has provided a convenient chart that outlines when and why works fall into the public domain.
domain. Generally, a work published before December 31, 1922 is in the public domain.\textsuperscript{11} After 1978 (the effective date of the 1976 Copyright Law), copyright protection changed from a determination based on publication date to a determination based on life of the author. Currently, works do not fall into the public domain generally until time expires equal to life of the author plus 70 years; works for hire or anonymous works are protected for 95 years from publication or 120 years from creation, whichever is sooner. Jointly authored works are protected until 70 years from death of the last surviving author; visual works are generally the life of the author plus 70 years, except for visual works created in 1991 or later, which are protected only for the life of the author. Unpublished works that were created before December 31, 1978 are protected for the author’s life plus 70 years or until December 31, 2002, whichever is longer. Since public domain works are not protected by copyright, if I am preparing a web page discussing Shakespeare’s sonnets, and I incorporate the sonnets into my web page, Shakespeare’s sonnets are in the public domain and may be used freely.\textsuperscript{12}

Fair use is also inapplicable for unoriginal or trite works and for works authored by the U.S. government (case law, statutes, legislation, government authored documentation, etc.). Court findings of unoriginality or triteness are relatively rare, but the concept was defined in \textit{Darrell v. Joe Morris Music Co.} (1940) and \textit{Arnstein v. Marks Music Corporation} (1936). In both cases, although the musical compositions of the alleged infringers were virtually identical to portions of the original copyrighted music, the court stated that “while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing” and noted that recurrence is not necessarily a “badge of plagiarism” (\textit{Darrell}).\textsuperscript{13} According to the court, simple, trite themes occur spontaneously and are not protected by copyright. Analogous situations for the visual might be the use of shapes, such as circles and squares. Shapes alone are not original. Unless some unique combination of shapes is copied, it is unlikely copyright protects red circles. Cliché phrases such as “once upon a time” or “and they lived happily ever after” are generally unoriginal and trite and therefore standing alone will not be protected by copyright. In such cases, a fair use analysis is unnecessary because copyright protection never comes into play.

Finally, a fair use determination is unnecessary if a particular use is \textit{de minimis} or is within a stated license (permission). \textit{De minimis} use can be illustrated by comparing the results of two cases involving the use of background visuals in movies/television. In \textit{Sandoval v. New Line Cinema Corp.} (1998), the court found that the use of several copyrighted photographs in the movie, \textit{Seven}, was so minimal as to not require a fair use determination. The court noted

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\item Works published between January 1, 1923 and December 31, 1978 are protected for 95 years as long as they have a notice affixed (per the 1976 Copyright Law, notices are no longer necessary, i.e.,\textsuperscript{10} marks), and as long as they were properly renewed (if they were published between 1923 and 1963 when the term was 28 years without renewal).
\item This is as far as copyright law. Plagiarism would still be a factor. Have I properly attributed Shakespeare, or am I passing off his sonnets as my own? Other legal issues can and do crop up when using others’ materials as well: Have I simply taken the sonnets, or have I also taken someone else’s design, use of fonts, arrangements on the page, organization, or possibly compilation (if original)?
\item The court’s use of the term “plagiarism” is interesting because the court in fact is referring to the passing off of someone else’s musical composition as one’s own. This is an example where a fair use discussion and “plagiarism” are literally intersecting on the pages of the judicial opinion.
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that the pictures were out of focus, obscured, and virtually unidentifiable. While in the case of
\textit{Ringgold v. Black Entertainment Television} (1997) the court found that a 27-second shot of a
copyrighted poster in the TV show, \textit{Rock}, was not so minimal as to avoid a fair use analysis.
\textit{Ringgold} can be distinguished from \textit{Sandoval} because in \textit{Ringgold} the poster was clearly
visible and provided enough detail for the “average lay observer” to view the poster artist’s
particular style (\textit{Stanford}, 2005). \textit{De minimis} use does not require a fair use determination, nor
does using with permission, such as use pursuant to a \textit{Creative Commons license}.

