

The Need for Educating Technical Communicators on the Changing Face of Copyright
and its Impact on the *Public Domain* and *Fair Use*

by

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This thesis presents a framework for understanding the historical basis of copyright in the United States and the impact that recent events have had upon the public domain and fair use. The necessity of technical communicators as writers and educators becoming educated on copyright so that they can knowledgeably navigate copyright laws and emerging issues is the central argument of this thesis.

Federal laws and international treaties have caused significant changes. The latest extension of the term of copyright under the Sonny Bono Copyright Act of 1998 has increased the length of copyright for another two decades, benefiting the copyright holder and trade interests, but causing a delay in the arrival of these works within the public domain. It's the public that reaps the benefits of these works when they enter the public domain since they may then freely use these works for knowledge or new creations. This is part of the historical balance of copyright where the creator benefits for a limited time and then the public gains access for its own benefit. Due to changes to copyright laws, this balance has changed, with critics of these changes arguing that the public benefit has been lessened. International treaties also have depleted the public domain since foreign works with an expired American copyright still receive

copyright protection if their foreign copyright remains in effect. The eroding public domain also affects the ability of technical communicators and others to access important information for a number of uses.

The passage of the Digital Millennium Copyright Act in 1998, which makes it illegal to circumvent technological controls that prevent unauthorized access to digital content, has made it more difficult for technical communicators as writers or educators to view this protected content. This lack of access may prevent them from finding the latest information, necessary for the production of a technical document. It also hampers the practice of fair use, which has historically occurred without permission, and allows for the partial and limited use of material. That use of material could include writing reviews or expressing opinions, including criticism. In the classroom, it could include using portions of the content to educate students. By preventing access, these technological controls create walls between information and knowledge and the public. Ultimately, this denial of access affects free speech since there can be no comments or criticism made about information that cannot be viewed.

This thesis draws upon the research and writings of academics and lawyers who are concerned about these copyright changes and their impact on society. It argues that there is a need to educate technical communicators about these issues so that they may navigate copyright without infringement and be aware of their rights to use information in the public domain or through fair use.

The Need for Educating Technical Communicators on the Changing Face of Copyright
and Its Impact on the *Public Domain* and *Fair Use*

A Thesis

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Chapter One

Introduction

A legal maelstrom is swirling about the control of intellectual property, with some academics, librarians, technical writers and others, opposing the increasingly restrictive climate that the corporate sector is supporting and enforcing. Changes to the laws governing one form of intellectual property called copyright and actions taken to control access, resulting from the proliferation of digital content, has critics voicing objections to what they perceive as curtailed *fair use* and an eroded *public domain*. Intellectual property law encompasses more than copyright, the focus of this thesis. It also includes protection for the creator or owner in the forms of trademarks, trade secrets, and patents. However, it is copyright law that has undergone recent changes that have prompted criticism and legal challenges, and these developments directly impact technical communicators in the workplace and in academia.

Technical writers and educators, collectively referred to as technical communicators when they work in the field of technical communication, are among those who customarily make legal use of portions of copyrighted material for allowable purposes legally defined as *fair use* or who may mine the riches of the *public domain*, legally defined as material no longer qualifying for intellectual property protection. As a result, they may find themselves opposing current law and corporate entities that are lobbying for evermore restrictive laws. These opponents assert that expanding the constraints on access to print and digital material make it more difficult for them to draw upon existing information. Some of these opponents also argue that these constraints hamstring free speech since knowledge becomes less available for people to use for purposes

including criticism, commentary, and the advancement of knowledge, a critical function of our American democratic culture (Herrington, 1998a).

The purpose of this thesis is to frame these issues within their historical and legal contexts, fostering understanding of the reasons for their existence and the importance of navigating copyright issues properly. This thesis also provides a more current look based upon recent court cases, whether these cases are decided or pending in the courts. It is a goal of this thesis to familiarize the reader with today's copyright climate so that they consider it worthwhile to become educated about copyright, as well as recognizing the necessity of keeping abreast of the latest developments, generally resulting from court decisions. These issues are highly important to technical communicators, and domestic law should be thoroughly understood while international law should be at least generally understood. Due to its complexity, international law will typically be within the purview of copyright attorneys. The proper application of domestic law also requires consultation with a copyright attorney for specific matters. This thesis contains information that may or may not be applicable to specific situations.

Overview of thesis organization

In the following chapters, which includes a review of the literature, this thesis will examine *public domain* and *fair use*, in chapters respectively titled, "Perspectives on the *public domain*" and "Perspectives on *fair use*." These chapters will detail the reasons why *public domain* and *fair use* have become topics germane to technical writers in the workplace and educators. The views of supporters of the laws and treaties that have led to the current intellectual property climate regarding copyright and *fair use* and the *public domain* will be presented, along with those of their critics. These issues are broad and while they are intertwined,

they are more easily understood in separate discussions. Technical communicators and others in the academic world who argue that practitioners should be well-versed in applicable copyright law will present their arguments in the concluding chapter titled, “Educating technical communicators.” As part of the final chapter, the Conclusion and the Implications sections will summarize the cumulative effects of these changes to copyright law, particularly their impact on technical communicators.

This thesis limits itself to discussing the use of others’ work. The law as it applies to technical communicators own work raises separate issues and is outside the scope of this thesis. The rest of this chapter discusses the legal definitions and how the Internet complicates copyright law and concludes by introducing *public domain* and *fair use*.

Legal definitions and statutes

Black’s Law Dictionary (2009, p. 881) defines intellectual property as “a commercially valuable product of the human intellect, in a concrete or abstract form, such as a copyrightable work, a protectable trademark, a patentable invention, or a trade secret.” Copyright law applies as soon as the original work takes tangible form. Copyright doesn’t pertain to the actual idea or facts. It’s about protecting the expression of an idea, providing a limited period during which the holder of the copyright has the sole right of making use of that work by reproducing it or creating derivative works. The first copyright law was enacted in 1790 and it granted a basic copyright term of 14 years, with the possibility of a 14-year renewal if the author was still living. Copyright has since seen several extensions in terms, among other revisions. The Copyright Act of 1909 increased the copyright term to 28 years, with a renewal term of 28 years as long as the author was still living. With Congress’ passage of The Copyright Act of 1976, the term of

copyright was again extended to the life of the author plus 50 years. The term was longer for works made for hire, anonymous or pseudonymous works, either 75 years from publication or one hundred years from creation, whichever is less (17 U.S.C.A. § 102(a)).

The Copyright Act of 1976, still the controlling law, grants the following rights to the copyholder:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission (17 U.S.C.A. § 106).

The Copyright Act of 1976 also made copyright protection possible for works that had not been published, allowing it to apply to works that had been “fixed in a tangible medium of

expression.” It has since been amended, including an amendment to once again lengthen the term of copyright.

The passage of the Sonny Bono Copyright Extension Act of 1998 added two decades to copyright protection, from life plus 50 years for natural authors to life plus 70 years for works created on or after January 1, 1978. It also increased the length of copyright for work-for-hire works, often created for the corporate sector, from 75 years to 95 years from publication or up to 120 years from the time of creation for works created on or after January 1, 1978. (17 U.S.C.A. § 304(a)(c), 1998). The consequences of this copyright extension will be discussed in the subsequent chapters titled “Perspectives on the *public domain*” and “Perspectives on *fair use*,” respectively.

Under the Copyright Act of 1976, the rights and limitations on reproduction for libraries and archives are explained in statute 17 U.S.C.A. § 108 (1976), which limits such activities to the creation of one copy or phonorecord [an object with fixed sounds as with a compact disc] and limits its distribution to noncommercial uses. The display of the copyright must be included on the copy. Copying for other users is limited to what is outlined under *fair use*. *Black’s Law Dictionary* (2009, p. 676) defines *fair use* as: “A reasonable and limited use of a copyrighted work without the author’s permission, such as quoting from a book in a book review or using parts of it in a parody.” This dictionary also defines *fair use* as a defense to an infringement claim.

Portions of a copyrighted work may be used by anyone without obtaining permission if that usage falls within the bounds of *fair use*. It is an established, time-honored practice, and *fair use* operates in the absence of any requirement that prior permission be obtained. Despite its

limited ability to be used—solely for specific purposes—*fair use* is still threatened by laws and treaties that act as filters, preventing it from being put into practice. These filters prevent unauthorized access, and this thwarting of access means that *fair use* cannot occur. *Fair use* of intellectual property was a historically respected common law doctrine that in terms of copyright was written into statutory law with the Copyright Act of 1976. As defined in federal statute, 17 U.S.C.A. § 107 (1982), *fair use* allows limited reproduction of a copyrighted work “. . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research . . . “. Such uses do not constitute an infringement of copyright.

The statute spells out the limitations on exclusive rights for *fair use* by describing the factors that are considered in determining whether a use is an infringement or a *fair use*, providing the guiding criteria for the courts. These factors are as follows:

- (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
- (17 U.S.C.A. § 107, 1982).

The statute also contains guidelines for classroom reproduction to address the “need for greater certainty and protection for teachers” discussed in greater depth in the *fair use* chapter. Other than that provision for educators, no other sector is addressed specifically.

Fair use and the *public domain* are historical rights that were designed around print uses, not the Internet, when copying and modifying materials could be easily accomplished. They were not designed around digital use and the appearance of Digital Rights Management (DRM) devices, which include technological controls like encryption. As Shipley (2008) states: “Traditional definitions of copying, performance, distribution, publication, and display do not necessarily make sense in this environment” (p. 5). When print forms were predominant, *fair use* could be put into practice without permission. There were no controls safeguarding materials. Applying copyright law to digital forms creates a different set of issues, complicating *fair use* interpretations, giving rise to legal cases where the Courts must determine if *fair use* took place (Anderson, 2001).

The impact of the Internet

The World Intellectual Property Organization (WIPO, n.d.) website discusses the impact of digital material on established practices of *fair use* in general, and its effect on the United States in particular. The WIPO’s website section titled, “The Impact of the Internet on Intellectual Property Law,” acknowledges that digital material has acted as a catalyst, altering historical balances as follows:

The Copyright system has traditionally maintained a balance between protecting creators’ property rights and the exclusive right to control uses of copies of their work, and the public good in fair access to and use of such materials. Copyright laws permit exceptions to copyright, in order to maintain this balance. ...

This balance is now in question because of digital technologies, and the way in which they have changed how we access and use information. ...

In addition, increasingly, copyright works are not sold, in the way that a book or a videocassette was sold in the past, but are licensed under certain terms and conditions of use. Our access to copyright works is increasingly governed by contract, which may impact on the application of exceptions and limitations, the traditional checks and balances of the copyright system, aimed at preserving the rights of consumers and the public interest (“The Impact of the Internet on Intellectual Property Law,” n.d., p. 5).

Griffin (2013) describes the way that licensing is often used instead of sales of works with digital content. He noted that creators can now distribute their works without a publisher. They also can use technology to track copyright infringements. They may use Copyright Management Information (CMI) methods to identify permission and use encryption to limit access, in addition to DRM devices. However, all of these technologies also mean that *fair use* is prevented since these technologies operate under the assumption that any unauthorized use is an infringement (Griffin, 2013, p. 16). Mazzone (2011) states that there are numerous ways to control access. It’s not just licensing that’s used; contracts also may be required, including “shrinkwrap” contracts for software that restrict all forms of reverse engineering, even those allowed under law. Such contracts typically require the user to agree to specified terms before removing the wrapping from the software. The increasing use of restrictions to govern access to content and the rise in the use of DRM devices are the result of the passage of the Digital Millennium Copyright Act in 1998 (DMCA), which was passed to protect digital works from infringement. Imfeld (2003) states the balance once inherent to copyright has been tipped in favor of copyright owners, increasing their ability to control the dissemination of digital content under DMCA with DRM devices. In addition, there’s been a failure to acknowledge the public’s need to access these works (p. 125).

