

Rights Still Protected at Schoolhouse Gate: Work-for-hire Policy for Student Journalists Fails to Diffuse across District Boundaries

Bradley Wilson, Ph.D., Midwestern State University*

If the question did not pose such serious implications for photographers nationwide, it might almost have been laughable. “If a Monkey Takes a Selfie, Who Owns the Copyright?” read the headline on Slate.com (Weissmann, 2014). Three years prior, in 2011, photographer David Slater traveled to Indonesia to take pictures of the black macaque. During the expedition, Matthew Sparkes (2014) who wrote online about the adventures said, “one of the animals came up to investigate his equipment, hijacked a camera and took hundreds of selfies.” Slater reported the monkey “must have taken hundreds of pictures by the time I got my camera back.” After the images started appearing all around the world, including in the Wikimedia Commons, a collection of more than 22 million images free for anyone to use, Slater sued Wikipedia, saying he owned the image, having provided the conditions under which the image was produced.

Government officials, ruling in 2014, disagreed with Slater. Because copyright law is limited to “original intellectual conceptions of the author,” the U.S. Copyright Office will not register works produced by nature, animals, or plants. In addition, the bureaucrats add, “Likewise, the Office cannot register a work purportedly created by divine or supernatural beings” (U.S. Copyright Office, 2014, chap. 300, p. 17). In an update released in December 2017, the U.S. Copyright Office specifically said it would not register “[a] photograph taken by a monkey” (“Who Can Register,” 2017; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58, 1884). So, the monkey selfie belongs to the public, and the copyright laws evolved. Still, the headlines continued: “U.S. Says Copyrighting a ‘Monkey Selfie’ is Bananas” (Picchi, 2014).

* Dr. Bradley Wilson is an Associate Professor of Communication at Midwestern State University. An earlier version of this paper was identified as the Top Paper for the Southern States Communication Association Free Speech Division in April 2016. Dr. Wilson may be reached at bradleywilson08@gmail.com.

The following year, another photojournalist, like Slater, put copyright concepts to the test in North Texas. This time it was a high school photographer, Anthony Mazur, shooting at Flower Mound High School in Lewisville, Texas, a northwestern suburb of Dallas. Like Slater's case, the controversy in which this student was involved centered on interpretation of government policy, this time a local school district's policy regarding student ownership and use of creative works produced.

First, it is useful to understand some of the basics of copyright law. In 1787, James Madison included provisions "to secure to literary authors their copyrights for a limited time" as part of the framing of the U.S. Constitution. Some years later, the Copyright Act (17 U.S.C. § 102(a)) was written to protect "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." The law and numerous subsequent court cases uphold that "pictorial, graphic and sculptural works" include two-dimensional works including photographs (H.R. Rep. No. 94-1476 at 53, 1976).

To obtain copyright, the work must be in fixed, tangible form and originally produced by a human author. Originality is "the bedrock principle of copyright" and "the very premise of copyright law" (U.S. Copyright Office, 2017; *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 347 (1991); LoMonte, Goldstein & Hiestand, 2013). The Student Press Law Center online primer on copyright emphasizes this point: "[T]he author must have shown at least a small spark of creativity when she made the work."

As with all laws, there are exceptions. The copyright law contains two: fair use and work for hire. The Fair Use Doctrine is a balance between the rights of the copyright holder and the need to encourage scientific and cultural progress, ensuring that creators get credit for what they do and society gets the information it needs. While fair use is beyond the scope of this paper, the Student Press Law Center and others provide lengthy explanations of when it applies, on a case-by-case basis. Work-for-hire, however, does become relevant. Under the work-for-hire exception, employers own the copyright of the works created by their employees while working

in the scope of their employment. The work-for-hire exception, however, requires the photographer to willingly give up his or her rights under the copyright law usually as part of an employment agreement. As a property law, the rights cannot be taken from the photographer. The work-for-hire exception makes no mention of whose equipment is being used or who makes the assignment. The exception simply requires the photographer to sign away his or her rights to the images. In lieu of such a written agreement, the creator of the work owns the copyright.

Even such written employment agreements can get tricky for photographers. For example, when Lester LaRue, while working for Oklahoma Natural Gas Co. as a safety coordinator, took photos of the aftermath of the Oklahoma City bombing in 1995, *Newsweek* paid him \$14,000 for the image that appeared on the May 1, 1995 cover. However, after judges ruled he was working “within the scope of his employment” partly because he used the company’s film and camera while taking the pictures, LaRue was forced to give up copyright ownership and pay statutory damages totaling nearly \$35,000. A similar photo taken by credit specialist Charles Porter and distributed by the Associated Press won a Pulitzer Prize (Eversley, 2016).