The Creative Commons website, a brainchild of the Intellectual Property Law icon, Lawrence
Lessig, among others, was founded in 2001 and embraces Lessig’s political position that current
copyright laws need to be relegislated by Congress (\textit{Band}, 2005). More than fifty million web
pages are linked to the site, and it is a “major player shaping the production and distribution of
creative works” (\textit{Katz}, 2006, p. 391). Creative Commons provides boilerplate copyright licenses
that authors can apply to their work. Its main goal is “to build a layer of reasonable, flexible
copyright in the face of increasingly restrictive default rules.” The licensing categories change to reflect public comment but currently include “some rights reserved” licenses that require any of, or combinations of, the following: attribution, noncommercial use, no derivative works, and sharing-like. New licenses under discussion include an educational license, one that “would encourage educational uses of a work (separate from commercial/noncommercial considerations).” Creative Commons permits searches of CC licensed material, as do Yahoo and Google search engines. The licensing plan established by Creative Commons does not, however, speak to fair use. The legal code of the licenses explicitly states that “Nothing in this license is intended to reduce, limit, or restrict any rights arising from fair use . . . or other limitations on the exclusive rights of the copyright owner under copyright law.” Creative Commons licenses do not enhance nor detract from fair use; they simply allow users to avoid fair use determinations in most cases. If I locate an image that is labeled with a Noncommercial, Attribution Creative Commons license, and I use within the boundaries of that license, fair use is irrelevant. But what if I decide to use this particular image and not give attribution? Maybe it is simply awkward for me to do so in the composition I am creating. Then, I would conduct a fair use analysis and determine whether, although I am violating the license, I am still within fair use. In the event I am challenged, the only way to obtain a concrete outcome would be through litigation. In the first known legal challenge to Creative Commons, the license was upheld.\textsuperscript{14}

The Creative Commons website is useful and pedagogically intriguing, but we need more
attention to the economic and rhetorical impact of using these licenses. For one, using the
licenses does not necessarily allow the avoidance of all fair use determinations (nor should it).
\textsuperscript{15} Analyses that first look to whether fair use is an issue are particularly relevant when
composing in Web spaces. Legal scholars say fair use is nothing more than a skimpy sliver

\textsuperscript{14} On March 9, 2006, a court in Amsterdam upheld a Creative Commons license. In the case, Adam Curry posted
picture of his family on Flickr. A Dutch tabloid used the picture in a story about Curry’s children. Curry sued,
arguing that the tabloid violated the conditions of the license. The court upheld the license. See “Creative Commons

\textsuperscript{15} For a critical analysis of how Creative Commons licensing is shaping the “future production and distribution
of creative works” in ways not intended, please see \textit{Katz} (2006).
or a concept now being compacted into ineffectuality (Bartow, 1998; Lessig, 2004a). Writing teachers, however, need a robust understanding of fair use and all of its nuances as a basic requirement in order to bolster fair use as well as the autonomy of rhetoric/composition as a discipline. Sometimes work may be used freely without any need to partake in the diligent effort required by a fair use analysis.

3. The history of fair use: Inception to current interpretation in the United States

Most of the time, digital compositionists need to conduct fair use determinations. On paper (or on your computer screen), Section 107 set forth above lays out the four elements used by the courts when making fair use determinations: (1) purpose and character of the use, (2) nature of the copyrighted work, (3) amount and substantiality of the portion used, and (4) market effect. No bright lines exist that tell for certain that a use is fair or not. Some, especially media conglomerates, would define fair use as a chimera, something mystical and even dangerous if you stake your scholarly life on it. Yet, fair use does have boundaries that can be understood and even relied on. Hesse (2005) noted that stakeholders outside composition studies (like lawyers, law professors, and media conglomerates) would like to organize writing. “Let’s attribute good intentions to them all. But let’s remember that my good intentions are likely not yours” (p. 354). I continue with a history of fair use in answer to John Logie’s (2006) call for us to make copyright central to pedagogy and to Hesse’s call for us to affirm our ownership of writing—to own it through knowledge while understanding that “with our knowledge comes responsibility” (Hesse, p. 355). Understanding U.S. fair use history assists in contextualizing the application of the four-factor test as well as aids in understanding the rhetorical dimensions of case law that interprets the fair use statute. Knowledge of history helps make visible the legal infrastructure that shapes writing practices. This knowledge is at the heart of rhetoric—seeing how some things come to be while others never do (Powell, 2004). I simply make a small start here toward an understanding of fair use history in the United States.

The term, “fair use,” first arose in the American judicial system in the case of Lawrence v. Dana (1869). In the case, Lawrence sued Dana et al. for infringing on Lawrence’s copyrights. Lawrence had edited and annotated two volumes of Wheaton’s Elements of International Law, memoirs of the deceased Mr. Wheaton (Lawrence did this gratuitously for the author’s wife, Mrs. Wheaton and her children, who had been left in “moderate circumstances” [p. 51]). At the time of the lawsuit, Mrs. Wheaton had died and a different publisher had published the memoirs with no accounting to Lawrence. The court noted that Lawrence’s annotations and editing “involved great research and labor” (p. 56) and ultimately found the use of Lawrence’s materials not to be fair. While Dana et al. argued that they had merely abridged, or fairly used, Lawrence’s materials, the court said the use was far more than a fair use; it was really a reprint.

