

Textbook Copyrights Vs. Open Educational Resources

Law360, New York (May 17, 2012, 1:05 PM ET) -- Over the past decade, pundits have predicted that new companies harnessing the Internet and related electronic devices would bring about the end of the record industry, print newspapers and brick-and-mortar bookstores. Whether those predictions are borne out remains an open question, but Boundless Learning, a Boston-based start-up that has raised roughly \$10 million in initial capital, has declared war on the college textbook industry.

Textbook publishers are not taking the threat lightly. In April, Pearson Education Inc., Cengage Learning Inc. and Bedford Freeman & Worth Publishing Group (collectively, the "publishers"), three of the largest publishers of academic textbooks, sued Boundless for copyright infringement in the United States District Court for the Southern District of New York.

Boundless represents the latest trend in the growing electronic textbook market, which Apple Inc., Amazon.com Inc. and others have flirted with for several years. For instance, Apple recently introduced its iBooks2 application, promising to provide interactive electronic textbooks for less than \$15. What makes Boundless different is that, like the infamous Napster, its offerings are free. Unlike Napster, however, Boundless disputes that its electronic versions of popular college textbooks transgress copyright laws in any respect. Whether Boundless is right could have a seismic impact on the textbook industry.

From its inception, copyright protection's purpose has been limited to encouraging creative endeavors by authors. It expressly excludes "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied." 17 U.S.C. §101(b). Of course, the substantive material in a college textbook consists largely of these elements.

The thrust of the publishers' lawsuit is that Boundless violated the Copyright Act by creating and distributing "replacement" copies of their textbooks that mirror not only the substance, but the organization, content selection and layout of the texts. Specifically, the publishers claim that Boundless "created" replacement textbooks for three popular college textbooks: "Biology, 9th Edition," by Neil Campbell; "Principles of Economics, 6th Edition," by N. Gregory Mankiw; and "Psychology, 9th Edition," by David Myers. Thus, a key issue in this litigation is whether the way in which the authors selected, organized and presented facts is sufficiently creative and unique to prevent Boundless from distributing free versions that merely paraphrase the material in these textbooks.

The Open Education Content Movement

The Boundless case is the latest extension of the open educational resources (OER) movement, a close cousin of the open source software movement. The OER movement capitalizes on technological advancements to share and distribute educational materials and to change the traditional interactions between and among authors, researchers, teachers and students. This educational content is considered "open" because it is intentionally injected into the public domain without intellectual property restrictions, allowing students, teachers and anyone else to freely exploit these resources.

The OER movement began just over a decade ago, around the time Napster was becoming popular, when several educational institutions turned to the internet to distribute content they were willing to share. A major driving force in the movement at the university level was Massachusetts Institute of Technology's decision in 2001 to support the MIT OpenCourseWare, which has made course materials for almost 2,000 classes available on the Internet at no cost.

MIT recently affirmed its commitment to the OER movement with its announcement, on May 2, 2012, of a \$60 million joint venture with Harvard University to create edX, a nonprofit entity that will offer free, online, college-level courses. Even Apple is joining the movement, recently introducing the "iTunes U" app that, according to Apple, is the "world's largest online catalog of free education content" and contains "more than 500,000 free lectures, videos, books and other resources on thousands of subjects."

Not surprisingly, electronic "textbooks" created from OER have been a particular area of growth. Long before Boundless appeared on the scene, Flat World Knowledge, founded by former employees of traditional textbook publishers, was soliciting submissions for its electronic textbooks, and then subjecting them to a traditional editing process before selling them with accompanying free electronic copies. For a fee, Flat World Knowledge also allows students and educators to tailor these textbooks, through an open license, to their particular educational needs. Flat World Knowledge has not been sued for copyright infringement by the publishers or any other company involved in traditional textbook publishing.

According to its own blog and the publishers' complaint, however, Boundless has taken the Flat World Knowledge approach one step further. Instead of offering education material gathered from various sources, Boundless advertises free textbook "replacements" for several of the most widely used collegiate textbooks. According to Boundless, its first offering "was a 100%-free textbook replacement that leveraged these [Open Education] resources to prevent students from being forced to shell out hundreds of dollars on their assigned texts."

The company says, "This initial product was just the first step toward our goal of making the world's open knowledge free, open and accessible." Although Boundless's materials are still in Beta testing, the publishers' complaint suggests the company is not shy about telling students that its "replacements" are not only every bit as good as the originals, but they so closely follow the layout and organization of the texts that if a professor directs a class to turn to page 22, students using the Boundless version and those using the traditional texts will find, substantively, the same material, though the Boundless version may use different words to convey the same themes.

In statements since the lawsuit was filed, Boundless maintains that the content it uses for its "replacements" comes from entirely OER sources. The publishers disagree, alleging Boundless copied their protected expressions of admittedly factual material, expressions that reflect creativity, originality, and years of hard work perfecting the most pedagogically effective identification, arrangement, presentation, and emphasis embodied in their textbooks. Whether these aspects are sufficiently creative to entitle the publishers to copyright protection is a crucial question. The answer necessarily depends on how the court views the few cases that have arisen in this area.

