

Copyright & Fair Use Issues

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OBJECTIVES

- ❑ Provide an overview of copyright law and current issues
- ❑ Discuss Fair Use and the framework you must use to determine whether your manner and use of information is permitted by law
- ❑ Discuss how distance education and the internet interact with copyright law
- ❑ Answer, or get answers, to questions you have

Current Issues in Copyright

- ❑ Fair Use
 - ❑ Google Settlement and Hathi Trust Case (scanning)
 - ❑ Georgia State Suit (materials in Electronic reserves)
 - ❑ Harry Potter (Lexcion guidebook a derivative)

- ❑ Copyright Infringement
 - ❑ Plagiarism Software (Turnitin)
 - ❑ CourseHero.com
 - ❑ Postyourtest.com Exam Website
 - ❑ Electronic Course Materials & Blackboard

- ❑ Anti-Circumvention Rules

- ❑ Orphan Works legislation

- ❑ Coursera--MOOCs

Current Issues: Copyright Infringement

- ❑ Georgia State Case:
 - ❑ University of Georgia sued by three major publishers:
 - ❑ Oxford University Press, Cambridge University Press, and SAGE Publishers.
 - ❑ Publishers claim that the University repeatedly provides their copyright materials in electronic form without permission.
 - ❑ The publishers are arguing violations should be looked at across the entire University as a whole as opposed to looking at each use by a particular individual.
 - ❑ The problem is not only course packets but digital downloading from Blackboard and similar sites.
- ❑ 5 of 75 alleged infringements were confirmed in a 340 page decision. No concrete guidance, just the rule that fair use is fact specific and must be applied on a case by case basis.
- ❑ On appeal to the 9th Circuit.

WHAT IS COPYRIGHT?

- ❑ Copyright is the form of protection provided by the laws of the United States to authors of “original works of authorship” including literary, dramatic, musical, artistic and certain other works.

WHO IS AN AUTHOR?

- ❑ An author is someone who provides significant creative input into the expression of an idea in a fixed form.
- ❑ There can be more than one author.
- ❑ Substantial contribution to conception, design, drafting, analysis, and critical revision.
- ❑ Providing \$ alone does not constitute authorship unless considered “Work for Hire”.

WHAT IS NOT PROTECTED

- ❑ Blank forms, processes, ideas, methods as opposed to explanations or descriptions
- ❑ Government documents and publications—exceptions?
- ❑ Titles, slogans, short phrases – trademark law?

WHAT DOES A COPYRIGHT DO?

- ❑ Provides the copyright owner with the following exclusive rights:
 - ❑ To reproduce the work in copies or phonorecords;
 - ❑ To prepare derivative works based upon the copyrighted work;
 - ❑ To distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or rental, lease or lending;

WHAT DOES A COPYRIGHT DO?

(Continued)

- ❑ Provides the copyright owner with the following exclusive rights:
 - ❑ In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the work publicly;
 - ❑ In the case of sound recordings, to perform the work publicly by means of a digital audio transmission.

Section 106, Copyright Act of 1976, 17 U.S.C. §106

COPYRIGHT OWNER VS. AUTHOR

- ❑ Note that the statutory rights described above attach to the copyright owner, not the author.
- ❑ The owner of a copyright may not have made any creative input into the work, i.e., purchase of a copyrighted work or publisher.
- ❑ Where the work is considered a “work made for hire,” the employer rather than the employee is presumed to be the author.

WORKS MADE FOR HIRE

as defined under 17 U.S.C. Section 201(b)

A “work made for hire” is defined as:

- (1) “a work prepared by an employee within the scope of his or her employment”; or
- (2) “a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the works shall be considered a work made for hire.”

COPYRIGHT OWNERSHIP

- ❑ Any of the exclusive rights of the copyright owner may be transferred separately.
- ❑ However, the transfer of any of the owner's exclusive rights is not valid unless the transfer is in writing and signed by the owner of the rights which are being conveyed.

COPYRIGHT OWNERSHIP

- ❑ Mere ownership of a book, manuscript, painting or any other copy or phonorecord does not give the possessor the copyright without some written evidence of actual transfer of the copyright to the Work.

Common Transfers of Ownership

- ❑ Publishing agreements wherein authors assign their rights to the publisher.
- ❑ Personal Services Contracts wherein individuals are commissioned to do specific work and in exchange for payment, they assign their rights to the contracting person or entity.
- ❑ Note: work done for an employer at the direction of an employer is presumed a Work Made for Hire. Evidence of the employment relationship suffices to give ownership to employer rather than employee.

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COPYRIGHT POLICY 11-02-02:

- ❑ Follows US copyright statute and states that a work created by a person in the course of his or her employment belongs to the employer rather than the individual creator. This is the principle of “Works Made for Hire.”
- ❑ All University staff creating copyrightable work in the course of his or her employment is engaged in “Works Made for Hire” and the University is considered the owner (and author) of such works.

