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# Are Student Affairs Professionals “Educators?:” Student Affairs and the Scope of the Educational Exemption of Copyright Law

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Are Student Affairs Professionals “Educators?:”

Student Affairs and the Scope of the Educational Exemption of Copyright Law

**Abstract**

Copyright is a critical, emerging issue in American higher education. Copyright restricts how educators use copyrighted materials in teaching activities. Although the fair use doctrine and the educational exemption in U.S. copyright law provide exceptions for educators, student affairs professionals might not meet the standards of the educational exemption. This paper serves as a primer on U.S. copyright law, the fair use doctrine, and the educational exemption. Analyses of case law suggest student affairs professionals should rely on the fair use doctrine rather than the educational exemption when using copyrighted materials for educational purposes.

*Keywords:* copyright, student affairs, educational exemption, legislative history.

### Are Student Affairs Professionals “Educators?”:

#### Student Affairs and the Scope of the Educational Exemption of Copyright Law

It is difficult to envision a classroom in which a professor of African American history cannot show the feature film *Malcolm X* to discuss civil rights with students. Yet in a very similar situation, a residence hall director infringes copyright if she performs the same film to engage her students in the same discussion. Although copyright law prohibits many uses of copyrighted works without the permissions of the rights holder, educators enjoy a fair measure of flexibility within the scope of their teaching activities. The fair use doctrine and the educational exemption are statutory exceptions to copyright law that provide faculty with the latitude to distribute, perform, or display limited portions of protected intellectual works to students as part of their regular instructional activities. Many student affairs professionals rely especially on the educational exemption in U.S. copyright law as a sort of blanket campus exemption from copyright infringement because of the exemption’s emphasis on nonprofit education and teaching (Bonner, 2006). However the legislative history of Title 17 (110) evinces a narrow intent that restricts the scope of the educational exemption to teaching activities by faculty in classroom settings. Student affairs professionals and their role in the educational process may not meet the statutory requirements. Consequently, they might create liability for themselves and their institutions by infringing on copyrights in the course of their duties.

The purpose of this paper is to analyze the role of student affairs professionals within the context of the educational exemption of section 110(1) of U.S. copyright law. Additionally, this paper recommends practices designed to reduce the risk of copyright infringement for student affairs professionals. This paper is divided into three parts. The first part describes U.S. copyright law, the fair use doctrine, and the educational exemption. In the second part, the

relationship between student affairs and the educational exemption is explored. The third part discusses strategies for student affairs professionals which reduce the risk of copyright infringement while satisfying the educational mission of their work.

### **Part I: What is Copyright?**

#### **Protectable Works**

Original, intellectual works are protected from infringement by copyright under Title 17 of the U.S. Code. An original work must embody a minimum amount of creativity. Almost any spark of creativity constitutes sufficient originality: A business directory has sufficient originality resulting from its categorization of information under subject headings (*Bellsouth Advertising & Publishing Corp. v. Donnelly Information Publishing, Inc.*, 1993). These original works include literary works such as novels, poems and plays; audiovisual works such as motion pictures, radio and television broadcasts, musical compositions and choreography; artistic works such as paintings, photographs, drawings and sculpture; and technical works such as architecture, maps, and software programs.

To be eligible for copyright protection, an original work must also be “fixed in any tangible medium of expression” (U.S. Copyright Act, 2005). “Fixed” is defined by statute as a physical form that exists for more than a “transitory duration” (U.S. Copyright Act, 2005). Examples of fixed works could include video, notes written on napkins or electronic documents stored on servers or USB devices. Works do not need to be formally published, deposited, or transmitted to other parties to be vested with copyright. Therefore unpublished manuscripts and other works in progress are copyrighted, so long as they are fixed in a tangible medium. Copyright protection does not require the work be registered with the federal government, printed with a copyright notice, or appear with a copyright symbol (U.S. Copyright Act, 2005).

Most foreign works are also protected under U.S. copyright law when they enter U.S. jurisdiction. Anonymous works are also protected under U.S. copyright law. The law assumes the author has registered the work and is therefore known in law but has chosen not to reveal their authorship to the world at large.

Some works are specifically excluded from copyright protection. These include facts, which are not original; ideas, which are not transfixed in a tangible medium; works of the federal government, which are intended for the public good; titles, names and short phrases; and works that contain exclusively factual information, such as height and weight charts and calendars. These works without copyright protection are deemed to belong to the public domain, meaning anyone can freely use the works without liability for infringement.