While some school districts may view students as employees, others may view students as independent contractors, allowing the independent contractor to retain ownership of the copyright as determined in *Community for Non-Violence v. Reid* (1989). The Community for Non-Violence (CCNV) case asked a simple question: “Is the making of a sculpture for an organization by someone who contracts with the organization but is not its employee, a work made for hire?” In a unanimous decision, the Supreme Court wrote “No,” in part because Reid supplied his own tools and worked in his own studio. CCNV paid the artist only when the work was complete and did not provide him any employee benefits or pay Social Security taxes.

Regardless of how laws view students, as individuals, employees, or independent contractors, sometimes school district policies intervene, waiting to be tested in court. A Maryland school district also tried to implement a controversial policy claiming that the creative work of its students is school property, not owned by the student creator (Martinez, 2015; Wiggins, 2013). The Maryland school district’s

Draft Policy 6160, which was never approved said, “Works created by employees and/or students specifically for use by the Prince George’s County Public Schools [PGCPS] or a specific school or department within PGCPS, are properties of the Board of Education even if created on the employee’s or student’s time and with use of their materials (Prince George’s County Public Schools, 2013). In a 2015 online article, Kristen Keller attempted to explain why the policy was necessary:

“The scrapped policy attempted to address sticky areas of joint, commissioned, and student (versus employee) work that tend to arise more often at the graduate school level. At any level, however, copyright is a complicated issue, but the simple takeaway is that, thanks in part to project-based learning and the maker movement (among other innovative curricula), younger and younger students are doing technologically smart and artistically interesting work.”

In the end, the school district let prevailing thoughts continue: just because students are using school equipment—often taxpayer funded—on school time does not mean the school owns what students create.

While Draft Policy 6160 did not pass, other interpretations over time show how the law can be changed through case law, policy, and practice. For example, after Slater’s case, in December of 2014 the U.S. Copyright Office issued the third edition of the *Compendium of U.S. Copyright Office Practices*. This volume specified that to qualify as a work of ‘authorship’ a work must be created by a human being. Works that do not satisfy this requirement are not copyrightable. The Office will not register works produced by nature, animals, or plants. The *Compendium* lists several examples of such ineligible works, including “a photograph taken by a monkey” and “a mural painted by an elephant” (chap. 300, p. 17). Still, neither the copyright law nor any interpretation of it makes any distinction based on age. Indeed, the website of the U.S. Copyright Office (2017) clearly states, “Minors may claim copyright, and the Copyright Office issues registrations to minors, but state laws may regulate the business dealings involving copyrights owned by minors.”

Independent School Districts (ISD) in Texas do not rely solely on federal laws. Administrators first turn to school district policy. Historically contained in multiple 6-inch binders, most districts have moved their policy handbooks online to make the easier to access. More than 90 percent of Texas school districts and education service centers use Policy On Line, a service of the Texas Association of School Boards to make district policies available to anyone with Internet access (Texas Association of School Boards, 2017). However, in accordance with Texas Education Code, Title 2, Subtitle C, Chapter 11, Subchapter A, the local board of trustees has the final say regarding school district policy. Since elected school board members rarely have the expertise to write policies on everything from copyright law to grading to dress codes, inevitably they defer to administrators, the superintendent of schools in particular, per the Texas Education Code. When looking for guidance in writing or amending policies, such administrators may look to nearby school districts, to the larger districts in the state, or to districts with more resources. In a similar manner, other state and local officials often look to nearby jurisdictions when adopting new policies or modifying old ones as part of the policy formulation and policy legitimation process to give the policies internal and external validity (Cairney, 2015; Slack, 2017).

Various researchers have developed models discussing such policy formation and modification at the national and regional level. Berry and Berry (1990), for example, hypothesized that the probability that a state will adopt a lottery is positively related to the number of states bordering it that have already adopted one (Elazar, 1972; Lutz, 1987; Mooney & Lee, 1995). Governments may be more likely to learn from nearby jurisdictions than those from far away because governments can more easily “analogize” to proximate jurisdictions (Berry & Berry, 2014). Whether states are dealing with the lottery or the legalization of marijuana laws (Carrillo, 2013), the pressure on lawmakers is greater when neighboring jurisdictions approve useful, popular, or profitable policies.

Such ideas resonate with the diffusion of innovation theory (Rogers, 2003), which explains how an innovation such as a new school district policy is communicated over time among the participants in a social system. In short, the

theory explains how early adopters, policy innovators who take the greatest risk, may develop policies. The innovators have the highest social status, have financial liquidity and have interaction with other innovators. They also risk failure. The early majority, the late majority, and the laggards have increasingly less risk but gain less social status.

Simply that one jurisdiction passes a policy may, however, not be enough to entice another district to pursue or adopt a similar policy. As agenda-setting models suggest, pressure from the news media and public opinion may push elected officials to policy development (Wilson, 2011). Further, officials from school districts that have already adopted a policy program presumably interact freely and mix thoroughly with officials from those districts that have not yet adopted it. Each contact by a not-yet-adopting district with a previous adopter provides an additional stimulus for the former to adopt (Berry & Berry, 1999) a policy.

