

Copyright Issues for the Unsuspecting School District

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The use of pictures, video and music files in school presentations, classroom lessons and on district websites is not a new phenomenon in New Jersey. However, a teacher or student's natural inclination to utilize current photos or videos to illustrate a point carries with it certain legal pitfalls that may catch a school district unaware, particularly when one fails

to properly reference and/or compensate the original author of the work.

Failure to do so can have far-reaching consequences for a school district, be it academic dishonesty or financial implications for unauthorized use of copyrighted work. While such infringements may have gone unnoticed in the past, the posting of classroom or school district materials on

the internet has caused these infringements to be increasingly noticed and acted upon.

Many school districts have received notification from companies such as License Compliance Services ("LCS"), seeking payment for use of images on district websites. In their letters, these companies claim the images were used



without proper compensation to the copyright holder and thus such use constitutes a violation of copyright law. It is important not to simply ignore notices such as these, as school districts can and will be held responsible for unauthorized use of copyrighted materials. However, before making any payment to a copyright holder, an understanding of the copyright law itself, as well as the exceptions under the law which may protect school districts when using certain copyrighted materials, is necessary.

Copyright Laws in the United States As far back as 1789, the framers of the United States Constitution recognized the need to protect authorship of original text, graphical images, sound and performances. Included within the list of enumerated congressional powers in the Constitution is Article I, Section 8, Clause 8, known as the “Copyright Clause,” which gives 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.” Within this framework, there are currently three main federal laws that govern and protect authorship in the United States: the Copyright Act of 1976; the Copyright Term Extension Act; and the Digital Millennium Copyright Act.

The Copyright Act of 1976 The Copyright Act of 1976, 17 U.S.C.S. 101, et seq., was enacted to address new forms of media that had become prevalent as of 1976, including television, radio, sound recordings and motion pictures. Under this act, copyright protection extends to creations such as music, literary and dramatic works, audio recordings, motion

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pictures, pictures and graphics, and architectural works.

The act also includes six exclusive protections for copyright holders – the right to:

- (1) reproduce;
- (2) distribute;
- (3) perform;
- (4) display;
- (5) create derivative works; and
- (6) perform sound recordings via digital audio.

In other words, individuals who do not hold a copyright may not use a copyrighted work to do any of these things without first obtaining permission from the copyright holder or providing

appropriate compensation for the use of the work.

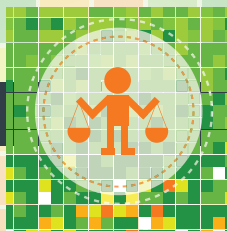
The Copyright Term Extension Act (“CTEA”)

In 1998, Congress passed the Copyright Term Extension Act (“CTEA”), 17 U.S.C. 108, et seq. The sole intent of the CTEA was to extend copyright terms and allow authors to protect their work for a longer time period than was provided for under the Copyright Act of 1976. Supporters of the CTEA believed that extending copyright protection would help the United States by providing more protection for their works in foreign countries, and by giving more incentive to digitize and preserve works since there was an exclusive right in them.

Under the CTEA, copyright terms were extended from life of the author plus 50 years, to life of the author plus 70 years. The copyright term for works of corporate authorship were increased from 75 years to 120 years after creation, or 95 years after publication, whichever is earlier. Finally, the copyright protection for works created prior to January 1, 1978 was increased by 20 years, to a total of 95 years from their publication date.

The Digital Millennium Copyright Act (“DMCA”)

One day after the CTEA took effect in 1998, the DMCA was enacted. The DMCA criminalizes the circumvention of measures that control access to copyrighted works, including digital works. Under the DMCA, the simple act of circumventing the access controls for protected work is sufficient to constitute a violation. The DMCA also significantly heightened the penalty for copyright infringement on the internet, and establishes procedures for copyright holders to request online service providers to take



down alleged infringing material (known as a “takedown notice”).

Copyright Protection and Penalties Copyrights protect works across a varied spectrum, including books, manuals and brochures; live and recorded performances; photographs and drawings; software and websites; and even cartoons. This alone is a concern for many school districts, as each of these types of items are regularly used in lessons and presentations. It is also incredibly easy to copy and paste a copyrighted image, song or video on a district website or in a teacher’s presentation without knowing whether the work is copyrighted, or whether permission for use has been granted.