### **Historical Development of U.S. Copyright Law**

From its beginnings, copyright has encompassed a delicate balance between public good and private, economic protection. The U.K. Copyright Act of 1709, commonly referred to as the Statute of Queen Anne, introduced the concept of ownership over published works. The Act offered authors and artists legal recognition and control over their original works and ideas, with economic protection against piracy for a limited period of time. However, their ownership was enforceable for just 28 years because the British government considered creative works to be ultimately intended for the public good. The First Continental Congress borrowed the spirit of the Statute of Queen Anne with the enactment of the Copyright Act of 1790. Under the title “An Act for the Encouragement of Literature and Genius,” the first U.S. copyright law resolved that protection for only 14 years after publication was “the most proper means of cherishing the genius of useful works through the United States by securing to the authors or publishers of new books their property in such works.”

In 1831, Congress revised the copyright act and extended the protection of copyrighted works to 28 years. The U.S. Supreme Court first handed down the first landmark copyright case law in 1834. The Court held an author has perpetual rights in unpublished works, but those rights terminate after the work is published after the statutory 28 years (*Wheaton v. Peters*, 1834). However, the ruling left open the question of when a work is considered officially published. Soon after *Wheaton v. Peters*, Congress revised the U.S. Copyright Act to require authors or publishers to provide a copy of their work to the Library of Congress within one month of publication. This deposit served as the lawfully recognized record of the book’s official publication.

The Court held copyright protection extended to circus posters in 1903, which had previously been granted only to literary works. Although *Bleistein v. Donaldson* (1903) focused originally on the artistic merits of advertisements, the case is seminal for copyright law for two reasons. The Court upheld the creator is morally entitled to claim authorship, associate his or her name with the work, and ensure the integrity of the work. The Court ruled, too, that the creator’s right to control the use of the work creates a market value for the work itself. Although copyright “encompasses a delicate balance between public use and private benefit,” the Court found the economic property rights inherent in copyright were the most salient dimension of copyright (*Bleistein v. Donaldson*, 1903). The case is often considered the foundation for modern copyright law (Urs, 2004).

In 1909, Congress revised the U.S. Copyright Act and substantially broadened its scope to include all creative and scientific works. A major revision of the Act occurred in 1976. The U. S. Copyright Act of 1976 extended the protection of copyright to the author’s natural life and an additional 50 years. Congress removed previous requirements that creators deposit copies

with the Library of Congress or print copyright notices. In 1998, Congress extended copyright protection for works made for hire to 120 years. Under the Sonny Bono Act, Congress renewed the U. S. Copyright Act in 2005 and once again extended protection of copyright to the author’s natural life and an additional 70 years.

### **The Rights of Copyright Holders**

Currently, copyright protection lasts for the life of the author and an additional 70 years (U.S. Copyright Act, 2005). For a work made for hire – meaning the work is created by an employee within the scope of his or her employment – the copyright lasts for 95 years from the year of its first publication or 120 years from the year of its creation, whichever expires first (U.S. Copyright Act, 2005). During this period of copyright protection, the copyright owner has specific rights. The rights are often called a “bundle of sticks” because the rights can be sold or given to other parties in whole or in part. These rights include:

- The right to reproduction, i.e. to make copies of the work;
- The right to adaptation, i.e. to create derivative works from the original or to adapt the work to a different medium;
- The right to distribution, i.e. to make the work available to others;
- The right to public performance, i.e. to authorize the recitation, play, or act in a public space or within view of the public;
- The right to display, i.e., to display the work anywhere a substantial number of unrelated people are gathered.

For the purposes of classroom instruction, the rights of reproduction and of distribution are arguably the most important. Under the right of reproduction, no one other than the copyright owner may make copies of the work, including photocopies for students in a class, a

course packet, or a conference proceeding. The right of distribution is tightly bound to the rights to reproduction, as it is generally essential to copy a work to distribute the work to others. With the right of distribution, no one but the copyright owner may make the work available to the public, students, colleagues, or libraries by sale, rental, lease, or lending.

For student affairs professionals, the rights to public performance and to public display are arguably the most essential for their work. Student affairs professionals perform films to entertain or to educate students on a variety of social issues. Under the rights to public performance and public display, such activities may infringe on the copyright owner’s rights if the performance or display is made to a “substantial number of people outside the usual circle of family, friends, and social acquaintances” (U.S. Copyright Act, 2005).