Why the Digital Millennium Copyright Act passed

The Digital Millennium Copyright Act (DMCA) was passed by Congress in an effort to keep pace with digital developments. The law endowed digital material with an additional layer of copyright protections beyond the standard provisions. The act included language prohibiting the circumvention of technological methods employed by copyright owners to control access and prohibited tampering with these controls, according to a U.S. Copyright Office Summary (“The Digital Millennium Copyright Act of 1998,” December 1998). The DMCA statute describes this circumvention, in part, as:

No person shall circumvent a technological measure that effectively controls access to a work protected under this title (17 U.S.C. § 1201(a)(1), 1998).

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof that (17 U.S.C. § 1201(a)(2), 1998 —

(A) is primarily designed or produced for the purpose or use of circumventing a technological measure that effectively controls access to a work protected under this title; ... (17 U.S.C. § 1201(a)(2)(A), 1998).

The trend under DMCA is to use technology to prevent the copying and sharing of content so that copyrighted material is protected. This technology could include digital watermarking, “embedding information into a signal,” and digital rights management, “deploying information in the signal” to prevent unauthorized access (Berti, 2009, p. 44). It also encompasses encryption devices use for this same purpose. The impact of DMCA will be

discussed in detail in the literature review and *fair use* chapters. Meanwhile, other changes to copyright have affected the *public domain*.

Public domain

The *public domain* also has been altered by recent copyright developments, which are unrelated to digital content, such as the extended term of copyright under the Sonny Bono Copyright Extension Act of 1998 and international treaties signed by the United States. *Black's Law Dictionary* (2009, p. 1349) defines the public domain as "... The universe of inventions and creative works that are not protected by intellectual property rights and are therefore available for anyone to use without charge."

Factors leading to these changes such as longer copyright terms that delay a work's entry into the *public domain* and treaties that have taken works out of America's *public domain* if their foreign copyrights were in effect have been supported by various interests. Longer copyright terms are a way to add to corporate coffers. Increasing copyright protection can extend profitability to creators and foster trade, priorities for the U.S. government. Meanwhile, critics of corporate copyright holders point to what they view as the resulting erosion of the *public domain* since material takes longer to be eligible for inclusion within the public domain. With longer copyright terms, works are protected for decades longer, restricting the public from use of these works, impacting the advancement of knowledge. International treaties also have played a part since the United States wanted to align its copyright laws with other countries that also signed these treaties. As a result of these international treaty negotiations, the United States was legally bound to honor the copyright terms of other countries. This caused works originally published in these other countries to be removed from the *public domain* in the U.S. when the U.S. copyright

term had expired if the original foreign copyright remained in force. After books and other material in the *public domain* in the United States were retracted and placed back under copyright protection due to treaties (Uruguay Round Agreement Act, and its impact on member countries from the Berne Convention to be discussed in the Perspectives on the *public domain* chapter), a lawsuit challenging this action as an impediment to the *public domain* was filed against the federal government. The plaintiff lost the case when the U.S. Supreme Court ruled that Congress had not acted outside its authority in *Golan v. Ashcroft* (2012), a case discussed further in the *public domain* chapter. There have been other legal challenges as well, including an unsuccessful one where the plaintiff argued that Congress didn't have the authority to extend the copyright term, and that doing so had violated the constitutional language of "limited" terms. That U.S. Supreme Court case, *Eldred v. Ashcroft* (2003), will be discussed further in the *fair use* chapter.

Those critics who object to the longer term for copyright argue that the term extensions in the Copyright Act of 1976 and the Sonny Bono Copyright Extension Act of 1998 dilute the vitality of the *public domain* by delaying the free availability of material, which the public may use for various purposes, including for inspiration to create new works. Other copyright issues are centered around *fair use*, which critics say also has been adversely affected by recent changes to federal law.

Fair use

Some technical writers and educators, along with librarians, argue that corporate interests were behind the passage of the Sonny Bono Copyright Extension Act of 1998 and the 1998 passage of the Digital Millennium Copyright Act (DMCA). They charge that these laws have

had a detrimental effect on the public's right to *fair use*. While on the other side of the spectrum, business interests and Congress consider the term extension and the expanded controls over digital access encouraged under DMCA as necessary measures crafted to ensure the profitability of copyright and to promote America's trade interests.

When material does fall within the *public domain*, it does so for a number of reasons. It could be due to the fact that copyright renewal steps weren't followed or it could be the result of an expiration of the length of time the copyright could remain in force. *Fair use*, however, means accessibility within prescribed boundaries despite copyright protection. Both uses of material—*public domain* and *fair use*—are widely viewed as crucial constitutionally protected uses of information to further the gain of knowledge, and encourage creativity and new works. Changes to U.S. law such as the extension of the longer copyright term with the Sonny Bono Copyright Extension Act and the passage of the DMCA, along with the U.S. government's compliance with international treaties it has signed, has created a climate that strictures *fair use* and access to the *public domain* to the detriment of technical writers and others who as a result have less access to material or who may now be understandably concerned about challenges to their use of material.

These changes require them to keep apprised of copyright issues to forestall allegations of infringements. Technical writers and others need to understand the background of these issues and become knowledgeable about current developments in order to navigate the copyright terrain as writers and as educators.

Chapter Two

Literature Review

This literature review is designed to put the subsequent chapters in a historical and legal context. The background of copyright law and recent developments needs to be understood, since various forces have created a new copyright environment that technical communicators and others need to master. This thesis argues that technical communicators need to be educated and kept informed about the *public domain*, *fair use*, and the rights of educators in order to perform their jobs within the laws' prescriptions and without inadvertently paying unnecessary fees and licenses for content that should be freely available.

Some outspoken academics, including technical communicators, law and English professors and librarians, who perceive recent legal developments as acts that are depleting the *public domain* and as attacks on *fair use*, have written articles in scholarly journals or given interviews to the media. For example, attorney and law professor Jennifer Jenkins, director of Duke University's Center for the Study of Public Domain, was interviewed as a legal expert for a 2013 article in which writer Leslie Klinger said that he was being unfairly asked to pay a royalty fee for using Sherlock Holmes content, which had long dwelled within the *public domain*. This status was not acknowledged by the heirs of the late creator Sir Arthur Conan Doyle. Jenkins agreed with Klinger that any material that was pre-1923 was rightfully available for use. ("Public domain: Who owns Sherlock Holmes?" 2013, p. 2). The U.S. Court of Appeals for the Seventh District in Chicago decided in Klinger's favor in 2014 that pre-1923 Sherlock Holmes writings were *public domain* material (*Conan Doyle Estate Ltd. V. Klinger*, 2014). By exercising its right

to decline to hear the case, the U.S. Supreme Court let this decision stand in November 2014. In addition to its discussion of the then-pending lawsuit, the article goes on to describe other instances where filmmakers and television producers paid fees to Doyle's estate for public domain material solely to avoid legal disputes despite their knowledge that the heirs had no justification for requesting payment. Mazzone (2011) also names instances where users were improperly charged to use other works lying within the *public domain*. He points to numerous examples, including classic works, such as reprints of Shakespeare's plays, and reprints of works by Charles Dickens, Jane Austen, and Benjamin Franklin, which sometimes have improper copyright notices attached by publishers (2011, p. 9).

Jenkins bemoans the erosion of the *public domain* in a 2013 article titled "In Ambiguous Battle: The Promise (and Pathos) of Public Domain Day, 2014" where the impact of longer copyright terms is discussed. She explains that many works created during a present-day reader's lifetime will not become part of the *public domain* during that reader's lifetime. Jassin (n.d.) an intellectual property attorney and author states that this delay means that works published in 1923 will not be public domain material until 2019. He also notes that in the future, *public domain* will be harder to determine since copyright law no longer requires registration, potentially making it difficult for users to know the status of a copyright or its owner. Jenkins agrees, noting that the former requirement of an "evidentiary trail" allowed the public to efficiently obtain permission or a license for use. Without this required trail, it can become more difficult to determine the "dividing line between copyright and the public domain" (Jenkins, 2013, p. 5).

In addition to improper claims of copyright for *public domain* works, there have been numerous cases where *fair use* was discouraged and claims were allegedly wrongfully made to

prevent the implementation of *fair use* (Netanel, 2008). In the book titled *Copyright's Paradox*, Netanel explain how *fair use* may be stymied when *public domain* works available electronically cannot be copied or reproduced. He describes how an early Adobe System's e-book edition of Lewis Carroll's classic *Alice's Adventures in Wonderland* had carried restrictions on its copyright page, preventing the copying of text selections to the clipboard, sharing a copy, or reading the book aloud, even though it's clearly in the *public domain* and freely available for use (p. 67).

A pending U.S. District Court case in the Central District of California filed in 2013 by documentary filmmakers alleges the lyrics to "Happy Birthday to You" dwell in the public domain. The plaintiffs refused to pay the fees demanded by a publisher, choosing to take their fight to court instead in the lawsuit, *Good Morning to You Productions Corp. v. Warner/Chappell Music, Inc.* (No. 13-CV-4460, 2013). The plaintiffs are requesting that the publisher refund millions in fees they say were unfairly charged to a number of people and organizations. An earlier case that was filed in New York was voluntarily dismissed by the plaintiffs in 2013 and this California case was filed instead. This lawsuit represents an example of continuing efforts by plaintiffs to take their arguments about the *public domain* to the courts when they perceive the *public domain* is threatened.

In the same New York court as the lawsuit about "Happy Birthday to You," Google successfully argued for the dismissal of a 2005 lawsuit by copyright holders related to its avowed *fair use* of digital books in partnership with libraries. This project was created to allow searches of library-provided books, displaying a limited amount of material from those volumes as the result. Goggle argued in the case of *The Authors Guild, Inc. v. Google Inc.* (2013) that this limited display of material constituted *fair use*, similar to the activities practiced by the libraries

that had provided the books, an argument accepted by the Court. This case is examined in greater detail in the *fair use* chapter.

A shift in power

There is a school of thought that copyright law's emphasis has shifted toward protecting copyholder rights at the expense of the public. (Anderson, 2008; Herrington, 1998a; Imfeld, 2003; Netanel, 2008; Shipley, 2008). Congress, aware of the hindrances to *fair use* posed by the DMCA, did enact two narrow exceptions to the practice of circumventing access. These are: Web site compilations blocked by software and literary works protected by ineffective or outdated "access control mechanisms" (Anderson, 2008, p. 113). Still, critics of the DMCA argue that the law goes too far, decimating what was meant to be a balanced copyright environment that rewarded creativity for a limited period and then allowed the public to reap its benefits in the *public domain*, instead shifting to copyright as a property right that shortchanges society.

Along with the *public domain*, critics argue that *fair use* is being thwarted by DMCA and by the technological safeguards in use by copyright holders to prevent unauthorized access to digital material. In addition, these critics argue that the intent of our forefathers when enacting intellectual copyright law was to ensure that copyright existed for a limited time, meaning that it was a period of time with a reasonable conclusion. These critics reference the appearance of the word, "limited," in the description of their interpretation of copyright's boundaries (Herrington, 1998a; Herrington, 1998b; DeVoss & Porter, 2006). As the U.S. Constitution states: "Congress shall have power . . . To 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;" (U.S.C.A. Const. Art. I § 8, cl. 8.). These critics refer to the phrasing used to

describe Congress' power over copyright and its purpose as proof that the forefathers intent was that copyright would be for a "limited" period, which in their view, Congress has exceeded (DeVoss & Porter, 2006; Herrington, 1998a; Herrington, 1998b; Herrington, 2011). However, the courts have disagreed, finding that having a limited period of time no matter its duration met the requirement of limited time in *Eldred v. Ashcroft* (2003). The courts also decided in *Eldred* that the power of Congress to change copyright law was constitutionally granted.

A change to the balance

Critics of the expanded copyright term assert that our forefathers aim was to fashion a balance that allowed the creator to profit so there was an incentive to create, while ensuring that the work would enter the *public domain*, so that it could be used freely by others, thereby increasing knowledge for all, and possibly leading to further knowledge. The current copyright climate, however, impedes this process. Hoffmann (2005), author of the book titled, *Copyright in Cyberspace 2*, noted that the longer copyright term of the Sonny Bono law harms libraries and information industries. Technical writers who rely on information to produce publications, often seeking the latest knowledge, are among those in the information industries who are impacted. A challenge to the reinstatement of copyright to foreign works that were once located in the United States' public domain, was turned aside by the courts, who said the action was the product of an international treaty that the government had to honor (*Golan v. Ashcroft*, 2012).

