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building on others' creative expression

Access to digital course materials

Overview

The barriers to providing access to digital educational materials in ways that easily enable compliance with copyright law are significant and complex. There are operational impediments: institutions that attempt to implement digital distribution systems will probably need to allocate more technological resources or more human resources, but probably both, to solving the problems they will encounter. Further, legal compliance in this context will likely require additional royalty payments to copyright owners for the use of their materials. Even more basically, simple lack of awareness creates a barrier to success: most campus administrators are not familiar with the scope of the compliance problem or its seriousness. Currently, a few individuals within the libraries are likely to fully understand the problems, but unfortunately libraries cannot address them acting alone. Finally, in addition to legal, technological, human resource, financial and awareness hurdles, evolving business models in the publishing community raise the possibility that systems devised today might be obsolete tomorrow. This paper briefly discusses all of these aspects of the digital distribution system.

Defining "digital distribution"

Universities utilize many different channels to distribute educational materials to students in digital form. For this discussion, I will define digital distribution as institutional use of any digital means to enable students to use their or their institution's computers to read, listen to, view or reproduce materials assigned to the students by a faculty member in connection with a course offered by the institution.

An ambiguous legal standard fosters differing points of view about whether or to what extent digital distribution is fair use or requires permission

Because fair use is by its nature vague, it complicates the resolution of any problem of which it is a part. Simply put, the question of what constitutes compliance with the law is not easy because fair use is not easy. The fair use statute does not specify what is fair, rather, it describes examples and recites a "four-factor" analysis courts must use to determine in a particular case whether a use is fair. So, fair use is vague, making it unclear what "compliant" means.

Additional forces that shape policies and procedures and pose likely impediments to establishing compliant digital distribution systems

Although there is disagreement about the extent to which one may rely on fair use to justify providing course materials without permission, suffice it to say that the idea that all uses are fair is unsupported. Thus, if some uses require permission, there exists the need for a copyright-compliant system as a starting point for the rest of the discussion. Assuming we acknowledge the need to have a system in place that enables us to pay permission fees as needed, this paper examines the institutional barriers to implementing such a system.

An ideal system would allow faculty members to identify required and recommended readings and post them themselves or delegate posting; those readings would be "cleared" if necessary (permission to duplicate and distribute would be obtained when needed, but not otherwise); students would access the materials through their course management systems or the library reserve system or as directed by their professors; and the whole process would be repeated each semester.

Many aspects of the University environment and the evolving publishing industry make achieving the goal of a compliant system difficult, if not impossible. Following is an outline describing five broad problems that significantly impede implementation.

1. Lack of awareness that a problem exists among campus administrators who can not be expected to allocate resources to solve a problem they do not know about
2. The decentralized nature of curricular decision-making
 - a. Faculty are reluctant to undertake the evaluative tasks involved in assessing whether a work is licensed already, is available for license through the Copyright Clearance Center (CCC),^{fn1} whether its use may be fair, or whether permission is required; they also are not inclined to obtain *and pay for* permission on behalf of their students
 - b. Educating those who use licensed materials about the best ways to make those materials available is a monumental task ("best ways" means, for example, linking to the materials in a database, rather than printing them out, digitizing them and posting them within a

course management system)

3. Centralizing these tasks at any level or at multiple levels may require hiring temporary staff at the beginning of each semester to quickly and efficiently assess whether materials are licensed already, available for license through CCC, whether their use may be fair, or whether permission is required
 - a. We need technological resources to create a bridge between those who acquire permission and the library databases of licensed materials
 1. Students are resisting paying additional copyright fees for materials that are already licensed for their use by the library, and institutions cannot afford to absorb "double" payments either
 - b. We must hire adequate numbers of staff to carry out these tasks -- individuals who are experienced, are good record-keepers, have knowledge of the relevant software tools, and can effectively run a centralized service that is able to avoid start-of-semester bottlenecks
 - c. We must allocate adequate financial resources to pay permission fees or charge the fees to students
 - d. These same processes are needed for many other campus projects involving digitization and distribution so systems devised to address digital distribution in this context (course materials) need to be available for other uses as well, such as digital repositories
4. There are some inherent inefficiencies in the fair use analysis which must be addressed if a scalable system is to be developed
5. Evolving business models in the publishing community may render complicated clearance processes obsolete in the near future