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16 The rhetoric of fair use in itself would be an extremely interesting research topic. I have explored this issue somewhat with respect to global identities formed through the rhetoric of fair use in the United States and Canada in a different manuscript (see Rife, 2006a).
In early English cases, the fair use concept known as “fair abridgment” appeared in Gyles v. Wilcox (1740), Dodsely v. Kinnersley (1761), Cary v. Kearsely (1802), and Roworth v. Wilkes (1807) (Duhl, 2004). Fair use has been recognized globally, in some form, since the earliest intellectual property regimes: “Most national laws recognized exceptions and limitations on the exercise of rights, for example, for educational or religious purposes” (Ricketson, 1986, p. 518). While “fair use” as a “name” did not appear in American courts until 1869, the English concept was appropriated in the U.S. 1841 case of Folsom v. Marsh. What is now the third factor (amount and substantiality of portion used) in the four-factor test was at the heart of the court’s decision. In Folsom, the defendant wrote a biography of George Washington but used 353 pages of plaintiff’s earlier published and copyrighted multivolume work to do so. Although the defendant’s use amounted to less than 6% of the plaintiff’s total work, the court held for the plaintiff, finding the defendant had copied the most important material (i.e., substantiality) in plaintiff’s earlier volumes. In the opinion, Justice Story set the framework that was codified over 130 years later in Section 107 of the 1976 Copyright Act. Story wrote (I have emphasized language that can be tied into the 1976 codification and present day four-factor analysis):

So, in cases of copyright, it is often exceedingly obvious, that the whole substance of one work has been copied from another, with slight omissions and formal differences only, which can be treated in no other way than as studied evasions; whereas, in other cases, the identity of the two works in substance, and the question of piracy, often depend upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials. Thus, for example, no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. . . . In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work. (emphasis added)

The above 1841 text is viewed as having influenced the reach of our current fair use statute (Bartow, 1998; Duhl, 2004). Both Folsom and Section 107 speak to the importance of preserving criticism, both look to the nature of the copyrighted work as well as the amount and substantiality (quantity and value) of the material used, and both Folsom and our current statute look to the impact on the copyright holder’s future market. Yes, our current statute, like Folsom’s enumeration, leaves space for interpretation: uncertainty. But this uncertainty serves an important rhetorical purpose in light of fast-changing technologies and globalization. It leaves space for change; it offers a method whereby the law, so tied to the alphabetic text, can keep up with digital technologies. The downside of uncertainty is that judges struggle with case-by-case fact-specific analyses, sometimes applying the doctrine inconsistently, thus increasing confusion (Duhl, 2004). However, some sense can be made of the doctrine. Writing teachers can increase understanding, and through pedagogy, professional conversations, research, and scholarship (despite Lessig’s fair use “cannot-bear-this-burden” argument) can make the fair use doctrine one that can bear the burden of their uses. The ability to map out a history of the doctrine is helpful.
The 1841 *Folsom* case was followed by other cases that laid a foundation for the drafting of the 1976, Copyright Act’s Section 107. In 1976 the thought of adopting a statute crystallizing fair use was revolutionary. Previously, “no one had ever come up with a satisfactory definition of fair use” (Lardner, 1986, p. 23). Pursuant to a 1961 list prepared by the federal Copyright Office, “fair use” included:

Quotation of excerpts in a review or criticism for purposes of illustration or comment. Quotation of short passages in a scholarly or technical work, for illustration or clarification of the author’s observations. Use in a parody of some of the content of the work parodied. Summary of an address or article, with brief quotations, in a news report. Reproduction by a library of a portion of a work to replace part of a damaged copy. Reproduction by a teacher of a small part of a work to illustrate a lesson. Reproduction of a work in legislative or judicial proceedings or reports. Incidental or fortuitous reproduction, in a newsreel or broadcast, of a work located at the scene of an event being reported. (Lardner, 1986, pp. 23–24)

Once the existing discourse of fair use was folded into the 1976 statute by way of the four-factor test, the courts began applying the factors. Court interpretation is key to understanding the fair use statute, but the U.S. Supreme Court has not interpreted fair use in an educational context.