Research Questions

Two research questions guide this research.

RQ1: Do school board policies in a suburban district like Lewisville, Texas, develop policies similar to surrounding districts in accordance with a diffusion theory of policy development?

RQ2: Did school administrators in Anthony Mazur's situation in Lewisville ISD follow both federal copyright laws and their own district policy?

Methodology

At the focus of the study are the policies of the Lewisville ISD, a district covering 127-square miles north of Dallas, including 13 of some of the fastest growing cities in the country. With 53,000 students, the district enrolls 49 percent white, 28 percent Hispanic, 12 percent Asian, and 9.4 percent African-American students. This is roughly similar to the population of the state and region (LISD, 2017; U.S. Census, 2015).

The situation involving Anthony Mazur—a high school sophomore who photographed images of school events in Lewisville ISD for the school yearbook and

uploaded them to the internet—was a high-profile and unique situation, the first of its kind according to the Student Press Law Center (LeBoeuf, 2016). However, because the situation was relatively high-profile, this researcher examined school board documents and documents made publicly available by the student, the student’s family, school administrators, and news media accounts.

Following the basic ideas of diffusion theory in policy development, two sets of Texas school district policies were examined: those of surrounding districts and those of the largest districts in the state, representing the geographic variety of Texas. In accordance with the first research question, districts adjacent to Lewisville should have a similar policy, making Lewisville ISD the early innovator while more distant districts would have policies more in line with the model policy from the state.

Of the hundreds and hundreds of policies adopted by each of the 1,247 public school districts in Lewisville ISD, only three were relevant for this research: a policy on Technology Resources dealing with availability of access, acceptable use and internet safety, a policy on Intellectual Property including who owns the rights and statements such as “A student shall retain all rights to work created as part of instruction or using District technology resources” and a policy addressing Employee Standards of Conduct including statements regarding use of electronic media. Policies from 22 of the 1,247 school districts, and related material when present, were downloaded in Microsoft Word from each district’s Policy On Line site and compared, word for word, using the Microsoft Word Compare Documents function.

Findings

In discussing Mazur’s situation, it becomes relevant to determine, first, if the student who was then a sophomore at Flower Mound High School was at all subject to the copyright laws and, hence the three policies adopted by the 1,247 Texas school districts. According to the provisions of federal copyright law, Mazur’s images were subject to copyright provisions: the student retained rights to reproduce the images. Were the works produced in fixed, tangible form? Yes. They were digital images uploaded to Flickr. Flickr does not assume any copyright of images. They remain

copyrighted by the creator. Were the works original? Yes. The student took the images, mostly of school sporting events at the public high school, himself. They were not derivatives. Because the works were subject to the copyright laws, the creator (alone) had the right to make copies of the images, to distribute the images, to create adaptations, and to display the works.

Given that the images Mazur produced held his copyright, the school district policies derived from those laws then merit scrutiny. When examining the policy, the first finding that became apparent was that the intellectual property policies, with only seven exceptions, were identical. Only one of the exceptions, Coppell ISD, was proximate to Lewisville ISD. While, on the surface, this appears to validate the diffusion model, not enough is known about the development of the policy to affirm the first research question, although some regional effects are apparent. It is likely that the school districts approve of a best practices model although this too has its drawbacks: “diffusion is biased toward policy innovations that have reached a certain degree of dissemination” (Schmitt, 2012, p. 38). More likely, the development of the policy takes more of a top-down approach coming from state associations that provide sample policies to school districts. While each district may adopt its own policy, the model policies and legal advice provided by the Texas Association of School Boards both push districts toward a common policy that, in their interpretation, would withstand court battles since they have already been vetted by state attorneys.

While the differences in all the policies, with two exceptions, were minor, making the affirmation of the first research question from convincing, two exceptions are worth noting. The Lewisville ISD Intellectual Property Policy clearly delineated students’ rights: “A student shall retain all rights to work created as part of instruction or using District technology resources.” All but two of the policies examined, policies governing more than 1.3 million students in Texas, have the exact same wording. Cypress-Fairbanks ISD outside of Houston edited the Intellectual Property Policy to read, “A student shall retain all rights to work created using District technology resources with the exception of work created for District-related projects.” That district removed the words “as part of instruction” and added the words “with the

exception of work created for District-related projects.” What was a district-related project was not defined, and it is unclear if a project such as the student newspaper, yearbook or website would be included or excluded from that section of the policy. Fort Bend ISD, located nearly 300 miles south of Lewisville on the southwest side of Houston, took a more radical approach. School board members there simply eliminated the entire section pertaining to students. Other changes in the Intellectual Property Policy were generally administrative, having more to do with training and punishment for violations than substantive issues. The policy for El Paso ISD in far west Texas and North East ISD near San Antonio both added substantive sections on training for employees and violations. The districts are 550 miles apart.