There is a group of writers from a number of disciplines who charge that the Internet and the World Wide Web are now under the dominion of the corporate sector (DeVoss & Porter, 2006; McKee & Porter, 2010). DeVoss and Porter write: "Through a combination of legislative lobbying, legal threats and bullying, and the pure power of money and media advertising, corporations are trying to seize control of what others are trying to construct (although not

without difficulty) as a ‘free’ citizens’ network and as an educational and political forum (2006, p. 191). Lawrence Lessig is one of the more prolific book authors arguing for a valued public domain where material that’s part of the culture can be drawn from without censure (p. 192). Interestingly, some critics of DMCA object to it on entirely different grounds albeit related to education. Encryption researchers charge that DMCA prevents encryption researchers at universities from bypassing DRM controls for educational purposes, hindering their ability to further knowledge (Franklin, 2009; Imfeld, 2003). An exception does exist for this activity if the research is done to identify flaws in the encryption technologies or if the protection devices are faulty, as described in the U.S. Copyright Office Summary (“The Digital Millennium Copyright Act of 1998,” December 1998).

The impact on free speech

Companies such as Disney and Microsoft are so concerned about making their digital material inaccessible that they’ve lost sight of the public’s rights under *fair use* (Herrington, 1998b). Herrington, an academic and an attorney, also asserts that the closing off of the public’s access to information harms the democratic process since free speech is hindered when information is hoarded away from the public, preventing the public from expressing related opinions and criticisms, among other uses (1998a). She states that “... it falls to the legal system to provide markers for how to ensure that these functions of a body of self-governing individuals remain feasible” (p. 128). This prohibition of access unless permission is granted or a fee paid or a license acquired under DMCA means that *fair use* cannot occur since the very tenet of *fair use* is that it is used without permission (DeVoss & Porter, 2006; Herrington, 1998b; Imfeld, 2003). The proper implementation of *fair use* provides a legal defense to allegations of infringement. However, with DRM devices, the role of the courts in deciding whether or not infringement had

occurred or if the use fell within the bounds of *fair use* may no longer be as necessary (Gillespie, 2006). The DRM devices circumvent unauthorized access for the onset, so *fair use* can't take place or be raised as a defense. Shipley (1996) raised concerns in advance of the passage of DMCA that the *fair use* doctrine would lose ground in a digital environment. He questioned whether or not the *fair use* doctrine could operate with "full force and effect in the digital environment" (p. 6).

On the other side of the debate, Berti (2009) defends DRM devices as essential for the prevention of illegal downloads and copying. He dismisses the attitude in existence mostly among younger age groups that it is revolutionary to freely exchange copyrighted material and that such actions don't cause any harm (p. 43). He writes that it's not just industry associations that lose profits, it's the copyright holders who lose financial compensation as a result of such unauthorized uses. A competing view is offered by DeVoss and Porter (2006) who argue that what is ensuing is actually a culture clash fueled by youth accustomed to sharing and distributing digital content, who have "... a view of the Internet as a public living space" and those who see this same digital content as property (p. 185). These youth value the collaboration possible with electronic works as opposed to corporate copyright holders who value protecting their economic interests (p. 185).

Another voice for the corporate view can be found in Hausmann who works in the digital content management field. He wrote an essay titled "Protecting Intellectual Property in the Digital Age," describing his view that DMCA is an essential law. He's of the opinion that a model that relies on legal licenses, where customers pay for content, provides the material to consumers at a low cost while also encouraging legal access. Further, he says that such controls stabilizes the digital media marketplace (Hausmann, 2002).

For supporters of DMCA, including the digital content management industry and the corporate producers or copyright holders of the content, the law is an asset. More control means that profitability is protected (Hausmann, 2002). The WIPO website's report states that the DMCA addresses the right of reproduction as defined by the Berne Convention as copies "in any manner or form," and that this protection from illicit copying is crucial to e-commerce and the business sector" (n.d., p. 2). In the view of DMCA's supporters, including many copyright lawyers, digital content is under siege due to the mushrooming popularity of the Internet, along with the resultant ability of users to copy and share content in the absence of technological restrictions preventing these actions. The advent of the digital age and the resulting avalanche of digital content meant that the existing copyright law was no longer adequate since it had been designed to meet the needs of a print marketplace. Unlike print, digital content that's accessible to the public allows for the creation of an unlimited number of "perfect" copies, which can be shared with other computer users. Infringement lawsuits decided by federal courts, including the U.S. Supreme Court, generally have held that in most cases, using or supplying technology that can be used for illegal copying and distribution is prohibited.

In the music file sharing case of *A & M Records, Inc. v. Napster, Inc.* (2001), the federal courts in California decided that copyright infringement had taken place due to the distribution of free software designed to download and share MP3 music files. In another case, the U.S. Supreme Court upheld the California courts decision against *Grokster*, ruling that the company had knowingly provided software so that copyrighted music and movies could be downloaded and shared without using computer servers through the use of peer-to-peer networks (*Metro-Goldwyn-Mayer Studios Inc., et al. v. Grokster, Ltd., et al.*, 2005). However, the court found in *Sony Corp. of America v. Universal City Studios, Inc.* (1984) that when the manufacturer wasn't

cognizant of a device's use for copying copyrighted material, the manufacturer wasn't liable. In that decision, the consumer use was for private purposes, not for commercial showings of television programs. *Sony* had petitioned the U.S. Supreme Court to hear its appeal of a California appeals court decision that had held that *Sony* was liable for copyright infringement. The Supreme Court decided that the buyers of *Sony's* videorecording equipment had engaged in *fair use* when videocopying television programs for private at home viewing since it was a commercial for-profit use (*Sony Corp. of America v. Universal City Studios, Inc.*, 1984).

The guidelines the law provides about *fair use* also have caused confusion since they refer to minimum uses, not to maximum uses. Courts interpret whether *fair use* is a defense to copyright infringement by applying the four-pronged test, examining the purpose and character of the use, the nature of the copyrighted work, the amount and context of the portion used, and the expected impact of the unauthorized use on the market value of the copyrighted work. The vagueness of the law is deliberate so that cases can be judged individually. However, with the emergence of digital content, courts are being asked to define it further (Anderson, 2008).

In another case that illustrates the tensions that exist between new technology and copyright, the U.S. Supreme Court heard oral arguments in April 2014 about a company that used technology to make copies of locally broadcast television programs for its subscribers. Aereo, a New York-based company, used a multitude of antennae along with other devices to retransmit the programs, allowing subscribers to watch the programs or record them onto their computers. The lower courts ruled that it was unlikely that the television stations would prevail in court, and the stations appealed. At issue was whether the retransmission of television programs was the same as the copyright infringement activity of a "public performance" shown without permission. In an October 2014 decision, the Court found that Aereo's retransmissions

violated copyright and banned this activity in *American Broadcasting Companies, Inc., v. Aereo, Inc.* (2014).

Law viewed as inadequate

All sides of these issues pertaining to the *public domain* and *fair use* appear to agree that copyright law needs to address copyright as it pertains to digital works and new technologies more thoroughly. Berti agrees on one point with critics of the DMCA. He also considers copyright laws as in need of improvement to facilitate “awareness and general education” (p. 44). There appears to be a general consensus that Congress needs to take some form of action; however, Anderson (2001) advocates for a slow approach where time is taken to examine all sides of the issue so that the public good is ultimately advanced.

It has been acknowledged that copyright law, with the exception of the DMCA, was developed for traditional media. Critics of the current trends of using DRM devices are advocating for changes to the law that remove some of the restrictions. They argue that there are better alternatives to the current technological safeguards of digital content, pointing to other technological means that could be tried or to the proven ability of the marketplace to balance interests. Adjustments to the law are perceived by technical writers and educators as necessary to ensure that digital information can be accessed and used fairly without undue restrictions.

The availability of licenses through Creative Commons has provided one option where the website provides a marketplace that seeks to balance the interests of parties (Rife, Westbrook, DeVoss, & Logie, 2010). According to its website, Creative Commons distributes licenses that address conflicts, and the company is committed to bridging the “... conflict between innovative digital culture and archaic copyright laws” (“Culture,” n.d., para. 1). Rife (2010) describes Creative Commons as an Internet provider of licenses that give creators the ability to personalize

boilerplate licenses by stating specific uses and restrictions. Creative Commons is seen as a way to streamline the copyright process of digital works for creators and users.

Some critics of the DMCA dispute the need to safeguard copyright at all. For example, James Boyle, a law professor at Duke University, who works with Jenkins at the Center for the Study of Public Domain, agrees that controls are needed but not to the extent allowed under DMCA. He argues that snippets of information have always been available to be used for new creations, and he doesn't agree that tighter copyright controls on digital content will have the effect of encouraging more innovation (Boyle, 2003). Author Jessica Litman writes in the 2006 edition of her book, titled *Digital Copyright*, that the prepayment system for digital content encouraged by DMCA may result in consumers having to buy access to content that they had already paid to use. Litman is among those writers asserting that copyright law isn't up to the task of dealing with digital content since it was designed around print uses. All of these issues surrounding copyright are important to the field of technical communicators as writers and as educators.

Effect on technical writers

These copyright changes and the confusion that surround them as well as the impact of recent or future court decisions mean that technical writers need to keep abreast of the latest developments and findings in order to steer clear of infringing uses. It's important to understand these laws in order to avoid infringement penalties, knowing when permission should be requested before posting website content. Care also should be taken to determine whether or not that content contains copyrighted information that was used without permission (Juillet, 2004). Issues that pertain to technical communicators on the domestic front include questions about when it's considered *fair use* to access text and images and when permission should be sought.

Often, technical writers are not well-schooled about the rules for navigating web content so that they can successfully skirt infringement (Rife, 2010). In a survey of digital writers—communication students in university writing programs and their instructors—Rife found there was a tendency to make decisions based on conscience, not the law. One way of gauging whether copyright applies is to consider whether it meets the test of originality, and this test applies on the international front as well (Rife, 2011, p. 85). Referencing international law, Rife said there needs to be an understanding among technical communicators of the necessity of seeking legal advice when appropriate. She advises technical communicators on the importance of their becoming knowledgeable about intellectual property law, which will also demonstrate their value as employees who possess crucial knowledge. However, this same advice would be equally applicable to domestic copyright law.

On the international front, technical writers conducting research need to keep abreast of legal and regulatory issues pertaining to the area where they are obtaining data or the websites they are accessing (McKee & Porter, 2010). Herrington (1998a) points to another concern among technical writers beyond acquiring knowledge of copyright law for international purposes. She has noted that there's a sense of unease among writers that *fair use* won't be recognized and understood, resulting in repercussions such as legal challenges made against writers, including technical communicators, for what are in actuality allowable uses of copyrighted material.

Herrington (2010b) has noted that *fair use* is an American creation, although there are some versions or approaches to it in use internationally. She argues that treaties signed by the United States have diminished *fair use* and technical communicators should be aware of the potential impacts. These treaties emphasize trade and protection for intellectual property and due to negotiations, they deemphasize the value Americans place on public access and *fair use*. She

urges technical communicators to voice support for *fair use* within the international community. She states that “Technical communicators working internationally without a *fair use* base might find their creativity restricted or, worse, their speech potential curtailed” (p. 322).

Potentially chilling effect

There’s a perception among technical communication and English scholars that a chilling effect is hovering about technical writers who have become wary of using content or publishing to the web in the current legal environment; however, Rife (2010) found that this might not occur as often as expected. Chilled speech refers to decisions made not to use content or not to use it fully out of concerns about infringement or possible objections. In Rife’s survey, only a small number of study participants reported they had been asked to removed something from the Web due to alleged infringement or that they had voluntarily taken something down without a request due to concerns about infringement. However, nearly half of the study subjects reported not posting something out of fear of infringement (p. 54). Other authors express more concern about the chilling effect (Herrington, 1998b; Porter, 2005). Their view is that technical writers may be overly concerned about using material in the current copyright climate. They trace this chilled speech to the arrival of digital content, followed by the passage of DMCA, and then to the government policies and court decisions that have occurred in the wake of DMCA (Herrington, 1998b; Porter, 2005).