Fair use has been considered four times by the Supreme Court since the enactment of U.S. Copyright Act of 1976. The *Sony* case measured the reach of the new 1976 fair use statute. In *Sony Corp of America v. Universal Studios, Inc.* (1984), the court held that sale of VCRs did not equal contributory infringement of Universal Studio’s copyrights. Applying the four-factor test, the court found that even though *entire shows* were taped (referring to factor three, portion used), because most use was legal, private taping and later viewing of broadcasts only amounted to time-shifting (referring to purpose and character of the use), and Universal Studios failed to establish harm to potential markets (referring to factor four, effect on potential market): This use was fair. The *Sony* court held that because substantial non-infringing use of VCRs existed (legal taping), the court would not stop Sony from manufacturing and distributing its technology. Sony was not liable for the infringing users’ actions. In *Harper & Row, Publishers, Inc. v. Nation Enterprises* (1985) the court applied the four factors and decided the use was not fair. In this case, President Gerald Ford’s memoirs were prepared for publication by Harper & Row. Meanwhile, Nation Enterprises published a magazine article containing excerpts (referring to factor three, portion used). Using a fact-specific analysis, the court held that the publication by Nation, prior to the memoir released by Harper & Row, harmed the potential market (referring to factor four, effect on potential market). In *Stewart v. Abend* (1990), the court focused on copyright protection of the owner’s exclusive right to create derivative works and did not find fair use. Cornell Woolrich is the author of “It Had to be Murder,” and *Rear Window* is based largely on Woolrich’s story. When MCA re-released the film, suit was brought. The court held the film was not a “new work” falling under the protection

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17 For an interesting discussion of a pre-codified fair use case, see the 1968 case of *Williams and Wilkins* regarding an M.D. who turned to the publication business and subsequently brought suit to stop coordinating libraries from providing medical journals free to doctors—through the National Institutes of Health and the National Library of Medicine. The case is discussed in *James Lardner’s Fast Forward Hollywood, the Japanese, and the VCR Wars* (1987, pp. 130–131).
of fair use. The four factors were taken into account by the court: The infringing work was commercial (factor one, purpose of the use), the original work was creative rather than factual (factor two, nature of the copyrighted work), and the re-release harmed the copyright holder’s ability to find new markets (factor four, effect on market). In the most recent Supreme Court fair use case, *Campbell v. Acuff-Rose Music, Inc.* (1994), the court found fair use. 2 Live Crew created a parody of the Roy Orbison song, “Pretty Woman.” Balancing the four factors, the court noted that the public-interest benefits of transformed songs were important but remanded the case to the lower court for consideration on the issue of harm to the copyright holder’s market.

In addition to these four Supreme Court cases, *MGM v. Grokster* (2005) is relevant; although the case did not directly consider fair use, it reinterpreted *Sony*’s reliance on “substantial non-infringing use.” In *Grokster*, the Supreme Court considered *Sony* in light of whether peer-to-peer reproduction/distribution dual-use technology distributors, StreamCast and Grokster, were contributorily and/or vicariously liable for the copyright infringing uses of individual users of their software. In its holding, the court determined that the lower Ninth Circuit opinion in favor of Grokster was imbued by a misreading of *Sony*. The *Grokster* court used *Sony* as precedent but remapped the considerations of the Ninth Circuit (the lower *Grokster* case and the *Napster* [A&M Records, 2001] case) and the Seventh Circuit (*Aimster*) when making its decision to invoke the legal doctrine of inducement. *Sony*’s safe harbor of substantial non-infringing use remained intact, but a second test was added. Now, in order for a use to be fair in peer-to-peer contexts, not only must substantial non-infringing use be present, but the technology provider must also be inducement-free (i.e., not induce users’ infringing behaviors).

Justice Souter wrote the main opinion and never mentioned fair use. Souter’s failure to discuss fair use, even when discussing *Sony*, may be interpreted as lending weight to Lessig’s and Bartow’s arguments: Fair use is a doctrine of increasingly diminishing returns. *Grokster* might be read as saying that what was once fair use (i.e., *Sony*, private copying) is no longer fair. On the other hand, I believe it more reasonable and true to read *Grokster* as leaving *Sony*’s fair use protection in place but adding a layer of consideration, that of inducement. Inducement contains an element of intent, and three key features of this intent, according to *Grokster*, are:

1. The distributor shows itself to be aiming to satisfy a market that was based on infringement, in this case, Napster.
2. The distributor fails to develop filters or other mechanisms to diminish or curtail infringing uses of its technology.
3. The distributor profits financially by the infringing activity, in this case, by selling advertisements (emphasis added).

While I would like to discuss all of the legal implications of the *Grokster* decision for composition studies, I am limiting my discussion in this paper to fair use. On that point, per *Grokster*, as long as educators are not purposely trying to break the law or encouraging

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18 For a detailed discussion of P2P cases and implication for rhetoric and composition, please see Rife (2006b).
19 For example, by doing the three things listed in *Grokster*, we could be “inducing” students to infringe and therefore be liable. One of the factors in *Grokster* was “aiming to satisfy a market that was based on infringement.” It is not so far-fetched to accomplish this. The copy shop cases clearly held that routinely copying course packs
students to do so and as long as teachers keep themselves informed of current laws as those
laws pertain to digital writing (Porter & Rife, 2005), Grokster should not strongly impact their
work.20 But because Grokster did not provide a robust discussion of fair use or situate that
doctrine in its holding, rhetoric/composition needs to keep fair use central in contemporary
legal discussions and visible as an element of the legal infrastructural framework in which
writing occurs.

