

# FEATURE



An illustration on the left side of the cover features a stack of four light blue books with a teal bookmark. Below the books is a wooden shelf. Underneath the shelf is a scale of justice with two yellow pans hanging from a brown beam. The scale sits on a purple base. The background is a solid teal color.

# Copyright Updates for K-12 Librarians

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## Introduction

As this special issue goes to press, a civil lawsuit accusing Robert Plant and Jimmy Page of Led Zeppelin of plagiarizing the opening chords of the 1971 rock classic “Stairway to Heaven” heads to federal court in Los Angeles. Federal judge Gary Klausner ruled that “Stairway to Heaven” and the 1967 instrumental “Taurus” by the band Spirit were similar enough that a jury should decide whether Led Zeppelin was liable for copyright infringement (“Led” 2016). Copyright concerns continue to bedevil K–12 librarians, who are often called upon to act as the copyright officers in public schools. As the Led Zeppelin case demonstrates, students who borrow even brief riffs or short chord progressions from rock and roll standards for a school band program may inadvertently engage in copyright violation. This article describes recent copyright developments of concern to these librarians in three areas: a recent court case involving a university library, pending legislation supported by ALA, and a regulatory update. Many recent cases, laws, and regulations stem from issues raised by the Digital Millennium Copyright Act (DMCA) of 1998.

## Court Case

The most recent court case related to copyright that is of interest to K–12 school librarians is *Cambridge University Press v. Carl Patton et al.* Three academic publishers, Cambridge University Press, Oxford University Press, and Sage Publications, sued Georgia State University (GSU) for copyright infringement. Carl Patton was named as a defendant in the suit since, at the time it was initiated, he was president of the university. GSU routinely placed copyrighted material on e-reserve, without paying licensing fees, for courses offered by the


university. At first glance, it might appear that the publishers should prevail. Before the widespread distribution of digital material (via course management systems such as Blackboard or WebCT), instructors who wanted to distribute copyrighted texts to students would assign a coursepack created by campus bookstores or commercial copying companies (for example, Kinko’s). The creators of these coursepacks paid licensing fees to the publishers for permission to reproduce and distribute copyrighted material. Digital distribution, however, bypasses bookstores and commercial copying companies. Consequently, no third party exists to pay the publishers for permission to use protected material. In this instance, GSU professors essentially replaced paper coursepacks, which were licensed, with e-reserves, which were not licensed. The academic publishers bringing the suit, Cambridge University Press et al., claimed that they were suffering economic harm at the hands of Georgia State University.

The *Patton* court disagreed. The court noted that, while publishers may have a system for licensing of paper excerpts, they did not always have one for digital excerpts. This, according to the court, implied that there was no market for licensing of digital excerpts. Therefore, allowing GSU professors to distribute excerpts digitally caused little market harm to the plaintiffs. In its decision, the court noted that technological advances had created new means for delivering copyrighted material to end users, causing headaches for consumers (including librarians) to define fair use standards for digital material. The court wanted to strike a balance between the rights of copyright holders, who must be provided with an economic incentive to produce

material, and consumers, who use this material to build on the ideas of others. The court found middle ground by distinguishing between Georgia State University’s nonprofit use of copyrighted materials (placing the works on e-reserve) from the commercial sale of coursepacks.

Annemarie Bridy, a copyright and fair use scholar at the University of Idaho, has explained three takeaways for school librarians from the GSU case. First, librarians who follow the doctrine of fair use do not need to obtain a license when they are the secondary users of copyright material (placing the items on e-reserve). Further, failure to obtain such a license does not convert such nonprofit secondary use into commercial use (that is, librarians do not become commercial users simply because they failed to obtain a license). Second, the court decision did away with arbitrary quantitative thresholds for fair use of copyrighted material. The 10 percent threshold contained in the legislative history of the 1976 Copyright Act does not carry the force of law and may represent a *floor* rather than a *ceiling* of fair use. Third, a secondary user’s failure to “transform” a digital work (such as offering a critique or a parody) does not violate fair use if the material is used for educational purposes (Bridy 2014). Thus, posting digital work on a library’s website or institution’s course management system without “transforming” it does not violate fair use standards. Regardless, K–12 librarians should still proceed with caution and evaluate each fair use situation on a case-by-case basis.

Legal research presents a daunting challenge to information professionals. However, school librarians do not need to go to a law library



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to do this specialized research. LexisNexis, an extensive online database of legal materials, is widely available and contains the texts of federal and state court cases. This resource provides “Headnotes” on most cases, which illustrate and explain the key legal points under consideration. The transcript of the *Patton* case contained in LexisNexis also provides the core terms librarians can use to decipher the case and conduct further research into the topic: fair use, excerpt, infringement, copyrighted, copying, permission, digital, coursepack, license, educational, classroom, publisher, user, guidelines, nonprofit, weigh, copied, electronic, educational purposes, holder, secondary, transformative, licensing, injunctive, original work, favored, work-by-work, unpaid, Copyright Act, and copyright infringement. Also, the particular glossary for *Patton* is very good on civil infringement and fair use.

### Pending Legislation

#### *Your Own Devices Act*

As of June 2016, ALA supports three pieces of pending legislation.