Authors can transfer or sell copyright to another party, called an assignee. The assignee controls all the rights associated with the copyright and is the work’s legal owner. The transfer of all the bundled rights is called the transfer of *exclusive* rights. However, authors can elect to transfer only one or more of the rights to a work while retaining others. Because the rights can be unbundled from each other and transferred or sold amongst many different parties, the legal profession refers to people or corporations with a vested interest in the protected work as *rights holders* rather than as strictly as copyright owners (Crews, 2006).

### **Copyright Infringement**

Copyright infringement is committed when someone reproduces, adapts, distributes, performs, or displays a protected work without obtaining the permission of the rights holder. There are three types of copyright infringement: direct, contributory, and vicarious. Direct infringement is committed by the person who actually reproduces, adapts, distributes, performs, or displays the work. Contributory infringement occurs when a person doesn’t directly infringe,

but is aware infringing activity is taking place and either induces it, causes it, or contributes to it. Vicarious infringement occurs when someone profits from the infringing activity, even if they are unaware the infringing activity is taking place. Infringing activity may subject the infringer to legal action in civil courts, and the rights holder can recover compensatory damages. The compensation established by statute can include the recovery of any profits made by the infringer, actual damages ranging between \$200 and \$150,000 per work infringed, and attorney’s fees (U.S. Copyright Act, 2005).

Although U.S. copyright law grants broad protections to rights holders, legislators recognized the need for the public to sometimes use protected works without the need to seek permission. Sixteen statutory exceptions allow the public to use protected works without liability for infringement. Most of the statutory exceptions apply only under very specific circumstances, such as libraries making copies of materials for preservation purposes, or booksellers displaying books to sell to customers. In higher education, the best known and most widely applied statutory exceptions are the fair use doctrine and the educational exemption.

### **The Fair Use Doctrine**

“Fair use” is a defense to copyright infringement when the defendant’s use is reasonable under the law (*Folsom v. Marsh*, 1841). Although the concept of fair use was present in British common law, fair use developed slowly in American law. The U.S. Supreme Court acknowledged the concept and provided a simple definition in case law: A person could use an original work without permission from the rights holder only if that use was “fair and reasonable” (*Folsom v. Marsh*, 1841). Fair use was enshrined in a statutory exception in the U.S. Copyright Act of 1976. The statutory exception is remarkably brief despite being the basis of numerous lawsuits. It says:

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 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 market for or value of the copyrighted work.

The first factor is rarely the subject of litigation because the commercial or nonprofit use of a protected work is generally evident (Kusinick, 2008). However, several case laws have slowly developed a definition of “educational purposes.” The courts have ruled that commentary, criticism, and news reporting are educational purposes and consequently favor fair use. In *Sundeman v. Seajay Society Inc.* (1998), a scholar at a nonprofit research institute did not infringe on an author’s copyright when he used quotations from the author’s book in his analytical literary presentation to a scholarly society. Similarly, evangelist Jerry Falwell did not violate *Hustler Magazine’s* copyright when Falwell copied pages from an issue of *Hustler Magazine* and distributed the copies to his fans; Falwell was commenting on the lasciviousness of the pornography industry (*Hustler Magazine Inc. v. Moral Majority, Inc.*, 1985).

The second factor is focused on the protected work’s nature. Fair use is less defensible when the protected work is creative in nature, meaning the work represents the rights holder’s artistic or literary output. The U.S. Postal Service infringed on the rights of a sculptor when the agency created a stamp featuring the Korean War veterans’ memorial without the sculptor’s permission (*Gaylord v. United States*, 2010). The courts are not lenient with claims of fair use

when the works are creative, but courts tend to permit greater latitude with works of nonfiction. The original spirit of copyright law is to encourage the growth of knowledge, and new knowledge must build upon older works of knowledge (U. S. Constitution, art. 1, sec. 8, cl. 8).

Fair use is frequently pivotal on the portion of a work used, which is the third factor of fair use. Even an educational purpose might not constitute fair use if the purpose uses too much of the protected work. An investigative journalist republished portions of an author’s manifesto in a news story to prove the author’s intent to overthrow of the Iranian government. The court ruled the news reporting of the manifesto was not fair use because the journalist had reproduced nearly half of the author’s work – “far too substantial a portion” (*Love v. Kwitny*, 1989). However, a biographer’s selection of 10 journal entries from Richard Wright’s unpublished diaries constituted fair use because the purpose was both informational and represented a mere 1% of Wright’s diaries (*Wright v. Warner Books, Inc.*, 1991).