According to Gregory E. Duhl (2004), the cases of Sony, Harper & Row, Stewart v. Abend,
and Campbell v. Acuff-Rose Music show the Supreme Court’s reluctance to define clear bound-
aries for the fair use doctrine. This uncertainty coupled with press coverage of high stakes
lawsuits cause fear; the fear causes some educational institutions to adopt policies that cir-
cumscribe teachers’ self-determination and ability to strategically push at boundaries. The
University of Texas (2005) maintains a comprehensive web site devoted to outlining the basics
of fair use. UT’s “Fair Use of Copyrighted Material” site contains a smart discussion of the
four-factor test, but if a (digital) writing teacher literally followed all of UT’s enumerated
“Rules of Thumb,” creating multimedia compositions and posting them to the Web would be
prohibited: “Don’t make any unnecessary copies of the multimedia work.” The restrictions on
UT’s web site for digitizing images are a little overwhelming—after reading and trying to fol-
low these restrictions, it is unlikely a first-year writing student would be willing to digitize any
image. While UT provides “Fair Use Rules of Thumb” some of which are not unreasonable,
note the University’s warning to faculty:

> There is another problem if you ignore our advice about fair use: The Texas Constitution and
statutes may limit our ability to defend individual employees and students, but to the extent
we can, U.T. System will defend you against a charge that your use of another’s works is an
infringement so long as you follow this Policy and abide by the terms of any licenses that affect
your rights to use others’ works. (emphasis added)

When Universities circumscribe what students may compose with Guidelines that act as
invisible but present constricting frameworks, teachers should have a voice in such regula-
tion, and yet “because of institutional and disciplinary trends, writing teachers are absent
from the histories and development of standards. . . . Standards—scripted as policies or
creates a market based on infringement. And so, isn’t the common practice of digitizing texts and providing them
in ANGEL satisfying a market based on infringement? A second factor in Grokster is failing to “develop filters or
other mechanisms to diminish or curtail infringing uses of its technology.” If my students are composing multimedia
texts and I have wind that they are violating copyright law—for example, perhaps a student has circumvented a
 technological measure to obtain movie clips for a rhetorical analysis—what is my duty to prevent this? Do I as
a classroom teacher have to police students and develop “filters” so they don’t use institutional technologies to
infringe? The third consideration enumerated in Grokster is whether the provider is profiting “financially by the
infringing activity.” This is the one factor where teachers are usually safe. Most of us are not selling our work for
cash or selling our students’ work. However, what if teachers in service learning courses have students developing
web spaces for outside clients who are in fact profiting financially? So it is not impossible that teachers could be
positioned as inducers under the three factors listed in the Grokster analysis.

20 However, Grokster did make the technology distributor liable for the infringing actions of its users. So if we
are in the position as teachers of also being technology distributors (say we require and provide a wiki or blog), we
could theoretically be held liable if our students use those spaces to infringe. Such liability would be perfectly in
sync with Grokster.
regulations—often emerge from technology committees and information system offices” (DeVoss et al., 2005, p. 26). Another negative aspect of UT’s fair use guidelines is their reference to now ancient 1976 Guidelines. Michigan State University’s “University Relations Fair Use Guidelines” contains the same reference. Referencing 1976 Guidelines as basis for current digital-use policies is simply unreasonable. To realize how antiquated these Guidelines are in the context of digital composing, consider that in 1976 VCRs were over $1000.00, and there was no video rental business, no Internet. Current copyright law had not yet taken effect.

Some universities do have more reasonable Fair Use Guidelines. Indiana University’s Policy (2006) on Fair Use of Copyrighted Works for Education and Research Statement of Supporting Principles gives a brief but pointed overview of the fair use doctrine, smartly telling readers that “an appropriate exercise of fair use depends on a case-by-case application and balancing of four factors as set forth in a statute enacted by Congress . . . Fair use is not determined by ‘guidelines’ that purport to quantify the boundaries of fair use.” Indiana’s policy emphasizes the importance of fair use to educators and admirably tells members of IU’s community if he/she acts in good faith “the IU indemnification policy can offer protection in the event of an infringement allegation. . . Ultimately, good faith is best manifested through knowledge of, and reasonable application of, the four factors.” Stanford University Libraries’ web site has one of the most comprehensive reviews of fair use. Not only does it outline the four factors, but the site gives a review of fair use case law that might be repurposed for classroom use. Sites like Stanford and Indiana’s are especially helpful since they provide a sense of fair use’s complexity but simultaneously leave room for critical engagement. University web sites that serve as fair use resources (rather than Guidelines, Policies, or Regulations) should proliferate, and composition teachers should be active participants in their development. Text-based web page resources are helpful, but even more helpful would be interactive web resources that might be explored with students. Composition/rhetorical teachers should work to develop such spaces and provide input in any fair use resources developed by university committees. Administration should back up the fair use decisions of writing teachers and their students when made from educated analyses. What writing teachers need is a self-authored discourse of fair use that permeates everyday practice and thinking, rather than someone else’s Guidelines posted on remote web pages.