Questions about hyperlinking also prevail among technical communicators and others (Porter, 2005). A hyperlink is an electronic link within a computer document that when clicked upon takes the user to another place in that document or another document or webpage. At times, it may be difficult for a technical writer to accurately judge if an action such as hyperlinking is

legal or not (Hoffman, 2005). Guidance for technical communicators on linking and other activities is provided in the “Educating technical communicators” chapter.

The remainder of this thesis focuses on domestic issues but will briefly discuss international impacts on technical writers conducting research to present a balanced picture. A discussion and analysis of the issues facing technical communicators within the framework of *fair use* and *public domain* have been presented in this literature review against a backdrop of federal statutes, treaties, and court decisions. The issues surrounding *fair use*, particularly as it pertains to educators and technical communicators, and the *public domain* will be addressed in more detail within the applicable chapters.

Chapter Three

Perspectives on the *Public Domain*

The public's eventual access to published copyrighted material has long been assured through the *public domain*, a term that refers to the free availability of material after the copyright either expires or due to other reasons. The U.S. Copyright Office website refers to reasons that are not attributable to copyright expiration as follows:

Examples of what might have caused the work to be in the public domain in the United States include lack of proper notice, failure to renew, failure to comply with manufacturing requirements, being a sound recording fixed prior to U.S. protection, and lack of national eligibility, that is, the source nation and the United States did not then have a treaty relationship (“Works in the public domain”, n.d.).

However, with copyright term expansions created by Congress with its passage of the Sonny Bono law, as well as through changes mandated by American's need to adhere to international agreements and treaties, the time frame for the entry of works into the realm of the *public domain* has become increasingly lengthy, prompting some challenges based, in part, upon arguments that these longer terms violated the “limited monopoly” time frame the framers meant to assign copyrights.

Jassin, who cowrote *The Copyright Permission and Libel Handbook*, notes that if not for the Sonny Bono law, works published in 1923 would have entered the *public domain* in 1999, not 2019. Furthermore, in 1992, Congress passed a law allowing renewal to take place by default for any works which were published between 1964 and 1978 (Jassin, n.d.).

Among the most vocal critics of this expansion are attorneys who are also academics like Herrington and those who are associated with Duke University's Center for the Study of the Public Domain like Jenkins. In Jenkins' 2013 article, the attorney discusses the dearth of American works entering the public domain due to longer copyright terms. She offers the following example of the impact of the expansion of terms by describing works that *would have* become part of the *public domain* in 2014 if *not* for these extensions, as follows:

[Previously] Under that relatively recent term, works published in 1957 would enter the public domain on January 1, 2014. These include books ranging from Jack Kerouac's *On the Road* to Ayn Rand's *Atlas Shrugged* to Dr. Seuss's *The Cat in the Hat*. . . . Under current law, they will remain under copyright until 2053. And famous creations like these are only the beginning. Most works from 1957 are out of circulation—a Congressional Research Service study suggested that only 2 percent of works between 55 and 75 years continue to retain commercial value (Jenkins, 2014, p. 4).

The United States reinstated *public domain* for some works first published in other countries due to its adherence to the Uruguay Round Agreements Act and the Berne Convention. Those works had lost copyright protection under the copyright length of terms in the United States, but in their country of origin, their terms had not expired. The U.S. Copyright Office website described the process:

In 1996, copyright was automatically restored in certain foreign works that were then in the public domain in the United States but were protected by copyright or neighboring rights in the source country. Owners of a restored work were directed to notify reliance parties if the owner of the rights planned to enforce the rights. One means of notification

was filing with the Copyright Office a Notice of Intent to Enforce (NIE) a Restored Copyright (“Notices of Restored Copyrights,” n.d., para. 1).

Decided legal challenges

Lawrence Golan unsuccessfully challenged this action to reestablish copyright protection for those works in the case, *Golan v. Ashcroft*, decided by the U.S. Supreme Court in 2012.

Golan argued that the application of the Uruguay Round Agreements Act was unconstitutional because he alleged that Congress had exceeded its copyright authority by affixing copyrights upon works that were already in the public domain. The Uruguay Round Agreements Act allowed the United States to reinstate copyright to foreign works. It also did not allow any action to be taken for previous use of those works up until one year after the enactment of the Act.

Golan argued that the reapplication of copyright protection violated the First Amendment free speech rights of those who had reproduced those works in an action filed against the U.S.

Attorney General. The Court decided that the Act was constitutional. In its findings, the Court also determined that the United States was within its rights to take this action since it had an important interest in complying with international treaties (*Golan v. Ashcroft*, 2012). The Berne Convention also was a consideration in the restoration of copyright. As revised in Stockholm in 1967, countries belonging to the Berne Union agreed to treat the works of other members as they would treat their own works. However, once a work has fallen into the *public domain* of the country where it originated, no country would be allowed to reinstate its copyright (*Golan v. Ashcroft*, 2012). Jenkins writes that the Court’s decision allowed Congress to:

. . . *remove* works from the public domain, even though citizens—including orchestra conductors, educators, librarians, and film archivists—were already legally using them.

According to the majority opinion, while copyright owners had legally protected rights

during the copyright term, the public had no First Amendment rights to use material in the public domain (2013, p. 3).

In the Court's dissenting opinion, Jenkins notes that justices in the minority considered the taking of material from the public domain an abridgement of a "preexisting freedom to speak" (p. 3). Jenkins states that, "This impoverishment of the public domain stands in stark contrast to the original purpose and history of our copyright laws" (p. 3).

She also disagrees with the Court's decision in *Eldred*, joining Herrington in her condemnation of the U.S. Supreme Court's decision that the 1998 Sonny Bono law did not conflict with the Constitution's specification that copyright last for "limited Times."

However, Herrington argues that despite this, there may be one possible positive outcome from *Eldred*, which is the Court's decision to constitutionalize *fair use* (See "Perspectives on *fair use*" chapter), she acknowledges that by upholding the extension of copyright term, the Court inflicted damage upon the public domain (Herrington, 2010a). She writes, "This case was quite a blow against those who want greater accessibility to copyrighted works as a means to combat the ever-extended product protection that developed in recent legislation" (2010a, p. 51). The impact upon users of others' works, including technical communicators like Herrington, is addressed in this statement:

As a creator whose interest is in using other work from which to expand or develop your own, your access is now severely limited; those who wish to use film clips, photos of artwork or other visual representations, or music clips, among other works that were created by an individual after 1923, are prohibited from doing so unless their uses is allowed by the fair use exception . . . (Herrington, 2003, p. 96).

Pending legal challenges

In a case filed in 2013 in the U.S. District Court, Central District of California, the plaintiffs, Good Morning to You Productions Corp., filed a class action suit against Warner/Chappell Music, Inc., alleging that the song “Happy Birthday to You” lies within the public domain and the publishers have wrongfully been charging for its use. The plaintiffs are documentary filmmakers who want to film a documentary about the song and who argue they should not have to pay fees to use the song. They argue in *Good Morning to You Productions Corp. v. Warner/Chappell Music, Inc.* that the melody is more than 120 years old and that there is evidence going back to 1893 indicating that if there was a valid copyright to the song, it expired in 1921. The suit asks that licensing fees that have been paid for its use by the respondents be returned.

According to the lawsuit, no court decision has ever been made regarding the validity of any copyright applications pertaining to the song. This is part of the basis for the assertions that the work resides within the public domain. There has been no recent activity in the case. As this case shows, the courts are being asked to decide whether or not works exist in the *public domain*. As potential users of *public domain* content, technical communicators and others need to be aware of these issues so that they don’t pay fees for information that is free as part of the *public domain*.

Guidelines for navigating the public domain

Mazzone (2011) uses the term “copyfraud” to refer to entities which purposely affix a copyright notice to a public domain work. He states that while Congress has made clear the importance of honoring copyright, it often has been left to individual copyright owners to truthfully designate when a work enters the public domain (2011, p.6). He argues that while the

penalties for copyright violation are clear, there are no clear civil penalties for falsely alleging copyright. The law does allow for criminalization of this activity under Section 506e of the Copyright Act of 1976, but he states that this punishment by a fine of no more than \$2,500 is rarely enforced (p. 7). He asserts the prevalence of copyfraud as follows:

Browse any bookstore, buy a poster or a greeting card, open up sheet music for choir or orchestra practice, or flip through a high school history text: copyfraud is everywhere. Despite the fact that copyrights are limited by time and original authorship, modern publishers routinely affix copyright notices to reprints of historical works in which copyright has expired. ... (p. 9).

It's not only the *public domain* that's at risk in today's copyright climate, according to critics. They say that *fair use* is also under attack due to the DMCA.

Chapter Four

Perspectives on fair use

In addition to the *public domain*, technical communicators and others need to keep abreast of changes to copyright law that impact *fair use*. Technical communicators and English faculty in academia, are often critical of efforts to eliminate access without prior permission, an activity which they say impedes upon the proper practice of *fair use*, which is predicated upon use without permission. According to the U.S. Copyright Office website, *fair use* are legal uses of copyrighted material where “reproduction of a particular work may be considered fair, such as criticism, comment, and news reporting” (“Fair Use,” June 2012).

Fair use strengthens the American citizenry by providing the public with access to protected intellectual material for the betterment of society and the fortification of democracy. This access without permission encompasses such legally allowable purposes as using excerpts for news reporting, or for the purpose of writing critical reviews or commentary. It also allows for parody geared toward criticism or protest. Herrington (1998a) has argued that many Americans aren't familiar with the concept of *fair use* and that they also fail to recognize its correlation to free speech. She has stated it this way:

Where the First Amendment assures that we have a right to voice our ideas, assert conflicting views from which new thought is derived, and criticize thought and action of powerful forces in society, fair use provides a means to access the information upon which our opinions are based. Without the fair use exception to copyright, free speech

would be, at best, inhibited, and in some cases, eliminated altogether” (Herrington, 1998a, p. 125).

She has argued that knowledge of this relationship is important to educators, including technical communicators, who rely upon *fair use* to access information for teaching (Herrington, 1998a). The *fair use* guidelines for educators are provided in the “Educating technical communicators” chapter. In addition, among technical communicators, the *fair use* of others’ intellectual creations can help spark the creation of something else, similar to “exchanging ideas” (Herrington, 2010b, p. 321).

However, *fair use* has been affected by the different views on copyright that began diverging with the development of the Internet (DeVoss & Porter, 2006). A gulf has grown between those who perceive intellectual content, especially digital, as having a property right, the protection of which is paramount, and those who argue that a rise in constraints pertaining to its use wrongfully undermines *fair use*, where the public’s right of access is paramount. Litman (2006) believes that the public’s view of copyright should govern, and she calls for educating people on their rights to make *fair use* of material. Advocates for the protection of *fair use* include technical communicators, librarians, public interest groups and small businesses, who favor easier distribution and more open access of content. On the other side of the issue are major media companies, including Disney, and the Motion Picture Association of America (MPAA). The viewpoint of Disney and the MPAA is described by critics DeVoss & Porter (2006, p. 190) as follows:

The proponents of strict copyright controls favor a view of information as a tangible product; they recognize (rightly) that the technological capability of the individual

networked computer is an immense threat to their proprietary control of audio, video, and other forms of digital information. They are working hard to close what they see as copyright loopholes (such as the Fair Use provision of copyright law) that allow for easy distribution of digital text. . . . But the copyright changes they are advocating will affect print distribution as well as audio and video filesharing; these changes will limit the ability of students and teachers to access information for research; and they will stifle criticism, especially criticism of corporate behavior, consumer culture, and economic policy (citing Benkler, 1999; “Copyright, Plagiarism,” 1998; Gurak & Johnson-Eilola, 1998; Heins, 2002; Kranich, 2004; Mann, Barlow, Stefik, & Lessig, 1998; Schiller, 1989).