The Internet Myth A common myth regarding copyright and the internet is that if a work is online, it may be freely used by anyone. This is untrue, as the copyright laws protect all original works despite the location of the work itself. Furthermore, simple attribution to the source material does not, itself, guarantee that the work may be used and the lack of a copyright notice does not mean that the work is not protected.

In fact, an author of a work does not need to even register the work in order to hold a copyright in it. As soon as the work is created and published, the author inherently obtains copyright protection over the work and has all attendant ownership rights and privileges under the law. However, the copyright owner does have incentives to register their copyright with the United States Copyright Office. A copyright holder who fails to register their work may request that the infringing use be stopped and the work taken down, but cannot sue for monetary damages.

If a teacher were to use a cartoon of a character such as Bart Simpson in a daily lesson once, for example, that use may be permitted, but using the same cartoon in the lesson for 20 years may constitute a possible infringement.

Registration is a prerequisite to suing for copyright infringement, and entitles the owner to statutory damages and attorney’s fees for any infringement which takes place after the registration. Damages for infringement can be severe, ranging from \$200 to \$150,000 per infringement, regardless of an individual’s actual damages, or higher if a plaintiff is able to show that its actual damages were greater than the statutory amount.

“Fair Use” and Defense to Infringement

Even if a district employee makes use of copyrighted material, it does not necessarily constitute copyright infringement, however. The Copyright Act of 1976 codified the “fair use” defense to infringement, which allows a teacher to make limited use of a copyright-protected work for educational purposes. When deciding whether the use of a copyrighted work is fair use, the court considers four factors:

(1) the purpose of the use; (2) the nature of the work; (3) the amount of the work taken; and (4) the effect of the use on the market for the work.

Non-profit educational use of a copyrighted work is generally permitted as fair use. The duration of the use and availability of the work must first be considered, i.e., whether it is a one-time use or if the same materials have been used without permission for a number of years. Use of the same copyrighted work every year may convert a fair use back into copyright infringement. In addition, posting material on a publicly-available website, even if for educational purposes, is likely to constitute infringement.

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Courts also look at the nature of the copyrighted work (e.g., creativity, originality and inventiveness) to determine if it is being used for a legitimate educational purpose, and the amount of the work that was taken, before determining whether there is fair use of a copyrighted work. Courts may look differently upon a portion of a history text being used in a class assignment, for example, than they would if a work of fiction, such as a novel, is posted on a website. The effect of the use on the potential market for the work is also considered. If the use of the copyrighted work negatively impacts the commercial value of that work such that potential buyers no longer have to pay for it, it may not constitute fair use even if used for educational purposes.

Furthermore, although companies



such as LCS may threaten to file suit against a school district for copyright infringement, they may not do so unless the work is registered with the United States Copyright Office. It is therefore important to check with the United States Copyright Office and Library of Congress to confirm that the work being used is registered before agreeing to settle any claims for payment.

What Can a School District Do? It is incredibly easy to infringe upon a copyright, even without intending to do so. Unfortunately, school districts are not protected from penalties should it be determined that such use constitutes an infringement,

unless a defense applies. The fines for violating a copyright can reach into the hundreds of thousands of dollars. Boards of education may wish to enact a policy addressing the use of copyrighted work and when such use is permitted. Staff and students should both be informed that cutting and pasting pictures, text or video from websites owned by others is prohibited, unless the use is limited to a specific class for educational purposes, or meets the standard of fair use. When at all possible, creating original work for a class or website is the best course of action and should be encouraged.

Another related issue is whether the copyright for work created by employees

becomes the property of the board of education. Your policies should clearly address this, including whether the original creator of the work has any remaining ownership in the work itself, and the circumstances where the copyright transfers to the school district, i.e., when work is created as part of a class, or at the direction of the board. The board may also wish to clarify the situations where it will enforce its own copyrights should members of the public use a district-created work for their own purposes.

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