The courts have adopted a standard for acceptable fair use, generally 10% of the entirety of the work. However, the courts sometimes consider even 10% too much, if the portion used is the “heart” of the work. A television station broadcast used one minute and 15 seconds of footage from a Charlie Chaplin film during a report of the actor’s death, but the court determined the footage contained the film’s most iconic scenes (*Roy Export Co. v. Columbia Broadcasting Sys., Inc.*, 1982). Similarly, a television studio infringed on an artist’s right to publicly display his work’s when a poster appeared in the background scene of the TV show *Roc*, despite the poster’s visibility for a mere 27 seconds. The court concluded that the poster’s inclusion on the stage set, however brief, was prominent and denied the artist the opportunity to profit from the poster’s public display (*Ringgold v. Black Entertainment Television, Inc.*, 1997).

Fortunately, there are times when an entire work can be used without the rights holders’ permission. The courts have recently described a “transformative” consideration in case law established in the last two decades. The U.S. Supreme Court articulated the transformative consideration in their opinion for *Campbell v. Acuff-Rose Music* (2003): “[T]he inquiry focuses on whether the new work... alters the original with new expression, meaning or message. The more transformative the work, the less will be the significance of other factors, like commercial value, that may weigh against a finding of fair use.” The Obama “Hope” poster is the subject of the arguably best known case illustrating the transformative factor of fair use. The stylized portrait with the word “hope” became iconic during the 2008 U.S. presidential campaign. The artist based the portrait on a stock photograph owned by the Associated Press. The court determined the artist’s alteration of the stock photograph had captured a spirit with historical worth and imparted a message impossible to convey with only the unaltered stock photograph (*Fairey v. The Associated Press*, 2011).

Sometimes the work itself does not need to be transformed into something entirely new, but instead serves as an integral part of a larger work’s purpose. The courts held a publisher’s reproduction of Grateful Dead concert posters in a biography about the band did not infringe on the artist’s copyright. The reproductions were reduced to thumbnail size and of poor image quality – therefore unlikely to diminish the market for the artist’s full-size, high quality images of the posters – and were accompanied by explanatory text for each poster and timelines. The courts found the explanatory text and timeline’s importance would have been diminished without the accompanying images. The “added value” was sufficient for the use to be transformative and therefore non-infringing (*Bill Graham Archives v. Dorling Kindersley Ltd*, 2006).

The fourth factor is the use’s effect on the market. Some courts have called the fourth factor the most controlling and compelling factor that could weigh against fair use (*Harper & Row Publishers, Inc. v. Nation Enterprises*, 1985). If the use substitutes for a potential sale of the protected work, the court is less likely to accept the use as fair. The court ruled against Kinko’s when the company copied and sold book chapters for sale in course-packs for students because students could have purchased the books instead. The course-packs substituted for book sales and thus deprived the books’ rights holders of the opportunity for income (*Basic Books, Inc. v. Kinko’s Graphics Corp.*, 1991). The courts also give weight to a protected work’s future market, especially if the work is not yet available commercially. The courts held a biographer recited too much of J.D. Salinger’s unpublished letters to a university audience because Salinger intended to publish his letters; now that their substance was already known to an audience likely to buy the published letters, their market value was reduced (*Salinger v. Random House*, 1987).

The market is damaged if the use undercuts potential licensing too. A Texaco researcher infringed when he copied and shared with colleagues a few articles from several scholarly journals published by the American Geophysical Union (AGU). AGU argued the scientist deprived the organization of the opportunity to sell Texaco a subscription to their journals. The court disagreed, believing a small number of copied articles do not reasonably substitute for a journal subscription. However, AGU also licensed a database aggregator to sell individual articles to database users. The court determined the copying and distribution of the articles undercut the licensing agreement (*American Geophysical Union v. Texaco Inc.*, 1994). The Texaco case is also notable for the court’s establishment of the “rule of five,” which suggests a subscription is justified after five articles are copied from the last five years of a journal’s issues.

While fair use analysis is complex, the fair use doctrine is an important exception to U.S. copyright for student affairs professionals. The four factors are judged together, with the fourth factor as arguably the controlling or most compelling. An affirmative fair use defense is highly circumstantial, so each and every use must be examined independently. However, the fair use doctrine is not the only the statutory exception in U.S. copyright law. The educational exemption is another statutory exception to copyright and is specifically designed for teaching activities.