Regardless of what the Lewisville ISD policy said, one school district administrator disagreed. Mazur posted on his Flickr account his discussion with the school administrator. The comments are still accessible and have received more than 250 “favs” and nearly 150 comments. Mazur recounted the discussion that occurred after being summoned to the principal’s office, as well as the subsequent administrative directive:

“When I entered the principal’s office, he asked me to close the door, and on his computer screen was my Flickr website where I posted all my pictures. Angrily, he told me I had to take it down, that I did not own my pictures, that what I was doing was illegal. I told him about Argyle, about the trip, about U.S. Federal Copyright Law, which states whoever takes the picture owns the picture and can sell it. He didn’t listen. Instead, he threw stacks of papers in front of me, threatened me with ISS (In-School Suspension), banning me from school activities, games, and from school camera equipment.”

While the Lewisville Intellectual Property policy, last amended in May of 2011, was the policy most closely scrutinized for this discussion, a statement produced by the school district more than two months after the initial administrative action cited the district’s Acceptable Use Policy. The policy reads, in part, “Access to the District’s technology resources is a privilege, not a right.” A statement, released May 22, 2015 to the website PetaPixel, reads:

“According to Lewisville ISD’s Acceptable Use Policy, the electronic communications system is defined as the district’s network (including the wireless network), servers, computer workstations, mobile technologies, peripherals, applications, databases, online resources, Internet access, email and any other technology designated for use by students, including all new technologies as they become available. The district considers the use of said technologies to be inappropriate when a student electronically posts data (including but not limited to audio recordings, video recordings, images and personal information) about others or oneself when it is not related to a class project and/or without the permission of all parties” (Archambault, 2015).

Lewisville ISD’s practice is if anyone attending a public district event takes photos using their own device from an area accessible to the public, the district would not interfere with those photos being posted to a third-party site. The district is not at liberty to share student information pertaining to this situation due to the Family Educational Rights and Privacy Act (FERPA).

Neither the Acceptable Use Policy nor any other published communications in this matter specifically reference another clause in the policy: “Limited personal use of the District’s technology resources shall be permitted if the use: (4) Has no commercial purpose,” one of the concerns school administrators cited when dealing with the student. Even in his initial postings, Mazur admitted selling the images, modeling a program at nearby Argyle High School in which students sell their images online using SmugMug. Mazur stated, “I’m not a millionaire, but I’m just a sophomore and a few parents were interested and I thought that was pretty cool” (LeBoeuf, 2015). Further, the Right of Publicity does not seem to apply because the images were taken under the auspices of a journalistic entity, the yearbook. FERPA does not, in any way, apply because all of the action takes place in a public arena and no school records are involved. Finally, other cases have helped to define privacy related to journalistic coverage and at school, including *Mark v. King Broadcasting Co.*, 618 P.2d 512 (1980); *New Jersey v. TLO*, 469 US 325 (1985); *Virgil v. Time, Inc.*, 424 F. Supp. 1286, 1289 (S.D.

Cal. 1976); *Lee v. Penthouse International Ltd.*, 1997 WL 406299 173 (C.D.Cal.1997); and *Michaels v. Internet Entertainment Group, Inc.*, 5 F.Supp.2d 823 (C.D. Cal. 1998).

In addition, as a sophomore, junior, and senior in high school, Mazur was doing what tens of thousands of student journalists do every day—distributing news. He was not selling a separate product that might invoke the Right of Publicity which, in Texas, by statute, applies to deceased individuals and to others as a common law, property right. As per *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) and *Henley v. Dillard Dep't Stores*, 46 F.Supp.2d 587 (N.D. Tex. 1999), the common law right excludes material created for a newsworthy purpose.

While the federal copyright laws support most public school district policies on copyright, there is no federal model for acceptable use policies. Nevertheless, the Lewisville policy closely resembled, word for word, comma for comma, the policies from similar school districts with one notable exception. Lewisville ISD was the only district of the 22 school districts whose policies were examined that included the clause prohibiting use of the District's technology purposes for commercial purposes perhaps moving toward development of a policy regarding Right of Publicity, the right to control the commercial use of one's identity. However, the Lewisville ISD policy did not define a "commercial purpose." Even the two districts that substantially rewrote the policy—Dallas ISD and Northside ISD outside San Antonio—did not include that clause or anything similar, and those two districts are more than half a state away from each other.

Four other districts made other minor changes to the policy. Two, Northwest ISD and Plano ISD, were proximate to Lewisville and they made different changes, involving digital signatures and acceptance of the Acceptable Use Policy. Fort Bend ISD removed the entire section on use of technological resources by members of the public.

Commercial purposes notwithstanding, at a June 15, 2015 Lewisville ISD (LISD) Board of Trustees meeting, elected trustees granted the student's parents' appeal and unanimously set aside the administrative directive. Board member Brenda Latham said, "The student will be allowed to use his or her own equipment and

photograph LISD events open to the public from public viewing areas.” The Board was prohibiting the student from using school equipment that any other student could use and could only take pictures in areas open to the general public (not the sidelines of football games, for example). To some people, that decision left more questions than answers about how the school district policies and copyright laws were being interpreted.