Today only a fraction of the materials used each semester passes through any kind of gatekeeper, such as a library reserve system or course pack operation, because all faculty members have the capacity to post their own readings within their course management systems. The magnitude of the problem should be clear. Addressing the problem of copyright compliance in digital distribution involves changing an entire culture, not just a few individuals' activities. Even if small institutions may work with individual faculty members to enable them to make all these decisions, the inefficiency of doing so seems painfully obvious when you try to apply that approach to mid- to large-size institutions.

Thus, establishing campus copyright offices centrally, or at college or departmental levels could be especially helpful because of the nature of the tasks required to implement a compliant system. None of these tasks is easy, and to expect everyone who ever uses others' works to learn them without the efficiencies created by experience, good record-keeping and sophisticated software is expecting the impossible. One or more centralized offices might be further justified because of the nature and volume of copyright questions arising on campuses today. Copyright compliance is part of many projects underway at our campuses, in addition to digital distribution of educational materials. For example, institutions are filling digital institutional repositories with materials whose duplication and distribution may require permission, so the same processes we identify and recommendations we might make for digital distribution of educational materials will have some application to other projects on campus. Any use of another's work that involves making a copy and distributing it online involves some question of whether permission is needed, some analysis of the rights we have already licensed or could easily license to make the copy and distribute it, and the extent of any statutory exemption that might apply. It seems clear that a centralized campus copyright office would greatly facilitate this evaluative process as well as compliance with copyright law, whenever permission is required.

Why act now?

The vagueness of fair use and the difficulty of training thousands of people to analyze it, the cost of compliance, the structural obstacles to controlling literally hundreds of thousands (if not millions) of decentralized potentially infringing behaviors, and the publishing industry's evolving business models all militate against compliance. Surprisingly, until recently, there was little that pushed the other way. Few universities have ever been sued in this context because neither side seemed in a hurry to clarify the situation -- fair use is vague enough that perhaps neither side felt assured of victory. In any event, the vagueness, described as "flexibility," is generally perceived by the university community to be an advantage even though it creates uncertainty and fear of being a test case.

Allegations against first the University of California San Diego (UCSD) library, then Cornell, and most recently, six additional universities, including Texas A&M University, signal a change in the status quo.² Publishers appear poised to take a chance on litigation. Their spring, 2007 allegations were delivered with formal complaints attached, ready to be filed. These complaints named Presidents, Provosts, Library Directors and Chief Information Officers. They no longer imply a threat of litigation -- they make the threat explicitly. While state institutions cannot be sued for money damages in federal court because of sovereign immunity, they can be sued for injunctive relief and attorneys' fees. Further, it could be politically damaging to be accused of being, or be found seriously out of compliance with what can reasonably be defended. Thus, as publishers' efforts to encourage licensing in these contexts become more aggressive, universities and libraries must face the problems that compliance presents. Hopefully, through a willingness to discuss the practical difficulties of compliance, we might find solutions to these problems without precipitating litigation. Those already accused are being forced to deal with these problems under the threat of litigation. Most of us would probably prefer to begin to think about these tasks while we can still do so under less pressure.

Most importantly, we must recognize that copyright compliance is not a library problem. It is a university problem. And it needs a university solution.

Footnotes:

1. The Copyright Clearance Center's Web site is www.copyright.com. The CCC was created in the mid-1970's to address the difficulty of licensing articles for individual use.
2. The Association of American Publishers (AAP) and several of its members have repeatedly notified major research institutions that they believe their handling of course-assigned instructional materials in the digital environment is in violation of copyright law, infringing the copyrights of the complaining publishers. They believe the universities need permission from the copyright owners to make and distribute such copies and must pay whatever fees the owners wish to charge. The publishers therefore seek operational changes in the way universities make materials available to students (incorporating a permission process) and the payment of permission fees for otherwise infringing uses. In response, Cornell issued [electronic course content guidelines](#), hailed by the AAP, in September, 2006. The more recent allegations (spring, 2007) have not yet produced public resolutions.

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