### **The Educational Exemption**

There is a significant statutory exception to the rights of copyright holders that allows instructors to use copyrighted works. The educational exemption grants instructors the right to use copyrighted works in their entirety without risk of copyright infringement in some circumstances. According to section 110(1) of the copyright law, the educational exemption has five elements that must be satisfied:

1. The performance of protected material must be from a legitimate copy and not recorded from a broadcast or be an unauthorized copy;
2. The use of protected material must directly apply to the purpose of the instruction;
3. The teaching activity using protected material must be face-to-face between instructors and pupils;
4. The teaching activity using protected materials must occur in a classroom or other space that is the students' primary place of instruction;
5. The institution must be nonprofit and educational;

The educational exemption provides considerable latitude that allows most teachers to use copyrighted materials without fear of infringement. Many educators rely on the educational

exemption in U.S. copyright law as a sort of blanket campus exemption from copyright infringement because of the exemption’s emphasis on nonprofit education and teaching (Bonner, 2006). Student affairs professionals tend to rely heavily on educational exemption too, given their role in student learning outside of the classroom. However, case law centered on the educational exemption casts doubt on student affairs professionals’ likelihood of meeting the standards of the educational exemption. Sawyer (2002) comments, “No court disputes the educational merit of using copyrighted materials as instructional aids in a history class. The merit of a residence hall director using the *Wizard of Oz* as to illustrate gender roles isn’t so obvious.” The following section analyzes the role of the student affairs professional in student learning in the context of case law and legislative history.

### **Part III: Legislative Intent & Analysis**

Legislative histories are useful when researching the meaning, intent, or effect of a law, especially when the law is new or there is little or no case law interpreting it. Sources of federal legislative intent include committee reports and hearings. The *Congressional Record* publishes floor debates. No relevant case law exists that speaks to the question of whether or not student affairs professionals are educators in the context of the educational exemption of U.S. copyright law. Subsequently, it is necessary to examine the legislative history of the educational exemption.

#### **Teaching Activity**

The educational exemption from copyright infringement is triggered when all the elements are met. Because the elements refer to protected materials used in the course of teaching activities, clarification of “teaching activities” is essential. The legislative history refers to teaching activities as “systematic, mediated instructional activities (U.S. Copyright Act, 2005). The legislature adopts a deliberately broad stroke for instructional activities: “The concept is intended as the general equivalent of curriculum but it could be broader...for an institution using systematic teaching

methods not related to specific course work” (Limitations on Exclusive Rights, 1975). Elsewhere, it is stated, “[A] transmission would be a regular part of these activities if it is in accordance with the pattern of teaching established by the institution” (House Report No. 94-1476).

Administrative and judicial activities within the educational institution are specifically excluded from teaching activities; neither administrative nor judicial activities are clearly defined (H.R. 94-1476, 1975). *Whitol v. Crow* (1962) provides some guidance on the distinction between teaching and administrative activities. A choir director copied and distributed sheet music of a special arrangement to 48 students at a school chapel meeting. He directed the students in two performances of the arrangement at a school chapel meeting and at a church recital. Although the district court interpreted the copying and performance of the arrangement as purely educational for the students’ growth as singers, the 8<sup>th</sup> Circuit Court reversed the decision upon appeal. The court held in favor of the rights holder because the choir director was employed as a member of the school’s administrative staff and because the school choir fell outside the scope of the school’s stated curriculum (*Whitol v. Crow*, 1962). The scope of admissions officers and judicial affairs officers may be similarly hampered by this exclusion. Additionally, student activities or student unions may also be restricted in their use of protected materials. House Report No. 94-1476 (1975) states,

The teaching activities exempted encompass systematic instruction in a very wide variety of subjects, but they do not include activities given for recreation or for entertainment, whatever the [works] cultural value or intellectual appeal (p. 34).

### **The Five Elements**

A few of the five elements are disposed of quickly because they are met easily or do not require significant investigation into the legislative intent behind their meaning. They are addressed first in this section - though they do not necessarily appear in the legislative history in this order. The elements which bear greater analysis or have the strongest implication for student affairs professionals are addressed last.

“*The performance must be from a legitimate copy and not recorded from a broadcast or be an unauthorized copy.*” This element is concerned with the right to public performance. It is therefore of interest to student affairs professionals who use films as instructional tools, such as Residential Life staff who perform a film for students in a residence hall to facilitate discussion about alcohol use. The legislative history defines a legitimate copy as “lawfully produced and acquired,” which suggests that public performance of copies not purchased or leased does not satisfy this element of the educational exemption. A producer of educational videos sued a consortium of public school districts, whose educators had recorded educational programs broadcast on public television stations and performed the videos in classes. Although the court expressed appreciation for the educational purpose and sympathy with the educators, it ruled the convenience of recorded programs was not reasonable because the programs were videos available for sale by the producer to educational institutions (*Encyclopedia Britannica Educational Corp. v. Crooks*, 1982).