However, the saga did not end there, even with the school board ruling. In September 2015, school administrators began requiring students in the yearbook class to sign an agreement that the district owns the copyright to any work they produce. “Students who don’t sign the contract—essentially a work for hire agreement—may be denied access to district-owned equipment and/or press credentials, except for school-specific assignments” (Goldstein and Will, 2015). The form was not available on the school’s website and was not contained as part of the 73-page Lewisville ISD Student Handbook or the 11-page Flower Mound High School supplement. The contract was still in use for the 2016-2017 academic year. Adam Goldstein, an attorney for the Student Press Law Center, in an online video, said,

“Anthony signed up for the yearbook class this year. The school says nothing until a little over a week before the start of the class and then they sent around this document they want everyone to sign and it’s titled ‘School Rules Regarding District Equipment.’ It tries to be a work-for-hire contract. Now Anthony’s being told that if he doesn’t sign this agreement he’s not allowed to participate in the yearbook, that he’s going to be administratively dropped from the yearbook class. Since the district owns the computers in the yearbook room and he has to use the computers to upload stuff for the yearbook, he can’t participate unless he agrees that the district owns everything he does, which is ridiculous for a lot of reasons” (Goldstein and Will, 2015).

The school district tried to force students in a public school curriculum to sign a work-for-hire agreement giving up their rights for works produced as part of the course.

Goldstein continued to cite reasons why the Lewisville ISD contract was not practical and was probably illegal including that it was coercive in violation of 17

U.S.C. Sec. 201 of the U.S. copyright laws. The law states, in part, “Copyright in a work protected under this title vests initially in the author or authors of the work.” The law was written, Goldstein continued, with a lack of consideration for work-for-hire agreements as independent contractors, “What this really looks like . . . is extortion,” Goldstein said. “There’s no legitimate reason to do this. No other school in the country has felt the need to do this. For decades, we’ve managed to get through public education without doing this. The district is having a temper tantrum because they didn’t get their way.” Mazur refused to sign the contract and, a few days later, a spokeswoman for the school district said students would not be transferred out of the class if they refused to sign.

However, a year later, Mazur, who graduated from high school in May 2017, described this as an “abhorrent” contract that was still in place.

“The ‘work for hire’ contract was pushed onto every student in LISD, even in middle school, who used school cameras in class. Included in the contract was prohibitions of even saving the photos, so students, according to the contract, couldn’t even have copies of their own work, so no portfolios or submitting to contests. If you didn’t sign the contract, you would be denied from using school equipment and had to use your own” (A. Mazur, 2017).

Although no legal action has been taken against the school district, Anthony said in the same email, “The contract is probably 10 times more illegal than it already was, because now they’re not even trying to pretend it’s a valid agreement.” Anthony’s father, Len, said,

“Indeed, at the end of the long appeals process, Anthony was able to repost his images and was not ultimately punished or suspended as originally sought by the district. It is my point of view that the district was not penalized in any way for violating Anthony’s copyrights or his ability to conduct commerce in the state of Texas. Having the district back down on harassing Anthony does not mitigate the violation or damages that they were responsible for” (L. Mazur, 2017).

So, while the school district continues to uphold that it owns the intellectual property rights—including at least some of those rights related to works produced by students, it has yet to reconcile that with existing Intellectual Property Policy that continues to state, “A student shall retain all rights to work. . . .”

While Lewisville administrators may continue to act seemingly in violation of the district’s own policy, the policies of surrounding school districts related to Intellectual Property, Employee Standards of Conduct, and Technology Resources remain very consistent. What few variations found in the policies have not diffused into surrounding areas. Neither has the idea brought forward by Lewisville administrators that the district owns the rights to student work.

Conclusions

Two research questions guided this research. The first research question asked if school board policies in a suburban district like Lewisville were developed similar to policies of surrounding districts in accordance with a diffusion theory of policy development. Evidence affirming the use of diffusion theory to explain local government policy development was weak. There was little data in the study to support causation. Still, the ideas of diffusion theory when applied to local policy development should not be discarded. When examining the first policy, Intellectual Property Policy, all but one of the adjacent school districts had the same wording. And the large nearby school districts (Fort Worth and Dallas) also had the same wording. When examining the second policy, Technology Resources, a policy clearly influenced more by local ideas, values and beliefs than a federal law such as the copyright law, all of the surrounding policies had the same deletion of the clause regarding commercial use of district technology. Dallas and Fort Worth had a similar policy. However, upon closer examination, the other differences did not vary geographically.

To fully study diffusion theory on a given policy, the history of the policy would have to be documented over time from conception to implementation. These policies were at least three years old and many did not include legislative history.