Herrington argues that the impact of technology has made it more important to safeguard *fair use*, which provides access to information that can spark or influence the “diverse expression of ideas” (1998a, p. 135). Digital materials in themselves have the inherent ability to influence opinion, Herrington adds (p. 136). While this thesis respects the rights of copyholders, it also recognizes is the value of access to the latest ideas and information for technical communicators in the workplace or as educators in the classroom. Otherwise, the information disseminated may be dated, to the detriment of readers of newly created technical material or to the students being taught in the classroom. Some suggest that allowing initial access, but limiting the ability to copy material unless the copying is tied to noncommercial purposes within the bounds of *fair use*, is one way that both sides of the copyright equation could be served in terms of Internet writings. In fact, the law allows limited copying for *fair use* purposes. However, this idea would not be applicable to all instances, particularly with software access.

Litman (2006) states that the DMCA was written to favor the copyright holder, not the public. As a result, the public's right to access material has been shortchanged. The reason behind public access is the promotion of knowledge and the creation of new works. When the law is no longer balanced, giving copyright holders an excessive amount of control over their works, public access is sacrificed. It is the opinion of this writer and many of the authors relied upon for this thesis that copyright law should be reexamined by Congress due to the complexities of digital content and copyright. Alternatives and solutions should be sought rather than the current dependence on the DMCA and DRM devices which emphasize copyholder rights, creating an imbalance and a lack of attention to the public's rights. This situation has developed since content is no longer primarily in print form. Creative Commons, which gives copyholders control but makes it easier for users to access material by streamlining the process for all parties, is one such alternative. Creative Commons allows users to understand immediately what uses are allowed and what uses aren't allowed since the creator includes this information on the licensing agreement. However, no alternative alone can solve this imbalance. It is Congress that has the power and the responsibility to undertake a more judicious and fair-minded examination of competing copyright interests.

Reasons behind corporate concerns

The ease of downloading and sharing digital material has led corporations like Disney and Microsoft to minimize the historical importance of *fair use* by choosing to make digital content unavailable due to their fears about the potential for copyright violation (Herrington, 1998b, p. 3) Herrington argues that technical communicators and other advocates for *fair use* should work to educate everyone about its importance. Herrington states that most elected officials are lawyers who think more in terms of individual rights than policy rights, resulting in

a lack of attention to the public's right to *fair use* of content. The 1976 Copyright Act makes it clear that *fair use* is important to public policy. As stated in the federal statute, 17 U. S. C. § 107 (1982), *fair use* is not an infringement of copyright, and may rightfully take the form of "... criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" Such activities may be essential to free speech and the protection of the First Amendment (Herrington, 1998b). She describes the relationship between fair use and free speech as follows:

The basis for the assertion of conflict lies in the following reasoning: The First Amendment's free speech protections ensure the free flow of information, but the copyright clause provides a limited yet exclusive statutory monopoly to authors that allows them to control access to information. A copyright can conflict with the Constitution's protections of free speech if the copyright is used to inhibit the free flow of information (Herrington, 1998a, p. 3).

For these reasons, actions taken to undermine *fair use* should not be ignored. Instead, Herrington advocates for support for information access, digital or otherwise. She argues that if the public accepts that digital products and their ideas can't be accessed, it could harm efforts to teach in electronic forums, comment critically about Web content and report on news that was generated by a digital source (Herrington, 1998b, p. 3). Herrington also states that the importance of *fair use* has intensified with the influence of technology, making access more crucial for the support of democracy (Herrington, 1998a).

Digital Millennium Copyright Act of 1998 (DMCA)

A U.S. Copyright Office Summary of the Act (“Notices of Restored Copyrights,” n.d.) describes DMCA as legislation signed by President Clinton which puts into effect two 1996 World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

One technical amendment requires member countries like the United States to protect works from other member countries as they would domestic works. The second technical amendment requires member countries to honor the copyright terms of the originating country, meaning that works will not be released into the U.S. public domain until their term had expired where the work was first published. The implementation of this law resulted in some foreign works that had reached *public domain* status in the United States being removed from the *public domain* and placed back under copyright protection. A similar guideline was instituted earlier with the Berne Convention and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement. It was implemented with the Uruguay Round Agreements Act of 1994, resulting in a new section to the Copyright Act of 1976. It also exempts most foreign works from the U.S. requirement that a copyright must be registered with the U.S. Copyright Office before a lawsuit for copyright violation can be filed. This exemption was made to correspond with the previous Berne Convention treaty.

Under DMCA, member countries governed by this Act are required to protect works from unauthorized access and provide legal remedies for violations. The DMCA forbids the use or sharing of software that can either decipher encryption or antipiracy codes to allow unauthorized access. The report further states that the *fair use doctrine* is not an available defense for copyright violation via unauthorized access. However, Section 1201 (1998) provides

for *fair use* by *not* prohibiting “the act of circumventing a technological measure that prevents copying” (“The Digital Millennium Copyright Act of 1998, December 1998, p. 4). However, the U.S. Copyright Office report also states (p. 4): “By contrast, since the fair use doctrine is not a defense to the act of gaining unauthorized access to a work, the act of circumventing a technological measure in order to gain access is prohibited.” This appears to suggest that one can access information without permission for copying, if the technological device that is circumvented is only for the prevention of copying. If the device prevents access, *fair use* is not a defense. In this manner, the law seeks to keep *fair use* viable within the constraints of DRM devices. So, the *fair use* doctrine can coexist with DRM devices in terms of allowing copying by any means. This is predicated on the legal understanding that *fair use* doesn’t require permission. If the copying conforms with the doctrine of *fair use* then it cannot be found to infringe upon copyright.

According to Anderson (2001), Congress, recognizing that blanket restrictions on circumvention in the Act could deter *fair use*, asked the Librarian of Congress and the Register of Copyright to determine which classes of works should be exempt for the circumvention constraints. As a result, two exceptions were made (p. 113): compilations of websites blocked by filtering software applications, and literary works, including computer programs and databases, that are protected by malfunctioning, damaged, or obsolete access control mechanisms.” Librarians were once again in a position that limited their *fair use* access, including their ability to backup software copies and make archival copies (p. 113).

Anderson (2001) states that since copyright law, including DMCA, was meant to be broad, allowing for case-by-case interpretation, questions about the *fair use* of digital works will continue to be decided in the Courts. These issues need to be addressed since he says, “. . .

copyright law is too important to rush judgment, especially since user rights are being diminished. . . . Public good is a process advanced by policies and laws that provide appropriate incentive to authors and creators while at the same time ensuring appropriate access to the information” (p. 112).

What has been clearly forbidden is described in the following section of the U.S. Copyright Office Summary (“The Digital Millennium Copyright Act of 1998,” December 1998, p. 5). Section 1201 of the Act (1998) proscribes devices or services that fall within any one of the following three categories:

- they are primarily designed or produced to circumvent.
- They have only limited commercially significant purpose or use other than to circumvent;
or
- They are marketed for use in circumventing.

The Act also carves out exceptions for “law enforcement, intelligence and other government activities.” And it names other groups as exceptions, including nonprofit libraries, archives and educational institutions, all of which may circumvent DRM devices to determine whether or not they want to seek authorized access. Reverse engineering also permits circumvention. In addition, encryption research is allowed if it is done to identify weaknesses within the protection devices. Security testing is permitted to use circumvention methods as long as the proper authorization is obtained beforehand. Circumvention also can be used to protect minors from viewing Internet material. And it allows circumvention if the technology has the ability to collect information about the online activities of a person.

Treaties encourage DMCA

Herrington states that demand for the DMCA arose due to treaties signed by the United States. She argues that the American tradition of *fair use* began to lose ground earlier with the Berne Convention and the Trade Related Aspects of Intellectual Property Rights (TRIPPS) agreement. Treaty negotiations require compromise and these compromises represent an erosion of the strength of *fair use*. Herrington asserts that negotiations to accommodate all interests means that the U.S. doctrine of *fair use* no longer carries the weight that it once did (2010b, p. 322). The emphasis has become more about meeting trade goals instead of about supporting democratic ideals, and this has adversely impacted the Constitution's view of intellectual property and the *fair use doctrine* (p. 322). Herrington states that the Berne Convention and TRIPPS has been the subject of criticism by U.S. scholars due to their lack of support for *fair use* and their emphasis on protecting trade and intellectual property, not for providing public access (p. 322).

The impact of DRMs

Corporations favor the use of DRM (Digital Rights Management) devices to curtail the computer's ability to make perfect copies and share files. However, since these devices are designed to circumvent access with permission, just as licenses prevent access without payment or the agreement to terms, critics say that all of these corporate strategies interfere with the operation of *fair use*, which is predicated on access without permission. Digital content users who disdain these circumscriptions are considered "bad users" since they "produce parody web sites ... hyperlink without permission ... [and] distribute and download content without paying for it" (DeVoss & Porter, 2006, pp. 190-191).

Academics like DeVoss & Porter (2006) equate this grab of “digital territory” to a corporate takeover, where the Wild West of the Internet is tamed to protect corporate profits by preventing the unauthorized distribution of content (p. 191). Such activities advance corporations desired “historical destiny” (p. 191). In DeVoss & Porter’s view, those who refuse to use digital content passively, and with permission only, are seen by the corporate world as “These cyberradicals—we might call them ‘digital content producers,’ perhaps even ‘writers’—[who] see the Internet as a free space to be ‘surfed’ by all for purposes of enjoyment, recreation, political discussion, and education” (p. 192). This view is at odds with the views of technical communicators, librarians, educators, and small business owners who generally support *fair use* and a vision of the Internet as a “public commons,” where the public can share information and have input into policymaking (p. 192). There are those in academia who are advocating for technology that allows increased public participation, for laws that uphold the public domain, including the fair use provision, free speech and privacy, according to DeVoss & Porter (p. 192) (citing Pamela Samuelson, 1998a, 1998b; Lawrence Lessig, 2001, 2002, 2004; John Perry Barlow, 1994; Howard Besser, 1995, 2001; Richard Sclove, 1995; and James Boyle, n.d.).

Lessig has argued that certain textual fragments should be incorporated within the public domain and available for reuse by the public (DeVoss & Porter, 2006, pp. 192-193). Allowing this would encourage creativity. According to Lessig, Mickey Mouse wasn’t a new creation but a revamped idea from Buster Keaton, illustrating the then-common type of transformational process that Disney now seeks to quash. Lessig also argues that Disney mined the fairy tales of the Brothers Grimm for its own use, but now seeks to prevent others from such endeavors. Historically, *fair use* has relied upon previous material for the creation of new works, a type of borrowing that pre-Internet could not be prevented.

Other constricting factors

Porter in a chapter of the edited 2005 book titled, *Technical Communication and the World Wide Web*, criticizes the post-911 political climate and DMCA for their constricting impact on the rhetorical obligation to serve the needs of readers and the public at large (Porter, 2005, p. 243). These chilling effects impede the flow of digital content, discourage fair use, and hamper free speech. In his discussion of the DMCA, Porter refers to the practice of using DRM devices to stop the creation of parody web sites used for venting criticism.

He calls upon technical communicators in the classroom to teach future technical communicators to question laws and policies that restrict their role as advocates for the public. He states that current ethical practices represent corporate interests and the needs of the clients and employers of technical communicators with less attention paid to the public's interests (p. 245). Porter argues that it is crucial for technical communicators to act in the best interests of the public regarding their use of information, with clients and employers a secondary concern (p. 254). These ethical considerations are increasingly important in a time of increased secrecy. Post-9/11, government restrictions on technical information resulted in the removal of information on infrastructure and research, and this was done without legislation. For example, the locations of nuclear power plants and plans designed to address chemical hazard risks were no longer available to the public. While Porter agrees that security measures were necessary and some of this material was deservedly mandated as classified, he said these measures have gone too far, discouraging the public from accessing information they have a right to view. Some of the removed material included historical maps. Other removed material had been placed on the Internet by government bodies to inform the public of ways to respond to disasters. From the technical communicators' viewpoint, some of this material could clearly be necessary for the

production of instructions, manuals, and scientific materials. A Freedom of Information Act request now may be required to have access, and this can cause significant delays in receiving needed material. An informed public is crucial to the operation of a democracy and unwarranted actions to prevent access to this information has consequences for the public at large, in addition to potentially degrading the output of technical communicators. As Porter and others assert, information is increasingly viewed as property, a departure from its former treatment as a shared resource with time-limited rights for creators before it was accessible for others to use. Access to *fair use* of material is crucial for technical communicators.