The work’s commercial availability and the educator’s intended use of the work over a period of time are important factors in the courts’ determination of whether the educational exemption applies. In *Universal City Studios v. Sony Corp* (1982), the Court concluded the recording of a full episode of the Kojak television show – at that time not released for sale – qualified under the educational exemption because the taping did not deprive the rights holders of revenue. The Court ruled, too, that the “impermanence” of the taping was crucial: The viewer did not intend to retain the copy permanently, but to erase it after the viewer had performed the work and the lesson concluded. In the Court’s analysis, the justices noted the viewer was not attempting to build a “personal video library.” In *Encyclopedia Britannica Educational Corp v. Crooks* (1982), the courts referred to the school districts’ “systematic

collecting and sharing” of the works as a contributing factor in their ruling that the educational purpose was not fair use. Taking the cases together, the legal opinions suggest educators’ systematic recording of programs not available for purchase is not an acceptable substitute for commercially available alternatives. However, renting a lawfully made or acquired video satisfies this element. With ready access to library media collections, video rental, and streaming services such as Netflix, the acquisition of a lawfully produced copy should not prove difficult.

*“The institution must be nonprofit and educational.”* The legislative history makes clear that the educational exemption applies only to the teaching activities of a nonprofit educational institution and excludes from the exemption “profit making institutions such as dance studios and language schools” (U.S. Copyright Act, 2005). Satisfaction of this element is contingent upon the nature of the educational institution and is not triggered by the nature of the teaching activity of the instructor. Nonetheless, student affairs professionals at for-profit educational institutions are negatively affected by this element.

*“The use of [protected] works in teaching activities must directly apply to the purpose of the instruction.”* Although the legislature acknowledges educators have significant latitude to determine the best tools to teach or facilitate lessons, the educational exemption restricts exemption to only protected works that are clearly germane to the lessons. There is little elaboration in the legislative history to reveal the legislative intent, but Pitt (1977) suggests the element encourages the courts to consider the purpose of the use of protected works in the larger context of instruction: Is a performance of a hit Broadway play appropriate for a class on Shakespeare, for instance?

*Marcus v. Rowley* (1983) is the only case involving a teacher copying for instructional use in the traditional classroom setting. Rowley, a public school teacher, copied pages of a book on cake decorating and distributed the copies to students enrolled in a food service class. Although Rowley’s copying and distribution of the work were for a nonprofit educational purpose, the court ruled she infringed because training students on food science was the “intrinsic purpose” of her class, and cake decorating was peripheral to their training (*Marcus v. Rowley*, 1983). The court’s holding in *Marcus v. Rowley* (1983) underscores the importance of syllabi and course preparation materials. These materials demonstrate to the courts that the use of protected works is deliberate and methodical and not merely incidental or “a device employed to mark time when an instructor is under prepared for the day’s lesson” (*Marcus v. Rowley*, 1983, p. 112).

*“The teaching activity using protected material must be face-to-face between instructors and pupils.”* Fisher and McGeveran (2006) lament, “This relatively simple language has hardly ever been the subject of litigation” and recommend the congressional record must be examined for clarity. The scope of face-to-face teaching activities is intended to define the conditions under which performances and displays in the course of instructional activities are exempted from copyright infringement. Many colleges and universities interpret the face-to-face condition as literally meaning students and instructors must occupy the same physical space within unimpeded view of each other (Bonner, 2006). For colleges and universities who interpret the face-to-face condition this way, the implications are sweeping and prohibitive for distance learning and other formats of asynchronous learning.

However the face-to-face condition is interpreted too literally in these instances. A reading of the floor discussion reveals the legislature’s intent was to emphasize the ephemeral

nature of the teaching activity itself. The discussion focuses on performances and displays within the context of “class sessions of a single course” and specifically excludes from exemption “textbooks, course packs, or other material...which are typically purchased by or acquired for...students for possession and independent use” (H.R. 94-1476, 1975). A significant portion of the floor discussion emphasizes broadcasting and the transmission of television and radio into the classroom. This strongly suggests the face-to-face condition does not require instructors and students be physically and simultaneously present in the same place or be able to physically see each other; rather the face-to-face requirement limits exempted teaching activities to those that are “not transmitted” (H.R. 94-1476, 1975).