Given that online sites only include the current version of the policy this could be a continuing problem for researchers. In addition, school board minutes only indicate that a change was made. They make little, if any, reference to the discussion regarding that change.

The second research question sought to determine if school administrators in followed either copyright law or school district policy given that policies are written in accordance with federal, state and local laws. District administrators eventually acknowledged that the student had neither violated copyright laws nor FERPA despite the principal's discussion that posting the images taken at public sporting events was a violation of FERPA. There was no mention of the Right of Publicity at any level. At the school board meeting, the superintendent, however, argued that the student photographer posted images of people without their consent in violation of the district's Acceptable Use Policy. Ultimately the elected officials chose to follow their own policy, unanimously approving a motion which left the family of the photographer confused—again. A school official later clarified that the student would be allowed to repost all of his images. However, school district spokeswoman Elizabeth Haas declined to comment on the specifics of the board's ruling, citing FERPA (LeBoeuf, 2016).¹

While individual administrators initially followed neither the copyright law as written and interpreted nor the district's policy, ultimately the elected school board for Lewisville ISD did follow both. As of spring 2017, Mazur has almost 16,000 images posted on Flickr including thousands of school events. All of them carry Mazur's personal copyright notice—"all rights reserved." However, Mazur said, "Our yearbooks were handed out yesterday and the school didn't give me photo credit for any of the photos they used from me" (Mazur, May 12, 2017). In addition, he received no compensation for the images that were downloaded from his Flickr site, images taken with his own equipment on his own time. "The saga continues," he said.

¹ FERPA would have prevented the spokesperson from discussing actions regarding student discipline that took place during executive session. However, the policy implications were not subject to FERPA and remain unclear.

Future Research

This examination of implementation and interpretation of copyright law and local government policies in a fast-changing media environment leaves room for future research. Policies rarely keep up with advances in technology. Both Slater, the photographer of the monkey, and the parents of Mazur acknowledged this. Slater made it possible for the photograph to be taken even if he did not click the shutter. Is the same true for images taken from an automated drone or taken when using a self-timer? Mazur's parents argued that the district's Acceptable Use Policy (AUP) did not apply because the student uploaded the images at home, not using school equipment. Further, use of the school camera did not violate the AUP because the camera itself does not upload images. But even today, an Eye-Fi card makes it possible for a camera such as the one the student used to upload images automatically. And digital cameras on the market now include WiFi. Click the shutter and the image may be instantly transmitted off-site.

In terms of policy development, Fort Bend ISD and Cypress-Fairbanks ISD are suburbs of Houston, only 40 miles apart and both on the West side of town. If the diffusion theory of policy development has a more local rather than statewide effect, policies in the Houston area are worth further examination to determine if there are other policies that curtail freedoms.

Of course, policy adoption is often more complex than simply having an adjoining jurisdiction approve a new policy. Berry and Berry (2014), for example, propose:

$$\text{ADOPTION}_{i,t} = f(\text{MOTIVATION}_{i,t}, \text{RESOURCES/OBSTACLES}_{i,t}, \\ \text{OTHER POLICIES}_{i,t}, \text{EXTERNAL}_{i,t})$$

Information (i) on the factors (f) of motivation, resources/obstacles, and external influences for the policies studied here, policies that have been enacted for at least four years of time (t) and for which no legislative history is available, is not practical. However, the motivations for elected officials to approve policies regarding copyright of student work, establishing work-for-hire policies for employees and students, and the implications of Right of Publicity regulations merit further examination,

particularly when such well-established legal principles might be at odds with each other.

Copyright and acceptable use are not the only legal concepts worth exploring around this case. One of the comments posted to Mazur's Flickr account brought up another issue—privacy, a right not clearly guaranteed by the U.S. Constitution. “People in the Free World have to come to understand that the minute you step out of the privacy of your home, there is no privacy. You've gone public” (Mazur, 2015). The public statement issued by the Lewisville ISD alluded to privacy issues when officials stated the photographer would have to get the permission of all parties before posting images for journalistic purposes. When appealing the administrative decision to the principal, and eventually the superintendent, Mazur said he got more confused regarding the issue of privacy. “Mazur said his parents were told by [Principal Sonya] Lail that not only did Mazur not own the copyright to the photos, but that posting them online also violated FERPA, the student privacy law” (LeBoeuf, 2015). The superintendent determined that no one had violated FERPA (20 U.S.C. § 1232g; 34 CFR Part 99),² a Federal law that protects the privacy of student education records.