Copyright Protection for Textbooks

The Copyright Act of 1976, protects only "original works of authorship fixed in any tangible medium of expression," including literary works, and provides the author of those works exclusive rights of publication, copying and distribution. To claim a valid copyright, a work requires only a minimal degree of creativity or originality. See *Feist Publ'g Inc. v. Rural Tele. Serv. Co. Inc.*, 499 U.S. 340, 345-46 (1991).

Moreover, while copyright protects an author's original work, consistent with the Constitution's aim "[t]o promote the Progress of Science and useful Arts," copyright does not protect the facts and ideas that underlie that work. Facts are not copyrightable is "because facts do not owe their origin to an act of authorship." *Feist*, 499 U.S. at 345. For example, an author may discuss Einstein's theory of relativity in her book, but that discussion, even if itself sufficiently creative to warrant copyright protection, does not create a copyright over Einstein's theory.

In *Feist*, a regional telephone utility alleged that a print publishing company's telephone directory, i.e., its white page listing, infringed the telephone utility's separately created directory. The publishing company conceded it had created its directory by using the utility's white pages. The U.S. Supreme Court found that while the publishing company admittedly copied much of its directory information from the telephone utility's directory, the material copied — names, towns, telephone numbers — did not satisfy the originality requirement and was not entitled to copyright protection.

While a phone book is an extreme example, copyright law has traditionally protected works that include otherwise unprotectable facts. Textbooks and other compilations of facts may have the requisite creativity for protection if they include original selection and arrangement. A compilation is defined under the Copyright Act as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." The key to deciding whether a compilation is entitled to copyright protection is "whether the selection, coordination, and arrangement are sufficiently original to merit protection." *Feist*, 499 U.S. at 358.

This "originality" test for compilations, however, is not terribly demanding. "Originality requires only that the author make the selection or arrangement independently (i.e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity." *Id.* While the test for originality in a compilation is low, so is the protection afforded. Under Section 103 of the Copyright Act, "copyright of the compilation ... extends only to the material contributed by the author of such work ... and does not imply any exclusive right in the preexisting materials."

Instead, "the facts contained in existing works may be freely copied because copyright protects only the elements that owe their origin to the compiler — the selection, coordination and arrangement of the facts." *Feist*, 499 U.S. at 359. In *Feist*, the Supreme Court added that because facts cannot be protected by the copyright laws that "inevitably means that the copyright in a factual compilation is thin." *Id.* at 349.

A compilation, however, will not receive copyright protection solely on account of the hard work and money the creator spent developing and refining the compilation. At least since the 1976 revisions to the Copyright Act, it has been clear that originality, not mere hard work, is the hallmark of a work that should be protected. So while a successful college text is undoubtedly the product of significant labor, without proof of originality or creativity, copyright law may not insulate the text from copying by others.

In order to defend their textbooks, the publishers in the Boundless case must show they contain sufficiently original and creative expressions through the distinctive selection, arrangement, and presentation of facts to entitle their works to some copyright protections. Courts have routinely acknowledged that textbooks with these qualities are subject to copyright protection, while rejecting protection for the facts and ideas contained in the text. Here, there are three creative elements to the publishers' textbooks that are likely to obtain some degree of copyright protection.

The first original element of a textbook is the decision about what information and topics to include. See *Feist*, 499 U.S. at 359 (selection of material to include in compilation possibly entitled to copyright protection). "Selection implies the exercise of judgment in choosing which facts from a given body of data to include in a compilation." *Key Publ'ns Inc. v. Chinatown Today Publ'g Enters. Inc.*, 945 F.2d 509, 512 (2d Cir. 1991) (decision to include certain business in a directory, out of a large pool of business reflected originality); *Eckes v. Card Prices Update*, 736 F.2d 859, 863 (2d Cir. 1984) (originality reflected in decision to designate 5000 baseball cards out of 18,000 as "premium").

This element of a textbook, however, provides a limited basis for protection. Depending on the subject matter, the decision about what material and topics to include may reflect less creative expression and more the expectation of the end-user regarding information to be covered. For example, every introductory biology textbook, like the one at issue in this litigation, is likely to contain the same broad set of facts and topics.

In such a scenario, decisions about what information to include would not reflect the originality of the author, but rather the norm of the subject matter. See *Schoolhouse Inc. v. Anderson*, 275 F.3d 726, 730 (8th Cir. 2002) (for compilation of school information, no originality reflected in decision to include information on almost every relevant topic pertinent to a school, or selecting those topics that "parents obviously consider important in selecting a school.").