The floor discussion regarding “instructors” and “pupils” casts light on where the educational work of student affairs professionals fits with the educational exemption. “Instructor” is defined only as the educational institution’s agent engaged in systematic instructional activity; the parameters of the term are defined largely by the specific exclusions mentioned by the legislation. Actors, singers, or instrumentalists engaged to participate in a sponsored program are specifically disqualified as instructors (H.R. 94-1476, 1975). This exclusion limits performances sponsored by student activities or student unions that engage outside participants from qualifying under the educational exemption.

However, the legislative history suggests systematic instructional activity is confined to the classroom. It is this repeated emphasis on the classroom as the controlling factor of teaching activities that imperils much of the work of student affairs professionals qualifying under the educational exemption. The classroom as the locus of teaching activity appears first in the Senate report’s inclusion of guest lecturers as instructors “...if their instructional activities remain confined to classroom situations” (S. R. No. 94-473). The importance of the classroom is suggested again when the term “pupil” is defined as “...the enrolled members of a class” (S.

R. No. 94-473). This definition of pupil is troubling for student affairs professionals because it implies strongly that teaching activities that occur outside the bounds of a formal course with enrolled pupils are not exempt from infringement. Given that student affairs professionals work primarily outside of the classroom, it is unlikely that *any* aspect of their educational role in student development meets the burden of the legislature’s expectation of classroom situations.

*“The teaching activity using protected materials must occur in a classroom or similar space that is the students’ primary place of instruction.”* With Senate Report No. 94-473, the classroom as the principal place in which instructional activity occurs is luculent. The teaching activities exempted by the educational exemption must occur “in a classroom or similar place devoted to instruction” (S. R. No. 94-473). The “similar place” referred to in this element is specifically defined as “devoted to instruction in the same way a classroom is: a studio, a workshop, a gymnasium, a training field, a library, the stage of an auditorium, or the auditorium itself if it is actually used as a classroom for systematic instructional activities” (S. R. No. 94-473).

The inclusion of the word “primary” is also notable; it implies systematic instructional activities are held regularly in such a place, especially when a traditional classroom is not the appropriate space for the instructional activity. Although training fields and gymnasiums are the expected and usual places for physical education classes, places such as residence halls, advising centers, student organization offices, and student unions – areas maintained traditionally by student affairs professionals – are less likely to be the expected and usual places for systematic instructional activity. It is improbable such spaces meet the conditions of this element.

Common functional areas of the student affairs profession include academic advising, residential life and housing, multicultural student services, and student activities and unions (Dungy, 2003). In these environments, student affairs professionals foster students’ cognitive and

psychosocial development. They teach and facilitate students’ leadership, conflict management, study skills, multicultural competencies, and perspective-taking. Similar to teaching faculty, student affairs professionals use protected works in their educational role by performing films or dramatic works, displaying works of art or media, copying and distributing study guides, or distributing readings.

Although the educational exemption of U.S. copyright law exempts many uses of protected works by teaching faculty, the exemption might not apply easily to student affairs professionals. An analysis of the legislative history of the educational exemption reveals that the legislature’s definitions of instructor and teaching activity are sufficiently broad to arguably encapsulate the role of student affairs professionals. However, the legislative history emphasizes teaching activity that transpires within the confines of a classroom or a similarly regular place of instruction with pupils enrolled for the purposes of a formal course. Student affairs professionals tend to educate students outside the bounds of traditional courses and in spaces such as residence halls and advising offices that are not the regular primary places of the students’ formal instructional activities. This analysis suggests strongly that the educational role of student affairs professionals does not meet the required elements of the educational exemption.

#### **Part IV: Recommendations for Student Affairs Professionals**

The legislative intent and existing case law suggest that the educational exemption is too narrow in scope to include the educational nature of student affairs. In *Marcus v. Rowley* (1983), the courts emphasized the importance of educational goals and objectives articulated by course syllabi. Student affairs professionals are often teaching through experiences outside the classroom and have no analogous teaching materials such as syllabi. *Whitol v. Crow* restricts the scope of teaching activities and distinguishes administrative activities as specifically outside the educational exemption, making some student affairs functions – such as student conduct –

distantly removed from the court’s opinion of teaching. House Report No. 94-1476 (1975) excludes specifically recreational and entertainment activities from the educational exemption even in an educational context, endangering student unions’ and student activities’ programming and performances. Programming that uses films and other media might also fail to qualify under the educational exemption if the copies were not rented or purchased with performance licenses. Senate Report No. 94-473 reveals Congress’ intent to apply the educational exemption only to activities with classrooms and other primary places of instruction, specifically mentioning residence halls and other common areas as outside the scope of the exemption. Senate Report No. 94-473 also suggests the statutory definition of “instructors” may exclude student affairs professionals from the educational exemption all together since they are not classroom teachers.

