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Between What’s Right and What’s Easy

By Tarleton Gillespie

Sometimes our tools are our politics, and that’s not always a good thing. Last week, the Copyright Clearance Center announced that it would integrate a “Copyright Permissions Building Block” function directly into Blackboard’s course management tools. The service automates the process of clearing copyright for course materials by incorporating it directly into the Blackboard tool kit; instructors post materials into their course space, and then tell the application to send information about those materials to CCC for clearance.

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For many, this move offers welcome relief to the confusion currently surrounding the issue of copyright. Getting clearance for the materials you provide to your students, despite the help of organizations like CCC, is still a complicated and opaque chore. Instructors either struggle through the clumsy legal and financial details or furtively dodge the process altogether and hope they don’t get caught. With the centralization offered by CCC and now the automation offered by this new Blackboard add-on, the process will be more user-friendly, comprehensive, and close at hand. As Tracey Armstrong, executive vice president for CCC, put it, “This integration is yet another success in making the ‘right thing’ become the ‘easy thing.’”

Certainly, anything that helps get intellectual resources into the hands of students in the format they find most useful is a good thing. I have no doubt that both the CCC and Blackboard genuinely want the practical details of getting course materials together, cleared, and to the student to be less and less an obstacle to
actually teaching with those materials. But I’m skeptical of whether this “easy thing” actually leads to the “right thing.” Making copyright clearance work smoothly overlooks the question of whether we should be seeking clearance at all — and what should instead be protected by the copyright exception we’ve come to know as “fair use.”

Fair use has been the most important exception to the rules of copyright since long before it was codified into law in 1976, especially for educators. For those uses of copyrighted materials that would otherwise be considered an infringement, the fair use doctrine offers us some leeway when making limited use for socially beneficial ends.

What ends are protected can vary, but the law explicitly includes education and criticism — including a specific reference to “multiple copies for classroom use.” It’s what lets us quote other research in our own without seeking permission, or put an image we found online in our PowerPoint presentations, or play a film clip in class. All of these actions are copyright violations, but would enjoy fair use protection were they ever to go to court.

But there is a dispute, among those who dispute these kinds of things, about exactly why it is we need fair use in such circumstances. Some have argued that fair use is a practical solution for the complex process of clearing permission. If I had to clear permission every single time I quoted someone else’s research or Xeroxed a newspaper article for my students — figuring out who owns the copyright and how to contact them, then gaining permission and (undoubtedly) negotiating a fee — I might be discouraged from doing so simply because it’s difficult and time-consuming. In the absence of an easy way to clear copyright, we have fair use as a way to “let it slide” when the economic impact is minimal and the social value is great.

Others argue that fair use is an affirmative protection designed to ensure that copyright owners don’t exploit their legal power to squelch the reuse of their work, especially when it might be critical of their ideas. If I want to include a quote in my classroom slides in order to demonstrate how derivative, how racist, or maybe just how incompetent the writer is, and copyright law compelled me to ask the writer’s permission to do it, he could simply say no, limiting my ability to powerfully critique the work. Since copyright veers dangerously close to a regulation of speech, fair use is a kind of First Amendment safety valve, such that speakers aren’t restricted by those they criticize by way of copyright.

This distinction was largely theoretical until organizations like CCC came along. With the help of new database technologies and the Internet, the CCC has made it much easier for people to clear copyright, solving some of the difficulty of locating owners and negotiating a fair price by doing it for us. The automatic mechanism being built into Blackboard goes one step further, making the process smooth, user-friendly, and automatic. So, if fair use is merely a way to account for how difficult clearing copyright can be, then the protection is growing less and less necessary. Fair use can finally be replaced by what Tom Bell called “fared use” — clear everything easily for a reasonable price.

If, on the other hand, fair use is a protection of free speech and academic freedom that deliberately allow certain uses without permission, then the CCC/Blackboard plan raises a significant problem.

The fact that the fair use doctrine explicitly refers to criticism and parody suggests that it is not just for when permission is difficult to achieve, but when we shouldn’t have to ask permission at all. The Supreme Court said as much in Campbell v. Acuff-Rose (1994), when Justice Kennedy in a concurring decision noted that fair use “protects works we have reason to fear will not be licensed by copyright holders who wish to shield their works from criticism.” Even in a case in which permission was requested and denied,
the court did not take this as a sign that the use was presumptively unfair. Fair use is much more than a salve for the difficulty of gaining permission.

Faculty and their universities should be at the forefront of the push for a more robust fair use, one that affirmatively protects “multiple copies for classroom use” when their distribution is noncommercial, especially as getting electronic readings to students is becoming ever cheaper and more practical.

Automating the clearance process undoes the possibility of utilizing, and more importantly challenging, this slow disintegration of fair use. Even if the Blackboard mechanism allows instructors simply not to send their information to CCC for clearance (and it is unclear if it is, or eventually could become, a compulsory mechanism), the simple fact that clearance is becoming a technical default means that more and more instructors will default to it rather than invoking fair use.

The power of defaults is that they demarcate the “norm”; the protection of pedagogy and criticism envisioned in fair use will increasingly deteriorate as automatic clearance is made easier, more obvious, and automatic. This concern is only intensified as Blackboard, recently merged with WebCT, continues to become the single, dominant provider of course management software for universities in the United States.

Technologies have politics, in that they make certain arrangements easier and more commonplace. But technologies also have the tendency to erase politics, rendering invisible the very interests and efforts currently working to establish “more copyright protection is better” as the accepted truth, when it is far from it.

As educators, scholars, librarians, and universities, we are in a rarified position to fight for a more robust protection of fair use in the digital realm, demanding that making “multiple copies for classroom use” means posting materials into Blackboard without needing to seek the permission of the copyright owners to do so.

The automation of copyright clearance now being deployed will work against this, continuing to shoehorn scholarship into the commercial model of information distribution, and erase the very question of what fair use was for — not by squelching it, but simply by making it easier not to fight for it and harder to even ask if there’s an alternative.

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