Navigating fair use

Herrington argues in her 2003 book titled, *A Legal Primer for the Digital Age*, that when the courts determine whether or not *fair use* is a viable defense to copyright infringement in regards to commercial uses, they “begin with the presumption of unfairness” (p. 108). She uses the *Sony v. Universal Studios* (1984) case as an example of this. Courts evaluate claims of copyright violation according to the statutory four-pronged test for *fair use* codified in The Copyright Act of 1976. (This legal excerpt is included in the Introduction chapter under Legal definitions and statutes, and in summary, states that factors for consideration include the purpose and character of the use, the nature of the work, the amount and substance of the portion used, and the effect on the market or value of the use of the copyrighted work.) Herrington points to the *fair use* section of The Copyright Act of 1976 as evidence of the esteem that it was meant to engender, writing:

The *fair use* clause . . . ensures that you and other citizens have access to intellectual information to enable you to maintain free speech rights and to participate in the development of knowledge that shapes what the country is and what it will be in the

future. . . . Fair use is intended to make information available to ensure an educated, free society. It allows intellectual products to be copied in order to support education, for purposes of criticism, news reporting, quotation, critical commentary, and parody (2003, p. 107).

She adds that the ability to make a “critical comment” is at the root of free speech (p. 108). While criticism, including parody, can impact the profitability of a copyrighted work, free speech trumps this consideration when *fair use* is at issue, she argues (p. 109). When *fair use* is curtailed, Herrington states, so is free speech. “Your personal use and free speech rights protect your ability to use other work to comment on and criticize cultural issues in our society” (p. 107).

Possible strengthening of fair use

In an article discussing the U.S. Supreme Court’s 2003 decision in the case, *Eldred v. Ashcroft*, Herrington argues that there was a potentially positive outcome to the U.S. Supreme Court’s otherwise disappointing decision to uphold Congress’ right to extend copyright terms (Herrington, 2010a). She states there could be a long-term benefit rooted in the Court’s acknowledgement of the importance to *fair use* shown by its giving Constitutional weight to *fair use* in its decision. *Eldred’s* unsuccessful challenge to the longer protection of Sonny Bono Copyright Extension Act was based upon the argument that it was unconstitutional for Congress to extend the copyright term. Herrington postulates that the argument was unsound since Congress clearly was given the authority to make decisions about intellectual property in the Constitution. The Court also found that although the new term was longer, it still was limited, and so was not unconstitutional. In *Eldred*, the creator of a web-based library consisting of works in the public domain objected to the extension of copyright terms since it meant that works

published after 1923 would not be public domain material until 2019. In an act that Herrington describes as “civil disobedience,” Eldred included a Robert Frost poem in his library that would have been allowed under the earlier copyright term. When issue was taken, Eldred took his case to the courts, but lost. Herrington suggests that a better argument that could have prevailed would have centered on whether or not the longer copyright term violated fair use (2010a). This case illustrates the ongoing challenges to copyright law in the Courts.

Google wins fair use battle

In 2005, Google was challenged in court due to one of its two digital books projects in the case, *The Authors Guild, Inc. v. Google Inc.* (2013). The U.S. District Court in the Southern District of New York dismissed the lawsuit in 2013 after granting Google’s motion for summary judgment. The program at issue is called the “Library Project,” for which Google, with permission, scanned books from the collections of research libraries. Google did not seek permission from the copyright holders. More than 90 percent of the books were nonfiction. The books included in print and out-of-print books, with most of them in the latter category. More than 20 million books were scanned. As part of their agreement with the research libraries, the libraries received free digital copies from Google of their own books only. Some of the libraries only provided works in the *public domain* while others provided books still in print.

Users of the system did not see the full text of the books although the full texts were digitized. With the aid of a search engine, they received a list of the books where their keywords appeared. They could click on a link that provided information about that book and links to sellers. Books appeared in a “snippet view,” showing a limited excerpt, and each search could produce just three results. In the Court’s decision in *The Author’s Guild*, it found that the Library Project made it possible for “readers and researchers to find books.” It found that Google’s use

of the works was “highly transformative” (p. 19). It also determined that Google did not “supersede or supplant books because it is not a tool to be used to read books. Instead it ‘adds value to the original’ and allows for ‘the creation of new information, new aesthetics, new insights and understandings’ ” (p. 21).

Further, the court found there was no copyright violation because the books came from libraries which had purchased them, and which were acting within the bounds of *fair use*. Google’s use also fell within *fair use* since these snippets were not for sale and no advertisements were displayed. No financial damage was incurred by the copyright holders. Also, only a limited amount of text was displayed from the books, within the guidelines of *fair use*. Further, the Court found that Google’s actions not only adhered to *fair use*, its Library Project benefited the public. This case is the exception to the recent trend to limit *fair use*, particularly of digital content, through the use of DRM devices. In the view of the sources for this thesis, *fair use* is necessary for the promotion of free speech and for the encouragement of knowledge. The benefit of knowledge view was shared by the Court in its opinion, referring to The Library Project, as follows:

It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders. It has become an invaluable research tool that permits students, teachers, librarians, and others to more efficiently identify and locate books. It has given scholars the ability, for the first time, to conduct full-text searches of tens of millions of books. It preserves books, in particular out-of-print and old books that have been forgotten in the bowels of libraries, and it gives them new life. It facilitates access to books for the print-disabled and remote or underserved populations.

It generates new audiences and creates new sources of income for authors and publishers. Indeed, all society benefits (*The Authors Guild, Inc. v. Google Inc.*, 2013, p. 26).

Writing prior to the Court's decision in Google's favor, (Netanel, 2008) praised Google's effort and criticized those publishers who had objected, considering them to offer an example of how "... today's proprietary copyright threatens to stand as an obstacle to the Internet's realization of our First Amendment ideals. ... At its core, copyright shares our First Amendment commitment both to increasing the store of knowledge and to making it widely available for learning, inspiration, enjoyment, and further expression" (p. 28).

The Court's decision in *The Authors Guild, Inc.* was in keeping with Netanel's support for "... a renewed weight in fair use analysis to the defendant's transformative expression and purpose" (2008, p. 191).

A hesitancy to exercise fair use

Mazzone (2011) writes that the current environment makes people unduly hesitant to make *fair use* of material. University professors may be concerned about legal actions even when their use is for educational purposes. The court's definition of *fair use*, which has been expanded upon for educators, offers detailed guidelines but these remain somewhat general and open to interpretation. As Mazzone states, companies may choose to exploit the vagueness of the definition of allowable *fair use* by wrongfully objecting to permissible *fair use*. He is especially censorious of educational nonprofits that fail to explain *fair use* or reference it when discussing the copyright law that governs the use of its material.

Chilled speech

Academics and technical writers disagree on the extent of chilled speech that exists among technical communicators attributable to changes to copyright law. The DMCA's passage led to the pervasiveness of DMCs that deny access to digital material unless payment is made to the copyright holder or permission is granted. Critics contend that preventing access in this manner prevents *fair use* of the material. Other impediments include barriers to the *public domain*. Situations have arisen where publishers and others enforce unwarranted conditions or impose improper demands for material that is in actuality free to use since it no longer qualifies for copyright protections. Researchers and technical communicators who have written on the topic of chilled speech, advocate for education about copyright law to assist technical communicators in navigating copyright issues so that they do not infringe upon copyrights but also are not subjected to unnecessary restrictions or fees for *public domain* material. They also would understand their right to use material under the guidelines of *fair use*. Chilled speech also occurs when professional writers in the digital realm are unsure about copyright law. Rife's 2010 study found digital writers who chose not to express themselves as they wished out of concerns about copyright liability. Becoming knowledgeable about copyright law could embolden technical communicators so that they can confidently follow the law, and understand when the information they are being given is false and meant to improperly limit or prevent their use of materials.

Chapter Five

Educating technical communicators

Technical communicators and other users of digital content need to understand the issues that could arise when they use material on the Internet either for *fair use* purposes or as a way of finding the most current information or relevant hyperlinks for their work. Rules for use have developed in some instances, but in other cases, court rulings are offering the most guidance. In some cases, there may be available defenses to allegations of copyright infringement. Nonprofits and educators may find that they have more access under *fair use* than is available for users who are creating works that are commercial or for profit. The relevant laws need to be understood and attention needs to be paid to the outcome of recent and pending lawsuits as these court decisions have an impact on technical communicators as writers and editors, as well as upon librarians, and small businesses.

Educational fair use

Technical communication educators and those writing material for nonprofits have less reason for concern about using copyrighted material than those in the private sectors, who must pay fees, if applicable, or ask permission to use material for commercial or for-profit purposes. Noncommercial uses may offer *fair use* protection, and the guidelines may not be as inflexible as some educators might think.

Enghagen (2005), a university professor and attorney, states that since the *fair use* guidelines only provide guidance, it also could be found that educators exceeding the

recommendations were still acting within the bounds of permissible *fair use*. These guidelines can help educators make decisions with relative certainty, however. Moreover, Enghagen states, a good faith belief that the use was allowable, along with a showing that the guidelines were relied upon, can provide legal protection to nonprofit libraries, archives, educational institutions and the employers of the user (p. 19). The educational agreements for copying copyrighted books and periodicals provide the *minimum* not the *maximum* allowable *fair use*.

Section 107 of H.R. 2223 (1998), provides these guidelines, useful to all educators at all levels, and in this case, technical communicators teaching in a college setting. These guidelines, reproduced below, took effect in 1976 and should be familiar to all educators since they are crucial for responsible *fair use* activity.

I. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book;
- B. An article from a periodical or newspaper;
- C. A short story, short essay or short poem, whether or not from a collective work;
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; *provided that*:

- A. The copying meets the tests of brevity and spontaneity as defined below; *and*
- B. Meets the cumulative effect test as defined below; *and*
- C. Each copy includes a notice of copyright.

Definitions:

Brevity

- (i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

- (ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10 % of the work, whichever is less, but in any event a minimum of 500 words.
[Each of the numerical limits stated in “I” or “ii” above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]
- (iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.
- (iv) “Special” works: Certain works in poetry, prose or in “poetic prose” which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10 % of the words found in the text thereof, may be reproduced.

Spontaneity

- (i) The copying is at the instance and inspiration of the individual teacher, and
- (ii) The inspiration and decision to use the work and moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

- (i) The copying of the material is for only one course in the school in which the copies are made.
- (ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, not more than three from the same collective work or periodical volume during one class term.
- (iii) There shall not be more than nine instances of such multiple copying for one course during one class term.
[The limitations stated in “ii” and “iii” above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

III. Prohibitions as to I and II Above

Notwithstanding any of the above, the following shall be prohibited:

- A. Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.
- B. There shall be no copying of or from works intended to be “consumable” in the course of study or teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.
- C. Copying shall not:
 - a. substitute for the purchase of books, publishers’ reprints or periodicals;
 - b. be directed by a higher authority;

- c. be repeated with respect to the same item by the same teacher from term to term.
- D. No charge shall be made to the student beyond the actual cost of photocopying.

In 1996, *fair use* guidelines for educational use of multimedia were developed and subsequently adopted to the Council on Fair Use (CONFU) (Enghagen, 2005). These multimedia guidelines are applicable to educational multimedia projects at nonprofit educational institutions, which combine students' or educators' original material with copyrighted material (p. 33). These guidelines state, in part, that educators may use others' materials for teaching for up to two years before permission must be sought from the copyright holder. Educators and students are required to include a notice that the works were prepared under *fair use* and so are "restricted from further use" (p. 42). There are also "portion limitations," allowing up to 10 percent of the works to be used or another measurement can be used depending upon the media. For example, along with the up to 10 percent guideline, it states text can contain up to 1,000 words, whichever criteria is less; for music, lyrics, and music videos, it could be no more than 30 seconds; for illustrations and photographs, it could be no more than 15 images, and for numerical data sets, no more than 2,500 fields or cell entries. In addition, there are copying restrictions of no more than two copies, only one of which can be placed on reserve (pp. 38-39).