H.R. 862, *Your Own Devices Act (YODA)*, introduced by Rep. Blake Farenthold (R-TX), amends federal copyright law “to allow the owner of a machine or other product operated in any part by a computer program to transfer an authorized copy of the computer program, or the right to obtain such copy, when the owner sells, leases, or otherwise transfers the machine or product to another person” (U.S. House of Rep. 2015a). In other words, when a librarian or library purchases (or sells) a digital device, YODA transfers a copy of the embedded software with that device and overrides the end-user license agreements usually included with such software. Further, if the owner of the device has the right to receive security updates or patches that right passes to the subsequent owner of the device. YODA is an important step toward addressing the problem of restricted licenses on software imbedded in digital devices (Walsh 2014).

Many K–12 school librarians, as well as their students and faculty, bring their own devices (smartphones, laptops, tablets) to work. If H.R.

862 is signed into law, these librarians and patrons can use newly purchased hardware (and embedded software) without fear of violating copyright law. By the same token, when end users sell surplus hardware, they are also transferring ownership of software contained in that hardware. However, YODA would prohibit school librarians, libraries, and library patrons from retaining an unauthorized copy of a computer *program* after transferring that program to another user or institution.

#### *Breaking Down Barriers to Innovation Act*

The second pending bill supported by ALA, S. 990, *Breaking Down Barriers to Innovation Act of 2015 (BDBI)*, revises procedures under the DMCA “for the Librarian of Congress to conduct an administrative rulemaking every three years to determine whether to exempt certain noninfringing uses of a copyrighted work from the statutory prohibition on circumventing a technological measure controlling access to a particular class of work” (U.S. Senate 2015). The question,

according to the bill's sponsor Senator Ron Wyden (D-OR), is whether Americans can unlock phones and other devices they have purchased. At present, the DMCA prohibits individuals from breaking the technological "lock" that protects copyrighted material. This provision of the DMCA can prevent Americans with disabilities from accessing e-books and other electronic media currently available in school libraries. Every three years the Copyright Office considers whether to grant exemptions against the blanket restriction prohibiting the circumventing of software locks on copyrighted works (Wyden 2015). BDBI would automatically renew previously granted exemptions and provide increased and improved access to adaptive technologies for library patrons in need of this assistance.

### *Unlocking Technology Act*

The third legislation granted ALA's approval is H.R. 1587, *Unlocking Technology Act of 2015 (UTA)*. The UTA declares that it is not a violation of copyright law to:

circumvent a technological measure if the purpose is to engage in a use that is not an infringement of federal copyright law; or (2) use, manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part primarily designed or produced to facilitate noninfringing uses of protected works by circumventing a technological measure that effectively controls access to such work, unless the intent is to infringe or facilitate infringement of a copyright. (U.S. House of Rep. 2015b)

Thus, librarians who engage in a technological workaround to provide fair use access to library material are not guilty of copyright infringement. A further upshot is that librarians can unlock mobile devices (smartphones, tablets, and library networking devices) without obtaining consent of the original carrier network before switching to a new carrier.

### **Regulatory Update**

Today, user-upload services such as SoundCloud, YouTube, and Vimeo make massive amounts of music and video content available. Regrettably, users of those websites post large quantities of infringing content, often under the guise of "fair use." Consider the following caveat posted on YouTube regarding a Moody Blues album:

Copyright Disclaimer Under Title 17 Section 107 of the Copyright Act 1976, allowance is made for "fair use" for purposes such as criticism, comment, news reporting, teaching, scholarship, and research. Fair use is a use permitted by copyright statute that might otherwise be infringing. Non-profit, educational or personal use tips the balance in favor of fair use. I receive No Profit on this audio/video, strictly for comment only, YouTube controls the commercials. NO INFRINGEMENT OF COPYRIGHT IS INTENDED. ("Hippie Chick" 2012)

Commercial trade organizations such as ASCAP (American Society of Composers, Authors and Publishers) and IFPI (International Federation of the Phonographic Industry) contend that the users of these websites post massive amounts of copyrighted material. Since 2012



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the recording industry has sent over seventeen million takedown notices (May and Cooper 2016). The industry argues that upload services draw revenue from Internet advertising (for example, the pop-up ads in YouTube videos) and, thus, have a financial disincentive to comply with takedown requests. The search engines create added traffic (and revenue) by linking to infringing content, an action that raises the question: Should the safe harbor provision of section 512 of the DMCA also apply to user-upload services (May and Cooper 2016)?

The Registrar of the U.S. Copyright Office is authorized to establish regulations consistent with U.S. copyright law (Bailey 2016). At present, the DMCA provides for a notice and takedown process for copyright works on the Internet. Those who comply with the takedown notice often are extended immunity from legal action. However, the Copyright Office is considering changing the DMCA mandate to a notice and staydown process in which the hosting organization cannot merely remove the copyrighted material from its platform; it must also ensure that the material does not appear on it in the future (Bailey 2016). This change, if implemented, would have implications for school librarians and school libraries because librarians may be responsible for ensuring that the copyrighted work never appears on the school's Internet platform again. Historically, using recorded material has been frowned upon by the courts, even though fair use standards exist. School librarians must tread carefully before posting audio material on a school's website lest they become responsible for filtering Internet content to prevent copyright infringement.

## Keeping Up with Changes

Librarians have two excellent options to check the status of pending legislation. (The material on these two websites overlaps.) ALA tracks copyright issues and legislation here: <[www.ala.org/advocacy/advleg/federallegislation/copyright](http://www.ala.org/advocacy/advleg/federallegislation/copyright)>. The federal government provides status updates on intellectual property legislation here: <[www.copyright.gov/legislation](http://www.copyright.gov/legislation)>.



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