Intellectual property law professors/lawyers have offered their advice, but it is not narrowly tailored to fit the needs of digital writing teachers. Ann Bartow (1998) recommended subversive assertion of fair use rights. Earlier I referred to Lessig’s “cannot-bear-this-burden” position. His solution to the current copyright wars was not an expansion of fair use; he instead minimized the potential for a remediated fair use doctrine, saying dependence on fair use limits insightfulness. He argued the reason for increased focus on fair use is because every use is now a regulated use (i.e., reading for example), and this dependence has existed to justify any use (where permission is not requested or received) as fair use. He asserted that fair use was not created to bear this burden. Yes, Lessig is correct that the current IP regime needs changing (1999, 2002, 2004a,b), but so far this change has not been forthcoming. In the meantime we have classes to teach. While the system needs changing, fair use should not be abandoned. The fair use doctrine, like the staple-article-of-commerce doctrine (used to explain fair use in Sony) and
the doctrine of inducement (used to find liability in Grokster), like every legal doctrine that lives (our U.S. Intellectual Property Clause repeats language crystallized in the 1474 Venetian Statute [see Mandich, 1948; May, 2002; Prager, 1944; Yu, 2004]) can be expanded to bear the “burden” of composing new media texts in connected classrooms.

4. Recommendations for digital writing teachers on implementing fair use

4.1. Situate it

Fair use is an exception to the exclusive rights provided to copyright owners by law. In order to have knowledge and understanding of fair use, the doctrine should be situated within copyright protection. The U.S. Intellectual Property Clause (Article I, section 8, U.S. Constitution) grants Congress the power “t[o] promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” The 1976 Copyright Act (Title 17) codified existing case law and is within Congress’ constitutional powers. Under Title 17, U.S. Code, current law gives copyright holders a limited monopoly over “original” works that are fixed in a “tangible medium of expression” (Section 102). Copyright protected works if original and fixed include literary works, musical works (including lyrics), 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. Title 17 also defines the kinds of uses (rights) that are protected (the strands in the bundle of copyright protections): to reproduce the copyrighted work, to prepare derivative works based upon the copyrighted work, to distribute copies of the copyrighted work to the public, and to publicly display or perform the work (Section 106). Because the rights given exclusively to copyright owners are enumerated separately, they can be divided up in licensing schemes like those provided by Creative Commons. Any strand in the bundle of rights might be given out to others by the copyright owner or donated completely to the public domain. Another legal use that is not a license nor fair use is use via the First Sale Doctrine. Under the First Sale Doctrine, any use (resale, gifting) of the single item purchased or otherwise owned by the user is a non-infringing use.

But where does fair use fit into this copyright scheme? In order to have copyright infringement, two elements must be present. There must be access to the copyrighted work by the alleged infringer, and there must be substantial similarity. But a use that is a fair use can contain both these elements and never infringe; fair use sits in space that copyright protection does not cover.

4.2. Teach it

Teaching students about fair use, helping them apply the four-factor test to their own composing practices, is engaging students in multiliteracy/information literacy. Teaching students how to navigate the fair use doctrine helps make visible the legal infrastructure that shapes writing practices. The American Library Association’s sixteen-page definition of infor-
mational literacy sets relevant standards to guide pedagogy (American Library Association [ALA], 2004). The ALA’s definition of literacy crosses all realms of life, work, school, all disciplines, and all learning environments. It is the basis for lifelong learning. An informationally literate individual is able to determine the extent of information needed (ALA, p. 2). Under a fair use analysis, a compositionist must determine how much use of another’s work might be used under the four-factor test. In Harper & Row, using 6% was not a fair use, but in Sony, using the entire work was fair. To know the appropriate extent of information needed, the rhetorical context must be analyzed along with the quantity of work used.