Enghagen includes the CONFU's guidelines for distance learning and digital images and software in the fourth edition of her 2005 book titled, *Fair Use for Educators*. This book is a valuable resource for educators, and also for students who wish to incorporate limited amounts of copyrighted materials into their creations for coursework.

Enghagen also edited the 1997 book titled, *Technology and Higher Education*, which includes a chapter where she discusses these guidelines, including a Court decision where copying for educational purposes was done for profit, stepping outside the bounds of *fair use*

protection. An important legal decision in 1991 made clear that photocopying copyrighted material for course packets for profit as was done by Kinko's violated copyright law since *fair use* does not apply to commercial uses. Since Kinko's profited from selling these course packets, which were comprised of articles and book excerpts, while neglecting to seek permission or pay royalties, it was found to have violated copyright law in a case brought by publishers, *Basic Books, Inc. v. Kinko's Graphics Corp.*, 1991.

Technical communicators whether in the workplace or as academics should be knowledgeable about court decisions and keep current on the latest legal decisions in order to avoid allegations of copyright infringement. They need a grounding in copyright law in order to perform effectively in the workplace or the classroom.

Other issues affecting technical communicators

For technical writers or creators who developed material on their own without knowledge or access to a similar work that has intellectual property protection, there are legal defenses available to them if an allegation of infringement is made (Herrington, 2003, pp. 104-105). These defenses include reverse engineering, merger, and the clean room defense. With reverse engineering, the creator shows that the content was reproduced through a different means. This is a defense often used by software developers who seek to show that expression and idea merged through reverse engineering. The clean room defense is used to show that the alleged infringer's work was developed in isolation and without knowledge of the protected material.

Other issues that could impact technical communicators are not as easily understood. Court cases could change the rules of legal use. Often, the rules change depending on what kind

of link is used or upon its intended purpose. Hyperlinking is one area that may be misunderstood by technical communicators.

Linking and deep linking

The World Intellectual Property Law Organization (WIPO) in its website report titled “The Impact of the Internet on Intellectual Property Law,” states that using hyperlinks to allow readers to click and be connected via the link to the home page of another website are not normally problematic as long as it’s a simple link that operates like a footnote to reference that other site. The reader is instantly aware that they have traveled to another website when they are linked to the home page. Simple hyperlinks are usually allowed “. . . either because the website owner has given an implied license to link by posting his material on the Web, or by characterizing such linking as *fair use* (WIPO, n.d., p. 9). However, objections may be raised under copyright law to deep linking, which establishes links to the interior pages of another website, avoiding the home page, along with any home page advertisements, and possibly obscuring the true creator of that content. The WIPO report states:

The use of deep-links to retrieve pages from the targeted site’s database may, in some jurisdictions, amount to an infringement of rights in the database that contains the secondary information. . . . In the United States, where no *sui generis* [Latin for *of one’s own kind*] database law currently exists, copyright owners have found protection against deep-linking by relying upon laws related to copyright, trespass, breach of contract, and common law appropriation (WIPO, n.d., p. 9).

The issues surrounding hyperlinks are important to technical communicators, and it is important that they understand the allowed uses and the uses that could create problems.

Guidelines for deep linking

As Porter notes, technical communicators who produce web pages may find it useful to include hyperlinks to related information. They also may create information that compares products or services, sometimes negatively, as with software reviews, and as a result, companies may oppose the use of deep links to their technical data (Porter, 2005, p. 250). Porter references a cease-and-desist letter sent to Google requiring them to remove links to a company's machine tool information. Porter also discusses how some companies, including General Electric, require permission before a link to web page can be used, and forbid linking to interior pages, requiring the link to be to the home page. He offers an example that could become commonplace for technical communicators, the specter of so many restrictions that necessary sources of reliable medical information, including the American Cancer Society, can't be included as links despite their importance to readers seeking more in-depth information.

Using hyperlinks was once considered a type of citation, indicating the source of the content. This type of simple linking is still normally allowed, according to the WIPO report (n.d.). Porter purports that this view toward the use of linking is based upon an atmosphere that encourages the exchange of knowledge. However, in the technological sense, Porter says that a hyperlink requires downloading, which also can be perceived as creating a copy, and this process runs counter to the emerging view of digital information as property. However, in WIPO's view, this download via a simple hyperlink or "in-line" link usually isn't problematic, but it could raise issues because these links "do not require a copy to be made of the linked material, but may violate the author's right to display or communicate their work to the public" (WIPO, n.d., p. 9).

Still, in Porter's view, hyperlinking, in general, has mistakenly become an issue. He argues that corporate or business rules that require users to always request permission before

hyperlinking feed into corporate policies which promote control of information. He points to websites that carry notices prohibiting linking without prior permission. This type of control serves to prevent *fair use* of the linked material. Porter (2005) names others whom consider these controls to have long-range consequences on the ability of technical communicators to practice *fair use* of copyrighted material since such permission requirements effectively act as a “corporate takeover of electronic writing” (as cited in Porter, 1999; see also Lessig, 2001; Samuelson, 1996, 1998; Schiller, 1989).

The copyright issues surrounding hyperlinking have been heard in the courts. Herrington states that the first two legal cases revolving around the issue of deep links were settled out of court; however, a California court’s decision in *Ticketmaster Corp., et al. v. Tickets Com, Inc.* (2000) indicated that deep links weren’t a violation of copyright (Herrington, 2003). In this case, a company deep linked calendar-type data of events from another website and then sold tickets itself for those events. According to the WIPO report on the impact of the Internet (n.d.), the Court decided that no violation of copyright existed in *Ticketmaster Corp.* since neither the web address nor the uniform resource locator (URL) were considered protected material. Other court cases have not addressed this issue directly. This is an area that could be affected by future court decisions.

One of the reasons there has been opposition to the practice of deep linking is the resultant loss of website visits to the homepage of the linked site, where visits are tracked to encourage advertising (Herrington, 2003; Hoffmann, 2005). Since other legal cases arising from this same issue have been settled out of court, there are no other judicial decisions to use as precedents. Herrington expects this issue to arise again in the courts.

Web uses

Hoffmann (2005) provides an overview of the law as it applies to using information downloaded or viewed on the Web. Gray areas exist regarding the legalities of browsing since temporary files are created in RAM or on a computer hard drive. The law is clearer, however, when Web files are downloaded or printed since this does infringe upon copyright if permission has not been granted (p. 73). Unless there is a usage policy or license, it may be difficult to determine if it is legal to download or print a file. If a technical communicator wants to use something that has been downloaded, permission should be requested. If the purpose is to share that information, then the URL should be sent instead of the file.

In the area of education, Enghagen (2005) states that the law that governs different uses are the applicable agreements hammered out by various organizations for books and periodicals, music, off-air recording of broadcasts, multimedia, distance learning, digital images, and software (p. 6). She states that instructors and students need to be educated on allowable uses so that they don't violate copyright laws. She also discusses the application of copyright law to distance learning, governed by the 2002 implementation of the Technology, Education, and Copyright Act (TEACH Act), which states that "accredited, nonprofit educational institutions" may use copyright-protected works in distance learning classes under certain conditions without requesting permission or paying for this use. Among the requirements is that the material only be accessible to registered students, which requires a password-protected system, and which limits the time these works are stored (Enghagen, 2005, p. 83) TEACH expanded the works that could be used for distance education to encompass sound recordings and many dramatic works and nondramatic works in their entirety with the exception of operas, music videos and musicals.

Other performances such as dramatic and audiovisual works can be transmitted as long as only portions of them are used (p. 83).

Using digital images

If images and graphics appear on a webpage, it should be assumed that these are copyrighted. No formal notice is required before copyright applies. For this reason, as a precaution, permission should be sought before downloading graphics from a webpage for any commercial use (Hoffmann, 2005). The payment of a fee or the purchase of a license could be a requirement of the copyright holder before that image or graphic can be legally used.

Downloading it for use or copying it could constitute copyright infringement. However, there could be exceptions depending upon the reason for its intended use. A nonprofit entity that uses a logo it has downloaded for a not-for-profit purpose—not for a fund-raising or a commercial purpose—might be able to use the image or graphic lawfully under *fair use*. Meanwhile, a technical communication instructor creating a website in class also would likely fall within the purview of *fair use* since it would be used for an educational purpose.

According to *The Conference on Fair Use: Fair Use Guidelines for Educational Multimedia* (1996), educators and students can use and display images for educational purposes that are noncommercial under *fair use*. However, Hoffmann (2005) notes that these guidelines are not intended as a replacement of other “preexisting education fair use guidelines that deal with the Copyright Act of 1976” (p. 234). This permitted use also applies to spontaneous uses, which were unplanned, with the caveat that permission must be sought for subsequent uses. Copyright notices that credit the sources should be used. Educational uses do not include the right to reproduce material or images in publications, including scholarly ones. If alterations are made for “criticism, comment, teaching, scholarship, and research,” then these changes should

be noted and described (p. 219). Enghagen (2005) also notes that these are guidelines, not laws, and use that exceeds the stated parameters may still be legal (p. 19). It is the Courts that can determine whether *fair use* has taken place.

If a technical communicator is not planning on using a graphic for either a nonprofit purpose or for an educational purpose, then permission must be requested. Another legal concern arises from the fact that a permitted use of an image or graphic may allow only limited uses. For example, it could be limited to use for printed copies. If it is reproduced on a webpage without permission, it could be a violation of the copyright holder's right to use it exclusively for public performance and display (Hoffmann, 2005, p. 88). Care also should be taken when reusing or copying material from a webpage since that webpage may contain copyrighted material belonging to another entity that was initially used without permission, as well as material that exists with the public domain and is accessible to anyone (p. 219).

Domestic law

A need for training and education

Many researchers argue that technical communicators should have a working knowledge of copyright law—domestic and international—in order to do their jobs effectively and so that they can judge when legal advice needs to be sought. Another reason for educating them in this area is to ensure that they act responsibly and put the needs of the public first.

In a survey of educational-context writers—instructors and students—including students with work experience in this area, Rife (2010) identified a lack of knowledge about copyright among these digital writers. Her study focused on digital writers, defined as educational-context professional writers of web content, who use the Internet for composing content, often as technical communicators. She notes that current copyright law, which affixes copyright

protection to anything original in a “fixed,” or “tangible” format, applies equally to web-published content (p. 46). Participants in Rife’s study demonstrated confusion in survey questions when it came to applying copyright to protect their own works and also when it came to accessing and making use of others’ work without violating copyright. Study results indicate that professional writers lack a clear understanding of the meaning of *fair use*, with nearly half of them incorrectly associating it with attribution, the crediting of a source. They also exhibited a lack of understanding about government documents, failing to realize that most such documents carry no copyright and are automatically included in the *public domain*. Study subjects were more aware of the protection afforded derivative works, realizing that the copyright holder has the sole privilege of creating derivative works. Since nearly half of the study participants agreed that it was important for them to be well-versed in matters of copyright law and a majority demonstrated a lack of understanding of basic issues, Rife (2010) asserts that professional training opportunities should be offered, particularly in the field of technical communication where there may be a lack of formal training in an educational setting (p. 62). In addition to the survey, Rife’s study included seven supplemental interviews with graduate students or recent graduates employed as web writers or managers of web spaces. Her findings appear to confirm an interest among study participants in learning more about copyright. She writes:

Interviews show digital writers want to learn and engage with *all* the various laws that impact professional writing, such as privacy law, defamation, law, and contract law.

Teaching copyright might be folded into a core course or a professional development seminar where the laws of public writing in general are taught (Rife, 2010, p. 62).

