

HRD Liability Update

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Copyright and Human Resource Development

By John Sample, Ph.D. SPHR

The most well known of intellectual property interests is by far the copyright. The holder of a copyright has the legal right to keep others from using the work unless permission is granted. Copyright automatically attaches to all types of original works, such as diagrams and flowcharts, software, CD ROMs, graphic designs, and text. It is not necessary for the creative or original work to be registered in order to enjoy the rewards of the copyright law. If a tangible description, explanation, or illustration occurs, then a copyright is secured immediately and automatically when the work is expressed in some tangible form, such as a printed copy, software, etc.

The federal copyright law protects the expression of ideas in some tangible form. The exact words or diagrams in a software or book may be copyrighted; the ideas are not are not subject to copyright. Ideas, processes, procedures, methods of operation, concepts, and principles cannot be copyrighted.

The holder of a copyright has five exclusive rights:

- To reproduce the copyrighted work;
- To prepare derivative works (adaption) based upon the copyrighted work;
- To distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- To perform the copyrighted work publicly, in the case of motion pictures and other audiovisual works; and
- To display the copyrighted work publicly, in the case of audiovisual work.

Table 1: Fair Use and Copyright

Title 17 U.S.C.A., Section 107 Limitations on exclusive rights

The fair use principle "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 of 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.

Title 17 U.S.C.A., Section 201 Works made for hire

"In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for [purposes of Title 17] unless the parties have agreed expressly otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."

The exclusive rights of the copyright holder are qualified by the privilege known as "Fair Use". Fair use continues to be a thorny issue for the public to comprehend and comply. The fair use exception allows others - within strict guidelines - to use works otherwise covered by a copyright.

The following exceptions to the federal copyright statute spell out fair use. Unauthorized copies may be made under the following conditions:

- in connection with the review and criticism of the work (as in a book review);
- for teaching purposes in educational institutions that are non-profit; and
- as part of scholarship or research activity.

The extent to which the fair use defense exists depends on these four factors:

- how the work was used, especially the extent to which a commercial or non-profit purpose was intended;
- the nature of the work;
- amount or proportion of work copied in relation to the total volume of the work as a whole;
- impact on the value of the potential market for the copyrighted work.

Lets consider two examples of fair use. In the first example, Tom the trainer, in a vocational trades program at the local community college or vocational/technical school, copies and distributes several pages from a copyrighted periodical. He provides a credit line as well as

information about the publisher and price. In the second example, Sarah the trainer, working for a for-profit utility, copies and distributes the same pages from the same periodical as part of her vocational skills training program at the utility. For Tom, his actions would very likely be within the scope of fair use. Not so for Sarah! She likely would have likely infringed on the copyright of the periodical.

There are several defenses to an allegation of copyright infringement. If the use of the work was a critical commentary (as in a book review), or was used in a non-profit organization, then the fair use exemption applies. The alleged copyright infringer could argue that his or her work was original or creative in nature and scope, or the owner of the copyright failed to bring action before the statute of limitations had run (three years). Works that are in the public domain are no longer copyrighted, and finally, the use was authorized.

Software and Computer Related Issues

Training and development professionals are continuing to rely on computers and software in the design, development, implementation and evaluation of instructional programs for customers, suppliers, employees and managers. Instructional materials that are print based are developed using sophisticated word processors and desk top publishers. Software is used to develop computer based training and multimedia applications. The advent of training and development on the internet and intranet means that computers are the future of learning. Software piracy is a serious form of copyright infringement. According to the Software Publishers Association, worldwide losses due to piracy are estimated at \$13.1 billion dollars in 1995. The United States reported losses of \$2.9 billion; the largest revenue loss for any individual nation. Businesses in the USA paid more than \$2.7 million in fines and penalties from software piracy in 1996. Table 2 lists an eight point strategy businesses can take to prevent litigation and fines due to this problem.

Table 2. Reducing Software Piracy

The Software Publishers Association suggests the following eight strategies for reducing software piracy:

1. Appoint a software manager to implement all aspects of company software policy.
2. Implement a software code of ethics.
3. Establish a procedure for acquiring and registering software.
4. Establish and maintain a software log.
5. Conduct periodic audits.
6. Establish a program to educate employees.
7. Maintain a library of software licenses.
8. Enjoy the benefits of complying with software agreements.

From Software Publishers Association, Washington, DC.