An informationally literate person “evaluates information and its sources critically and incorporates selected information into his or her knowledge base” (ALA, 2004, p. 11). Digital writers should understand how to make evaluations of who owns what materials and what terms of use or licenses are offered. Fluency is encouraged if students can find or obtain licensing information and use policies but at the same time understand their rights to fair use. Students should be introduced to basic IP concepts such as trademark, servicemark, copyright, and plagiarism and should know where to find needed definitions effectively and efficiently. Students should be able to make at least cursory evaluations regarding where information comes from, who owns it, and what rights are offered. Westbrook (2006) suggested using Lessig’s Creative Commons licensing as an immediate practical solution to the copyright problem (see p. 478). The Creative Commons web site is interesting to students; I have used it in my first-year writing classrooms with success and student approval. If students are encouraged to incorporate licensing information in their own student work, it gives them a critically conscious awareness of how texts can be used. Reflection and control over use of their own texts places material and social value on that work; it allows responsible citizenship rather than leaving further use of work by others open to interpretation. Informationally literate digital writers should know where to find fair use resources and critically consume and apply that knowledge in their writing practices. This enables strategic pushing at the standards and practices that are part of the infrastructure.

Informationally literate individuals should understand the “economic, legal, and social issues surrounding the use of information, and access and [use] information ethically and legally” (ALA, 2004, p. 14). As students apply the four-factor test they gain awareness of the “issues.” Through participation in the academic community, teachers develop a sense (often difficult to articulate) against plagiarism and hope to impart this to students. Teachers and students also need to develop a sense of fair use by gaining metacognitive awareness of fair use issues (as teachers routinely outline the various issues and nuances of plagiarism). Working with students to uncover the intricacies of copyright law, focusing on key legal cases, helps students understand the economic, legal, and social issues surrounding the use of information. Just like students have difficulty avoiding plagiarism when they are simply told: “Don’t do it”—in order to be using fairly, students need to be shown what the risks are and why they shouldn’t infringe (DeVoss & Rosati, 2002). By discussing legal damages assessed in various infringement cases such as Napster and Grokster, by reviewing the elements of willful infringement and how to avoid it, students can understand the potential implications of using others’ work outside fair use. By looking at culturally significant perspectives embodied in law and governmental agencies (such as the U.S. Patent and Trademark Office’s (2003) database
of Native American Insignia), by examining other cultures’ paradigms for controlling the creation and dissemination of knowledge, students can make autonomous decisions within their own comfort level of ethical/legal use. For example, a student interviewed in Rife and Hart-Davidson’s (2006) study had circumvented technological measures that prevented the copying of DVDs so that she could take clips for purposes of exploring the stereotypes of Native Americans in popular movies and include those clips in a new media class-based seminar project. The student, who had the highest level of knowledge on fair use among twenty-three of her peers, said:

Like with the movies it is supposed to be illegal to circumvent the copyright protection on the disks but I circumvented that because the law prevents fair use which I don’t agree with so I sort of use my own judgment about breaking that and that is the policy that I follow.

The student knew she might be breaking the law, but because she did not agree with the law, weighing the risks, she did it anyway in order to create a class assignment. The student’s knowledge gave her agency in her composing choices and competent control over the outcome. She knew the risks and made an informed decision she felt was ethical. This is what I mean by “autonomous” composing choices: a high level of knowledge coupled with a high level of agency. Writing instruction should impart this knowledge to students, thus avoiding “too often” teaching “students to accept their subjection within a culture of corporate consumerism” (Westbrook, 2006, p. 476). Students need to know what their options are in order to act responsibly and within their own political, social, spiritual, and personal beliefs.

I recommend coupling fair use syllabi language with plagiarism policies and learning outcomes. Below is a mix-and-match sample that might be integrated into a first-year writing course syllabus:

21 A Federal Australian Court has found analogies to copyright law in Aboriginal law (Bulun Bulun v. R&T Textiles Pty. Ltd., 1998). In footnote 9, Gellar (2000) notes that tribal art is controlled as “technical virtuosos” by artisans instilling it with magical influence (p. 212). In Africa, artistic know-how is passed on through “kinship, corporate, and other groups” (p. 212, n. 10).

22 The student had this new media piece posted in her digital portfolio (crafted in part for potential employers) and had decided the worst-case scenario would be to receive a take-down notice which she would likely heed. Note that this student was asked if she would act differently in a different context, for example, if she was willing to sell the remixed movie for a profit or construct the same for a client for a fee. In these instances, the student felt she would need to seek permissions. And so, this student had carefully weighed the risks involved in taking movie clips for use in a seminar project and posting it to her web space versus doing the same thing in a more commercial context. This is the kind of analysis, I argue, new media composers should be able to make with relative confidence.