Success as a technical communicator not only requires a grounding in domestic copyright law but also a grasp of international law, according to Rife (2011). Digital writings often are

shaped with an eye toward international law due to their ability to circulate in cyberspace (Rife, p. 79). According to Hoffmann (2005), knowledge of domestic law is crucial for technical communicators, but an overview of international law also is valuable. Hoffmann notes that whether or not the material is designated for an international audience, its international aspect is a factor since anything that's put on the Internet becomes "immediately international in scope" (p. 9). In general terms, Hoffmann provides guidance for using content lawfully. Hoffmann also describes the types of copyright infringement that can occur: direct and indirect infringement, contributory infringement and vicarious infringement. A technical communicator could directly infringe upon copyright on his/her own by distributing copies of copyrighted material outside the bounds of *fair use*, or could contribute to infringement by aiding someone else's infringing activity indirectly. Anyone who aids or causes an infringement has engaged in contributory infringement. The infringement is vicarious if a person fails to prevent an infringement about which he or she has a financial interest.

Guideposts for technical communicators

Copyright

Technical communicators may be unaware that the absence of a copyright notice doesn't signal that the material can be legally used. U.S. law does not require that websites or web pages contain a notice of copyright or a copyright symbol even when copyright protection is in place (Hoffmann, 2005). As a result, technical communicators may mistakenly assume they have skirted the issue if they want to use material on a website that doesn't announce its copyright protection. In actuality, U.S. copyright is automatically triggered immediately after the posting of Web materials that are "fixed" and "original" (Rife, 2010, p. 46). Copyright automatically applies when images are "fixed," in a "tangible medium of expression" that is "sufficiently

permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration,” and is also “an original work of authorship,” according to the definitions of the Copyright Act of 1976.

Copyright may be automatic under certain circumstances, but registered copyright is not, and it is registered copyright that allows the holder to collect monetary damages for copyright infringement and attorney’s fees. When a work is registered, it becomes part of the public record and creates a certificate of registration. If registration takes place within five years of publication, in a court of law the copyright is considered *prima facie* [on the face of it] evidence (“Copyright in General,” n.d.). In addition to understanding applicable domestic law pertaining to copyright, technical communicators need to have a basic knowledge of international law when they use the Internet to conduct research.

Perspectives on international copyright law for researchers

Technical communicators as researchers

On the international front, technical communicators who may view other websites for ideas or for guidance on tackling a new project or who intend to download material for research purposes need to have some understanding of international law if they are accessing material from other countries using the Internet. An in-depth discussion of international law is outside the scope of this thesis; however, an overview of the issues that affect technical communicators engaging in international research is provided here.

McKee & Porter (2010) developed a copyright model listing the issues that international researchers should consider. This heuristic addresses the identification of the material, its intended use, possible infringements, and legal and ethical matters. They state:

An important aspect of this heuristic is gathering information and perspectives. In this endeavor, technical communicators would be wise to talk through these issues with colleagues (especially legal advisors, if the company employs a legal team; with fellow technical communicators (in national and international venues); and with the persons/corporations whose communications are being studied” (McKee & Porter, 2010, p. 295).

McKee and Porter (2010) further counsel researchers to be aware of several factors, including laws and regulations, cultural differences, the possibility of dangerous situations or other insurmountable barriers to research, the diversity of the expected audience, and the fact that laws and cultural customs are continually adapting and undergoing changes (p. 296).

Many countries rely upon the “moral rights” afforded the work’s creator to determine if an infringement has occurred. The term “moral rights” applies to the rights of the creator to control the work and be credited for its production. The economic rights belong to the copyright holder, who may not be the creator (McKee & Porter, 2010, p. 293). McKee & Porter (2010, p. 291) write that in France, the “right of integrity” recognizes a personal relationship between the creator and the work that allows for action whenever an alteration of the work could affect the standing or reputation of the creator (as cited in Suhl, 2002). The term of copyright also varies McKee & Porter (2010, p. 291) state, with France granting it in perpetuity in comparison to other European countries which deem moral rights to expire alongside expiring economic rights (as cited in Gnädig et al., 2003).

Traditionally, European laws have given more rights to the copyright holder than the U.S., but this is changing as the European Union works to standardize its law, leaning more toward corporate rather than individual ownership (McKee & Porter, 2010).

The WIPO website contains the text for the revision to the Berne Convention for the Protection of Literary and Artistic Works', which, in part, addresses the international fair use of quotations, as follows:

It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries (Berne Convention, Article 10, 1886, 1896, 1908, 1914, 1928, 1948, 1967, 1971, 1979).

The concept of *fair use* is a U.S. creation. Other countries address these same issues differently. In Sweden, the DMCs used in the U.S. to circumvent access are considered oppressive since Swedes lean more towards supporting common access, where people may walk on privately owned land if they do not cause harm, and this transfers to a cultural acceptance for using intellectual property for print and digital works (McKee & Porter, 2010, p. 291-292).

McKee & Porter (2010) recommend avoiding violations by following these guidelines when copying material for research: consider the applicability of more than one law to research activities and whether regional laws apply, not just the country's law, and also the copyright laws of those countries where the work will be purposely distributed (as cited in Gnädig, Knorpp, Grosse Ruse, and Giannakoulis, 2003). For example, when copying material, researchers are governed by the copyright law of the country where the copying occurs, but when distributing that copied material, the copyright laws of the targeted countries need to be considered.

Technical communicators engaging in research outside of the United States need to be aware of regional and local laws as well as differing cultural attitudes towards privacy. (McKee & Porter, 2010).

Another concern is monitoring and screening of Internet content or surveillance by some governments. Protection of study subjects and guidelines regarding their treatment vary across countries and cultures. Internet research is further complicated by the absence of a legal framework that can serve as a guide. For these reasons, McKee & Porter (2010) assert that researchers need to develop some criteria while conducting research. Otherwise, technical communication researchers “who collect, copy, or quote others’ communications without consent”—could be perceived as violating an individual’s human right to privacy,” state McKee & Porter (p. 286). Criteria could be derived based upon the responsibilities to the public outlined in the *Code of Ethics of the Association of Teachers of Technical Writing*, pertaining to confidentiality, informed consent and privacy (p. 286).

In the area of human rights and research, guidance is provided by the United Nations General 1948 document arising in the aftermath of World War II and Nazi Germany atrocities, *The Universal Declaration of Human Rights*. McKee & Porter (2010) assert that researchers should be familiar with this document and aware that some people could interpret the privacy protection in Article 12 as applicable to collecting material or quotes using Internet communications without their consent (p. 286).

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks. (United Nations General Assembly, 1948)

Other considerations also need to be understood when working in an international environment. Rife (2011) notes that originality is required for a work to qualify for copyright protection in most of the countries which are governed by Berne Convention and TRIPPS.

However, different countries offer various explanations of originality. Rife states that technical communicators need to be familiar with these diverse international standards when trying to determine whether a work they wish to use for some purpose has copyright protection.

Chapter Six

Conclusion

Technical communicators, whether they are engaged in the workplace or in academia, need to be well-versed in copyright issues, particularly domestic ones, which impact their work and their teaching.

Expansions to copyright terms have placed new limits upon access, allowing works to remain under copyright protection for decades longer than before. In addition, the DMCA has hampered access to digital content by making it illegal to circumvent DRM devices or provide devices for others to do so. However, the law does allow for the copying of digital materials if access is available under the applicable provisions of fair use. *Fair use* is a defense against allegations of infringement. A technical communicator may want to use material in the classroom or for research. For these activities, *fair use* would apply. Use of copyrighted materials for commercial purposes, however, is prohibited without permission whether it's digital content or print.

Critics of these changes to copyright consider the longer term and the DMCA as leading to a deterioration of the *public domain* and a decimation of *fair use* of most digital content. Meanwhile, supporters say that these developments are necessary to ensure that the United States is honoring its international agreements pertaining to copyright, safeguarding the rights of copyright holders, and fostering trade among countries.

Technical communicators are among the interested parties in this debate since they are affected in the workplace and the classroom. As writers, they may be losing access to material

that they require since it takes much longer to reach *public domain* status, forcing them to rely upon less current material. At other times, they may be denied access to the latest up-to-date information that they need to create meaningful work due to DMR devices. This could mean denial of access to the latest reported research or the inability to link to a website that contains important related information for a health article or a review of a technical product or software.

Other authors in the field voice concern that a lack of access for *fair use* purposes may hinder the public's right to access information for free speech purposes. Some technical communicators are concerned that these restrictions are creating a chilling effect where writers are so wary of using material that they will not use it even though it is legally available or it clearly resides within the *public domain*.

In academia, some technical communicators argue that there is a need for educating people working in this area so that they do not violate copyright and also do not pay license fees when they are not warranted. A general understanding of domestic law and some knowledge of international law also is crucial for technical communicators due to the global nature of information today and the prevalence of the Internet. However, these authors also caution that legal advice should be sought for specific situations.

Some authors call for a heightened involvement in copyright issues and advocacy to protect *fair use* and the eroding *public domain* among technical communicators, librarians, lawyers, and other interested parties. Educating technical communicators and the public is one way to encourage advocacy. These copyright issues are important, and guarding the right to access information has implications for everyone. These implications could have far-reaching effects on the public and technical communicators and others. The shutting away of information and knowledge from the public view can hamper the acquisition of knowledge.

Implications

The balance of copyright that historically allowed copyright holders to benefit from their creations for a limited time before those creations became freely available for public use has been tipped in the favor of copyright holders and creators. One of the contributing factors is the expansion of copyright terms in the United States, culminating with the Sonny Bono Copyright Extension Act of 1998.

Copyright terms now have become so lengthy that works will take decades to become available in the *public domain*. When Congress increased the term of copyright with the Act, it didn't just add two decades to the term for new works, it made it retroactive for works still under copyright. These longer terms mean that works produced in 1923 will not enter the *public domain* until 2019.

The *public domain* also is suffering from the effects of The Copyright Act of 1976, which eliminated the requirement that copyrights be registered. Instead, any original work that is “fixed” and “tangible” automatically receives copyright protection. This automatic copyright also doesn't require renewals. This means that works that once would have become part of the *public domain* when their copyright wasn't renewed now retain copyright without any action being taken. So, it is taking two more decades for works to fall within the bounds of the *public domain* and fewer works are eligible for the *public domain* since a failure to renew doesn't trigger the loss of copyright protection. International treaties also have had an impact. Works with an expired American copyright now retain copyright protection if they still have copyright protection in the country where they were originally published.

This depletion of the *public domain* means that technical communicators and others cannot make free use of many works that once would have been available. Instead, permission must be sought and fees paid for their use. Ultimately, this means that technical communicators have less material at their disposal unless they are able to pay the requested fees.

In addition to these *public domain* issues, technical communicators and others are finding their ability to exercise their right of *fair use* hampered by the DMCA and the use of DRM devices that prevent unauthorized access. This may be the larger concern since without payment many works that represent the most up-to-date information may be inaccessible. Technical communicators in various fields may need to find the most recent health and medical information or technical content about products in order to write the most accurate information possible. It can be cost prohibitive to pay to view a variety of content when only a fraction of that content is actually needed. Without access to that digital information, however, it's impossible to know what content needs to be purchased or licensed for use in a work product. In other cases, technical communicators may need to review software or provide critical commentary on a product. Without access to the necessary technical information, they are prevented from writing reviews, which may contain criticism.

Prior to the prevalence of digital content and the passage of the DMCA in 1998 and the resulting use of DRM devices, users of content were able to access content and possibly use portions under the provisions of *fair use* or decide to pay for the right to use the material under some sort of agreement. *Fair use* has historically taken place without permission. That's one of the tenets of *fair use*. In today's restrictive climate that is no longer the case. Access is often prevented by technological means and it's illegal to circumvent these controls. This lack of access also has repercussions for the rights of citizens to view information and exercise their free

speech rights about that information. If it can't be seen, then the public cannot comment or criticize. The public is being denied access to information that could be valuable, even necessary.

The longer term of copyright and the control over digital content together are stemming the flow of information and knowledge. These copyright issues are important to all, but are not well understood by most people. Technical communicators as writers and educators, along with librarians and others, need to be educated about these issues, not just so they can navigate copyright issues effectively, but also so they can advocate for the identification of ways that information can become more available and less controlled. It is widely agreed that Congress needs to reconsider existing copyright law. There should be more of a focus on the public's needs for information and knowledge, while also honoring the copyright holder or creator's rights.

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