In the fourth edition of *Law of the Student Press*, the Student Press Law Center devotes an entire chapter to privacy. Privacy merits further discussion in the context of taking photos at school events and on school grounds and posting them online in light of the four tenets of invasion of privacy: (1) public disclosure of private and embarrassing facts; (2) intrusion upon seclusion; (3) false light; and (4) misappropriation (LoMonte, 2013). Such works are clearly exempt from the Texas Property Code (Title 4, Chap. 26), more commonly known as the Right of Publicity, that protects against use of a person's name or likeness for commercial purposes. Can

² The courts continue to uphold that, when contested, “FERPA is not a law which prohibits disclosure of educational records. It is a provision which imposes a penalty for the disclosure of educational record” (*Bauer v. Kincaid*, 759 F. Supp. 575, 589, 1991). Yet the courts also maintain that once federal funds are accepted, “the school is indeed prohibited from systematically releasing education records without consent” (*United States v. Miami University*, 294 F.3d at 809-810). Clearly “state and federal courts are sharply divided on this issue” (*Caledonian-Record Publishing Company v. Vermont. State College*, 833 A.2d at 1273, 1274-76, 2003).

a Texas newspaper sell a picture published in the news publication without violating the Property Code?

In addition, the student at the focus of this situation was a minor. The copyright law does not differentiate between authors who are adults and those who are still minors and defers to state laws for contractual issues. In terms of the subjects of photojournalistic images for publication, as long as a person, even a minor, understands what he is consenting to and realizes the consequences of allowing such information to be published, the consent (express or implied) should be valid (LoMonte, 2013). What do states use to determine whether a minor can enter into a contractual relationship for the terms of copyright? Partly because of issues dealing with consent, the U.S. Copyright office has refused to grant copyright to non-humans. Yet the issues surrounding copyright held by minors warrants further exploration possibly on a state-by-state basis. The copyright might be owned by the creator by the contract might have to be executed by the parents, just as Mazur's parents had to make the appeal to the school board. And the implications of FERPA in a public setting also warrant exploration. Lawmakers wrote FERPA to protect educational records not discussions at a school board meeting. Could works created in the classroom be subject to FERPA?

Finally, as discussed, the copyright law provides for one clear exception—works for hire. Employers own the copyright of works created by their employees while working the scope of their employment (17 U.S.C.S. Sec. 101, 1977; Supp. 1992). The U.S. Supreme Court in a unanimous decision in *Creative Non-Violence v. Reid* (490 U.S. 730, 1989) provided a list of factors in determining whether someone is an employee or an independent contractor. A savvy lawyer might argue that special privileges granted to student media participants constitute compensation and, therefore, employment. In this situation, elected school officials resolved Mazur's case before it went to court and school district policy remains written in favor of the students and their ownership of the copyright to works they produce. The next situation might result in students' rights being limited when they enter the schoolhouse gates.

References

- Archambault, Michael. (May 21, 2015). "High School Forces Student to Remove Online Photos Under Threat of Suspension." Retrieved from <https://petapixel.com/2015/05/21/high-school-forces-student-to-remove-online-photos-under-threat-of-suspension/>
- Berry, Frances Stokes, and William D. Berry. (2014). "Innovation and Diffusion Models in Policy Research" in *Theories of the Policy Process*, Paul Sabatier, ed. Boulder, CO: Westview Press, pp. 307-362.
- Berry, Frances Stokes and William D. Berry. (1990). "State Lottery Adoptions as Policy Innovations: An Event History Analysis," *American Political Science Review* 84: 395-415.
- Cairney, Paul. (2016). *The Politics of Evidence-Based Policymaking*. London: Palgrave Pivot.
- Carrillo, Dolores Elizabeth. (2013). *A Growing Trend: Policy Diffusion of Medical Marijuana Laws in the American States* (Master's Thesis). San Diego State University, San Diego, California.
- Community for Non-Violence v. Reid*, 490 U.S. 730 (1989).
- Elazar, Daniel. (1972). *American Federalism: A View from the States*. New York, NY: Thomas Crowell.
- Eversley, Melanie. (April 18, 2015). "Iconic Oklahoma City Photo Caused Twists and Turns," *USA Today*. Retrieved from <https://www.usatoday.com/story/news/2015/04/18/oklahoma-city-photo/25957831/>
- Goldstein, Adam and Madeline Will. "Texas High School Is Requiring Students in Yearbook Class to Sign Over the Copyright to Their Work." Retrieved from <http://www.splc.org/blog/splc/2015/09/texas-high-school-requiring-students-in-yearbook-class-to-give-school-the-copyright-to-their-work>
- Goldstein, Adam. (Sept. 4, 2015). "Flower Mound High School's Failure at Work for Hire." Video retrieved online from <https://www.youtube.com/watch?v=1mTuKHdCN90>
- Keller, Kristen. (Nov. 12, 2015). "When Students Get Creative, Should Schools Own Copyright?" Retrieved from <https://www.noodle.com/articles/who-owns-the-copyright-to-student-schoolwork164>
- LeBoeuf, Trisha. (June 18, 2015). "Texas High School Student Released from Administrative Directive, but Questions Still Remain." Retrieved from <http://www.splc.org/article/2015/06/texas-high-school-student-released-from-administrative-directive-but-questions-still-remain>.
- LeBoeuf, Trisha. (Jan. 29, 2016). "Copywrong: Students Often Clash with Administrators Over Copyright Law." Retrieved from <http://www.splc.org/article/2016/01/copyright-or-copywrong>
- Lewisville ISD: Real Innovation, Limitless Opportunity*. (2017). Retrieved from <http://www.lisd.net/Page/9115>
- LoMonte, Frank D., Adam Goldstein, and Michael Hiestand. (2013). *Law of the Student Press* (4th ed.). Arlington, Virginia: Student Press Law Center.
- Lutz, James M. (1987). "Regional Leadership Patterns in the Diffusion of Public Policies," *American Politics Quarterly* 15: 387-398.
- Martinez, Nicole. (Nov. 22, 2015). "Can a District Claim Copyright in its Student Art?" *Art Law Journal*. Retrieved online from <http://artlawjournal.com/school-copyright-in-student-work/>
- Mazur, Anthony (May 19, 2015). "I AM Anthony." Retrieved from <https://www.flickr.com/photos/129536761@N08/17840279472>
- Mazur, Anthony. (April 17, 2017). "Question for Me." Personal correspondence.
- Mazur, Len. (April 18, 2017). "#IAMAnthony research question." Personal correspondence.
- Mooney, Christopher, & Lee, Mei-Hsien (1995). "Legislative Morality in the American States: The Case of Pre-Roe Abortion Regulation Reform." *American Journal of Political Science*, 39: 599-627.