The second element of creativity in a textbook is the order of presentation of topics. See *Churchill Livingstone Inc. v. Williams & Wilkins*, 949 F. Supp. 1045, 1052 (S.D.N.Y. 1996) ("[W]hat I have assumed may be protectible in plaintiff's work is plaintiff's selection and arrangement of the facts and topics of embryology."); *Lipton v. Nature Co.*, 781 F. Supp. 1032, 1034 (S.D.N.Y. 1992) ("Choices regarding selection and arrangement of facts, made independently by the compiler and entailing even a minimal degree of creativity, are deserving of protection.").

Here again, to meet the low bar of originality the publishers will have to establish only that the organizational decisions for the information was original, and not simply done in a formulaic or routine manner that is found in all textbooks on the same subject matter. See *Morrison v. Solomons*, 494 F. Supp. 218, 224 (S.D.N.Y. 1980) ("it is expected that introductory texts on such a subject as the introduction to organic chemistry would cover pretty much the same subjects and would present them in roughly the same order."); *American Massage Therapy Assoc. v. Maxwell Petersen Assocs. Inc.* 209 F. Supp. 2d 941, 949 (N.D. Ill. 2002) (mechanical organization of therapist information not original, even if alternative order possible).

The final aspect of a textbook that reflect creativity is the manner in which it emphasizes and presents the specific topics covered — in other words, the manner in which it teaches the subject matter. This would seem to be a textbook's strongest claim to copyright protection because it presents the greatest opportunity for originality. The facts in a textbook are well established, and the options on what facts to include in a standard introductory textbook on a particular subject are generally limited. The author, however, has almost limitless options in the manner and treatment of the facts

Given the number of ways the publishers can prove originality in the creation of a textbook, and the extremely low bar to obtain copyright protection, the publishers may successfully establish their works are entitled to some degree of protection. See *Feist* 499 U.S. at 345. The publishers' complaint amply describes originality and creativity in the decisions about which materials to include, the order of information, and the manner of presentation. If the publishers can prove these elements, they may be well on their way to stopping Boundless before the fall sales cycle.

Copyright Infringement

The mere fact that the textbooks may enjoy some measure of protection does not mean that the publishers will automatically establish that the Boundless texts infringe the originals. They also have to establish that Boundless copied the original elements of the textbooks.

Copying can be shown by evidence of actual word-by-word copying, or by evidence the defendant had access to the copyrighted work and that the allegedly infringing work is substantially similar to the original.

The publishers do not claim Boundless created exact copies of their textbooks, as the recording industry alleged with respect to their copyrighted music in *Napster*. Instead, the complaint focuses on the second category of "copying," namely that Boundless has created shadow or alternative textbooks that, while including the unprotected facts from the textbooks, also implicate their creative elements. The publishers' claims that the Boundless texts are substantially similar to the originals is bolstered by proclamations that Boundless made on its website (though most of these have been muted or removed since the filing of this litigation), offering its texts as free alternatives that included all the important elements of the originals — even graphs and photos that convey the same information as the originals.

When determining substantial similarity, the court generally applies an "ordinary observer test" that considers whether the average reader would overlook any differences in the works and conclude that one was copied from the other.

Where a work contains both copyright protected and unprotected materials — as do traditional textbooks — a more discerning approach is required. The unprotected elements are not considered, leaving only the original creative elements to be compared.

This means that in the Boundless case, the court will have to identify what aspects of the textbooks are sufficiently creative to be protected and compare them to the Boundless versions. In many respects, this inquiry will draw the court into uncharted waters. Because OER is such a new field, the law respecting infringement there is not well developed. However, cases decided under traditional copyright principles will necessarily inform the inquiry. Applying those principles, the allegations of infringement in the publishers' complaint are strong, and, if proven, could spell trouble for Boundless.

Boundless advertises its textbooks as alternatives to the traditional texts, claiming its books are as good as the original. That approach intentionally creates the impression that the Boundless version is a virtual copy of the original. Although the publishers complain that the Boundless versions contain 100 percent of the material found in publishers' works, that overlap is likely to be of no moment to the court, as other courts have noted, because one would expect that two texts that are targeted at the same students at the same level will contain substantially the same factual material.

Probably for this reason, the publishers focus almost exclusively on the creative elements of their texts, including the layout, organization, headings, photographs and charts. The complaint asserts that Boundless has made a wholesale copy of the "precise selection, organization and depth of coverage of plaintiffs' textbooks." Boundless's own marketing materials bolster this claim.

Boundless has not yet responded formally to the complaint, but has promised to defend the litigation aggressively, repeatedly citing what it claims is its use of exclusively OER materials. Boundless is expected to argue that any similarities between the information and structure of the textbooks merely reflect the common understanding of the order and importance of these well-studied topics.

In the end, the outcome of the lawsuit will turn on the fact-intensive review of the competing textbooks. No matter how it is resolved, much like the Napster litigation almost a decade ago, the outcome of the publishers' infringement claim will likely resound throughout the textbook industry for years to come.

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