There are additional areas worth mentioning in terms of copyright and computers. There are occasions in which databases are used to store information in a computer for easy retrieval

and manipulation. A typical example include marketing lists of customers that describe residential areas by zip code or other socioeconomic factors, average personal income, purchasing patterns, etc. From a HRD perspective, the development and maintenance of job-task analysis information in which tasks, standards of performance, processes utilized, and knowledge, skills and attitudes can be listed in a data base. Assume for the sake of argument moment that the tasks and related information were in the public domain. The structure of the database itself may qualify as an original work and therefore subject to copyright restrictions.

Instructional materials developed by a business or corporation that contain original and creative works, including charts, graphs, and graphics may - and should be under certain circumstances - copyrighted. There may be opportunities for the business to market its training and development programs to other businesses or to the public. Be sure to receive permission from the copyright holder if the instructional materials include any information from books, periodicals, or other protected forms of expression.

Instructional designers who conduct desk top publishing as part of their job should be aware of software license agreements limiting the manipulation of copyrighted clip art. Some software companies license the owner to use its clip art for most purposes - except resale or wide scale distribution. In these instances, printed material or products may require permission from some software companies for the use of clip art. Other software companies freely allow unlimited reproduction and distribution of their clip art.

Digital manipulation of clip art or scanned photographs does not remove the possibility of infringement, as some training and development specialists may believe. The original copyright holder has the right to make derivations of the original work. Slightly modifying a piece of clip art does not make the artwork original and creative.

Preventing Infringement Litigation

- Copyright works that are creative, innovative and original. Although a copyright attaches immediately upon development, there is an extra measure of protection afforded the copyright holder when the copyright is registered. Contact the Library of Congress Copyright Office, address, Washington, DC. 20559. The Public Information Office telephone number is (202) 707-3000, and the Forms Hotline number is (202) 707-9100.
- Employees of companies have been known to quit their employer with the intent of conducting training and consulting services for other companies. If this should occur, do not use material that was developed for your previous employer. There may be a temptation to use instructional materials developed for their former employer. Since the employer owns the right to material developed by its employees, those wishing use materials must secure an agreement from their current or former employer.
- Gaining permission to copy materials covered by a copyright may not be as difficult as one would imagine. The Copyright Clearance Center provides a service for those who require permission quickly for permission assistance. For an annual fee, service from the Center allows your organization to make immediate authorized copies

without having to obtain permission directly from the holder of the copyright. Contact the Copyright Clearance Center by mail (27 Congress St., Salem, MA 01970) or telephone (508-744-3350).

- Seek permission to photocopy directly from author/publisher. Some journals and trade magazines will provide authorization at no cost, as long as credit is noted on the distributed copies. Others will require a royalty payment and the credit notice.

Case Example: Copyright Infringement

Consider the human resource management and development department of a major manufacturing company. Their internal consultants, instructional designers, and training personnel regularly photocopied articles from technical, trade, academic, and professional publications. Sometimes, the copies were sent to regional offices of the corporation, or were used as handouts in corporate training programs. The corporation was designing and developing a comprehensive training program for its technical and support personnel. The project required the extensive use of subject matter (SME's), internal and external consultants, and computer-based instructional designers. The corporation had only one subscription per journal.

The rationale for making copies from journals was simple - the original journals got lost in the shuffle of circulation among those on the various teams of the project. Personnel also stated that they preferred to make notes in the margins of articles or to highlight sentences or paragraphs from the journals. One of the quarterly journals was quite bulky - usually more than 150 pages per issue. It was argued that copying a ten page article was easier for personnel to carry and store for future use.

The argument for using the articles in training was that corporate personnel were the authors of the articles. The corporations orientation program used the articles for indoctrinating new employees and for impressing suppliers. Other articles about technical innovations were regularly copied and circulated in training programs for technical personnel.

Is there a violation of the federal copyright law? Does any provision of the fair use exception apply to this case? A federal court would likely conclude the following:

- The corporation systematically made and distributed multiple copies of articles from journals and magazines. Nothing new or different was created from the original copyrighted work.
- The corporation as a sole subscriber might argue that making one copy for taking notes in the margin was not a violation of the copyright law. In this instance, many people were using copies from a single copy of a journal, trade publication or magazine.
- In this case, the reason for transforming the copyrighted information into a more useable form is overshadowed by the primary aspect of making multiple copies.
- The copying was done for commercial gain. Entire articles had been copied for a variety of uses, all of which were designed to increase the competitive edge of the corporation. Internal marketing (employee orientation) and external marketing (suppliers), instructional designers, all were recipients of copyrighted articles.

- The use of copyrighted articles authored by employees of the corporation still violates the law. Authors do not jointly own rights to their published works unless there is an agreement between the author and the publisher. (For a similar case example, see *American Geophysical Union v. Texaco Inc.* 1992 U.S. Dist. LEXIS 10540 (S.D. N.Y. 1992))

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