23 Another example of this is that under the right rhetorical context, I am willing to use materials created by Native Americans under the fair use doctrine even though there may be language present (on a web site) prohibiting me from doing so. Politically, I generally believe that folks who try to tie up information and/or texts are working against the public’s best interests. In contrast, my colleague does not agree with this, and because of a number of complex issues, including her knowledge of the history of Native Americans and their plight, she has decided not to use texts created by Native Americans under fair use if they have requested that she not do so. Both of us have made autonomous, but different, decisions we feel are ethical within our own political and spiritual beliefs.

Another example concerns a colleague who has several books published. He regularly attends academic conferences wherein he distributes via CDs copies of his books that he has scanned himself. It is my understanding that this CD distribution is obviously in violation of the publishing contract and he is aware of this—however, this is a political action on his part and he considers it ethical.
Learning outcomes:

- By the end of the course you will know where to find definitions and/or examples of plagiarism, copyright, trademark, servicemark, patent, trade secret, licensing, fair use guidelines, and fair use.
- You will understand what work is copyright protected.
- You will know the four-factor fair use test and how to apply it to your own composing practices.
- You will understand how to draft/select a (Creative Commons) license if you so choose.

Administrative policies:

- Plagiarism: (insert appropriate policy).
- Fair use: In this class we strongly encourage and uphold a positive atmosphere of scholarly/intellectual sharing. Students are expected to articulate (sometimes in writing) not only what material they have acquired from outside sources and who owns that material but why they have chosen to use such material and how this use meets the four-factor fair use test/has permissions granted by the material’s owner (or does not).

4.3. Model it

Another strategy teachers might use is modeling appropriate fair use behavior. Avoid a fair use faux pas: An action that works against fair use by failing to acknowledge some uses of others’ work as unregulated while others are fair use (and still other uses are infringing). A fair use faux pas might involve requiring students always ask permission to use other’s images when creating web interfaces or requiring students always select “copyright free” images in their designs. I have seen both examples recently. Also, digital writing teachers might consider modeling in their own work a critical consciousness of copyright/fair use. Classroom materials that are visible to students might be marked with © All Rights Reserved or some license, such as Creative Commons or other teacher-drafted language for use as class discussion points. Writing teachers might be willing to discuss with writing students why he/she has chosen one use condition or another.

Teachers with web pages or digital portfolios might develop use policies and post them. An appropriate Creative Commons license might be selected (the html is provided on the site for cutting and pasting), or web authors can draft their own. The following is an example of Prof. Peter Yu’s (2006) web policy:

All web site design, text, graphics, and the selection and arrangement thereof are copyrighted by Peter K. Yu. Permission is granted to electronically copy and to print in hard copy portions of this web site for educational, personal, and non-commercial use. Any other use of materials on this web site—including reproduction for purposes other than those noted above, modification, distribution, or republication—without the prior written permission of the webmaster is strictly prohibited. To report copyright infringement of this web site, please contact. . . .

Using Creative Commons licensing on web spaces shows an awareness of current use issues that are relevant to digitally circulating texts, but crafting one’s own custom made policy can serve rhetorically sophisticated purposes for particular audiences—Yu’s policy shows that
he is knowledgeable enough to know the legal issues surrounding the use of his materials in addition to the limitations of boilerplate licensing provided by Creative Commons. Such a custom-crafted web policy fits rhetorically with his position as director of the intellectual property program at a law college. His policy is also clever because he provides a method by which to report infringement; this has been relevant in some court determinations of copyright infringement liability.

5. Conclusion

I call for rhetoric/composition teachers and scholars to develop and make visible fair use as a legal framework that shapes writing. Doing so makes visible institutional and political infrastructures that frame digital writing practices and pedagogy. Composition teachers need to affirm that they who teach writing own it, acknowledging that otherwise “all sorts of interests would organize writing” (Hesse, 2005, p. 354). Perhaps it is not so much a question of who owns writing but a question of who owns the right to regulate writing, to construct the standards and frameworks that shape practice. “All writing activities are contextualized by certain infrastructures” (DeVoss et al., 2005, p. 22). While ways of incorporating plagiarism curriculum into the computer-writing classroom have been modified with the advent of the WWW, digital technologies, and new media, so too another related trajectory must become part of daily practice. The nature of composing requires writers use others’ materials. But now that those compositions that frequently involve the use of images, movies, and sound are disseminated beyond the classroom’s four walls, the responsibility that comes with ownership, knowledge, and expertise in writing must be undertaken. Understanding fair use must become as second nature to writing teachers as understanding plagiarism. By situating fair use within copyright, by explicitly teaching fair use, and by modeling fair use behavior, the fair use doctrine can be expanded, its boundaries even challenged. Developing rhetoric and composition research and scholarly discourse along this trajectory of intellectual use will allow writing teachers to facilitate their own and student learning such that together they can be well equipped, strategic, smart writers, and good citizens.

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