- Osborne, Stephen P., and Brown, L. (2013). *Handbook of Innovation in Public Services*. Northampton, MA: Edward Elgar Publishing.
- Picchi, Aimee. (Aug. 22, 2014). "U. S. Says Copyrighting a 'Monkey Selfie' Is Bananas." CBSNews. Retrieved from <https://www.cbsnews.com/news/us-says-copyrighting-a-monkey-selfie-is-bananas/>
- Prince George's County Public Schools. (Feb. 7, 2013). "Board of Education Policy: Use and Creation of Copyrighted Materials." Retrieved from <https://www.scribd.com/document/123663365/Prince-George-s-County-Public-Schools-Board-of-Education-proposal>
- Rogers, E. (2003). *Diffusion of Innovations* (5th ed.). New York, NY: The Free Press.
- Sabatier, P., & Weible, C. (2014). *Theories of the Policy Process* (3rd ed.). Boulder, CO: Westview Press.
- Schmitt, S. (2012). "Comparative Approaches to the Study of Public Policy-Making" in *Routledge Handbook of Public Policy* (29-43). Eds., E. Araral, S. Fritzen, M. Howlett, M. Ramesh, & X. Wu. Abingdon, VA: Routledge.
- Slack, Brian. (2017) "The Policy Process" in *The Geography of Transport Systems*, 4th ed. Jean-Paul Rodrigue with Claude Comtois and Brian Slack. New York: Routledge. Retrieved from <https://people.hofstra.edu/geotrans/index.html>.
- Sparkes, Matthew. (Aug. 6, 2014). "Wikipedia Refuses to Delete Photo as 'Monkey Owns It.'" Retrieved from <http://www.telegraph.co.uk/technology/news/11015672/Wikipedia-refuses-to-delete-photo-as-monkey-owns-it.html>
- Student Press Law Center. (2016). "Student Media Guide to Copyright Law." Retrieved from <http://www.splc.org/article/2015/08/student-media-guide-to-copyright-law>.
- Texas Association of School Boards. (2017). <https://www.tasb.org/Services/Policy-Service/Policy-Maintenance-Services/Policy-On-Line.aspx>
- U.S. Census. (2017) "QuickFacts: Texas." Retrieved from <http://www.census.gov/quickfacts/table/PST045215/48>.
- U.S. Copyright Office. (2017). "Who Can Register?" Retrieved from <https://www.copyright.gov/help/faq/faq-who.html>
- U.S. Copyright Office. (2014). *Compendium of Copyright Office Practices*, 3rd ed. Washington, D.C.: U.S. Government Printing Office.
- Weissmann, Jordan. (Aug. 6, 2014). "If a Monkey Takes a Selfie, Who Owns the Copyright?" Retrieved online from http://www.slate.com/blogs/moneybox/2014/08/06/monkey_selfie_who_owns_the_copyright.html.
- Wiggins, Ovetta. (Feb. 2, 2013). "Prince George's Considers Copyright Policy that Takes Ownership of Students' Work." *Washington Post*. Retrieved from https://www.washingtonpost.com/local/education/prince-georges-considers-copyright-policy-that-takes-ownership-of-students-work/2013/02/02/dc592dea-6b08-11e2-ada3-d86a4806d5ee_story.html?utm_term=.93cc33a0e20a.
- Wilson, Bradley. (April 10, 2011). "The Impact of Media Agenda Setting on Local Governments: Examining the Relationship between Media Coverage and Policy Outcomes" presented at the Western Political Science Association Annual Meeting.