### **Conduct a Fair Use Analysis**

Student affairs professionals should conduct a fair use assessment to determine whether they intended uses of protected works might fall under the fair use doctrine. *Love v. Kwitny* (1989), *Roy Export Co. v. Columbia Broadcasting Sys., Inc.* (1982) and *Ringgold v. Black Entertainment Television, Inc.* established that only portions of protected works can be used, and only if those portions are not the heart of the works. For student affairs professionals, this might mean showing only portions of a film rather than the entire film, or reciting only portions of a poem or play. It might be possible to use an entire work if an entirely new work with new meaning emerges, such as using magazine advertisements to create educational programs on body images (*Campbell v. Acuff-Rose Music*, 2003). However, conducting a fair use analysis is difficult. The circumstances will vary significantly for each protected work and for each use, and standards are difficult to devise in light of evolving case law.

**Permissions**

When a fair use analysis is not favorable to student affairs professional or difficult to sort out, student affairs professionals should consider obtaining permission the copyright owner or right holder. Obtaining permissions or a license from the rights holder is the easiest method for ensuring that educational activities can continue without fear of litigation. Permissions might be easier to obtain than many student affairs professions suspect. Rights holders may have statements of permissions on their website or in their product catalog that permit a variety of educational uses, and no correspondence with the copyright owner may be necessary. Often academic libraries purchase films with a license for educational performances on the institution’s campus; check with librarians to determine if such a licenses cover performances in the spaces where student affairs professionals educate their students (Crews, 2006).

A large number of copyright owners authorize third parties called licensing agents to negotiate licenses or permissions on their behalf. The Copyright Clearance Center and the American Society for Composers, Authors, and Publishers (ASCAP) are two such licensing agents. The Copyright Clearance Center licenses content from more than nine million publications to educational institutions (Copyright Clearance Center, 2011). ASCAP licenses more than eight million items of audiovisual content for more than 400,000 filmmakers, artists, photographers, and musicians (ASCAP, 2011). A benefit to working with a licensing agent is the ability to negotiate an umbrella or blanket license – a fee that covers the performance of a number of titles in the company’s catalog.

Sometimes rights holder must be contacted directly to obtain permission. Some rights holders will insist on a detailed request dictating when, for how long, to whom, why and how much of the work will be used. However, student affairs professionals might be served better

using nonspecific language when initially requesting permission from copyright owners. A simple grant of permission to use a copyright owner’s work with no specific restrictions in time, place, or manner could mean the student affairs professional can use the work in repeated semesters or for future projects. Whenever possible, secure grants of permission in writing. A written and signed document will be important in case of any misunderstanding between the student affairs professional and the copyright owner.

### **Use Alternative Materials**

If attempts to obtain permissions are unsuccessful, student affairs professionals should explore alternative sources that will fulfill the educational goal. Keep plans flexible and select several works as acceptable back-ups if the rights holders do not respond to or deny requests for permission. Other rights holders may be more forthcoming; many independent filmmakers and artists are more eager to earn name recognition or share their message than they are with protecting their exclusive rights (Crews, 2002). Student affairs professionals can also revise their fair use analysis of protected works, such as smaller portions of works. Works in the public domain may be used freely without risk of copyright infringement at all, and many images can be found online that were created with creative commons licenses.

### **Conclusion**

Copyright law bestows copyright protection for printed works, media, art, and other scholarly and creative materials. The penalties for copyright infringement are costly, and copyright law itself is complex and still evolving through new case law. A number of exceptions to rights holders’ rights, such as fair use and the educational exemption, are enshrined in copyright law and exempt educators from copyright infringement. Many student affairs professionals use protected works to educate students on a variety of issues and believe their activities are exempt because of their role as educators. However, analyses of legislative history and case laws suggest that student affairs

professionals may not meet the standards for exemption. When intending to use protected works, student affairs professionals should consider whether fair use applies to their circumstances. If a fair use argument does not appear reasonable, student affairs professionals should take steps towards obtaining permission from the right holders or consider alternatives works that are in the public domain, use only portions of works, or develop their own materials for which they or their institution will hold the copyright.

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