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COPYRIGHT POLICY 11-02-02:

- ❑ There is an exception created in the University Copyright Policy for faculty and students who create “Scholarly Work” in connection with their faculty duties.
- ❑ “Scholarly Work” is defined in the policy as “scholarly, creative, musical, literary or architectural work, in the author’s field of expertise... such as scientific or scholarly research papers, popular nonfiction, novels, textbooks, computer programs, poems, musical compositions, films, webpages, lecture notes, dramatic works or other works of artistic imagination.” Para. IIA.

SCHOLARLY WORK UNDER THE COPYRIGHT POLICY 11-02-02:

- ❑ Faculty and Student Scholarly Work is owned by the faculty/student even if University time and resources are used to create the materials.
- ❑ The University retains a non-exclusive, perpetual, and irrevocable world-wide license to use course material and to make derivatives of the course material (but not to publish the course material outside the University setting).
- ❑ Under Proposed Open Access Policy, the University will retain a license to post faculty scholarly work in its digital repository (under a creative commons license) and to Pub Med Central. There will be notice to faculty and an opportunity to opt out.

Scholarly Work Exceptions

- ❑ The University does retain title to Scholarly Work created by faculty and students in the following circumstances:
 - ❑ Assigned Tasks
 - ❑ Outside Agreements
 - ❑ Patentable Works
 - ❑ Institutional Works
 - ❑ Recording, transmission and related classroom technology. The University owns recording; faculty must seek permission to use recording at another institution.

Royalty Share from Commercializing University Owned Copyright Material

- ❑ 50% share to authors/developers
- ❑ 25% to department or school of the authors/developers
- ❑ 25% to copyright development fund

SECURING A COPYRIGHT

- ❑ Copyright is secured automatically when the work is created (i.e. fixed in a tangible form).
- ❑ A copyright notice © is not required but is always recommended if you intend to have any protection in the work.



COPYRIGHT NOTICE

- ❑ A copyright notice is currently not required under U.S. law to have copyright protection. However, use of the notice is still valuable because it clearly informs the public that the work is protected by copyright, identifies the owner of the copyright, and states the year of first publication of the work.
- ❑ Prior to January 1, 1978, works published without a notice passed into the “public domain” and received no copyright protection at all.



COPYRIGHT NOTICE

- ❑ More importantly, the copyright notice prevents an infringer who had access to the work from claiming that they are an innocent infringer.
- ❑ Copyright Notice is different from Copyright Registration.

COPYRIGHT NOTICE

Elements

- The symbol © (the letter “C” inside a circle), the word “Copyright,” or the abbreviation “Copr.”;
- The name of the owner of the copyright;
- The year of the first publication of the work.

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FORMAL COPYRIGHT REGISTRATION

- ❑ To reiterate, formal registration of copyright ownership with the United States Copyright Office, Library of Congress, is not a requirement or prerequisite for copyright protection.
- ❑ However, registration with the Copyright Office provides a number of benefits.

LIABILITY FOR COPYRIGHT INFRINGEMENT

- ❑ Willful infringement can result in damages of up to \$150,000 for each separate act of infringement
- ❑ Copyright owners are likely to sue the individual(s) involved as well as the University
- ❑ Criminal Liability

FAIR USE

- ❑ GOOD FAITH FAIR USE DEFENSE (17 U.S.C § 504(c)(2)).
- ❑ Acts as a defense to copyright infringement allegations.
- ❑ In questionable cases of Fair Use, always obtain written permission.

FAIR USE

❑ GOOD FAITH FAIR USE DEFENSE (17 U.S.C § 504(c)(2))

- ❑ This provision allows a court to refuse to award damages.
- ❑ This defense applies only if the infringer reasonably believed what he or she did was a fair use.

FAIR USE

- ❑ Section 107 of the Copyright Act of 1976:
 - ❑ Limitations on exclusive rights: Fair Use
 - ❑ Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

FAIR USE FACTORS

- Purpose of the Use
- Nature of the Work
- Amount of Work Copied
- Effect on the Market for the Work

PURPOSE OF THE USE

- ❑ Nonprofit or educational (favors fair use)
 - ❑ Teaching, research, scholarship, criticism, comment

- ❑ Commercial (against fair use)
 - ❑ Commercial, entertainment, profit generating.

- ❑ Transformative (favors fair use)
 - ❑ Change work to serve a new purpose (parody)

- ❑ Nontransformative (against fair use)
 - ❑ Verbatim

NATURE OF THE WORK

- ❑ Factual, nonfiction, news (favors fair use)
 - ❑ Teaching, research, scholarship, criticism, comment

- ❑ Creative (against fair use)
 - ❑ Art, music, fiction or consumable works (workbooks and tests)

- ❑ Published work (favors fair use)

- ❑ Unpublished work (against fair use)

AMOUNT OF WORK COPIED

- ❑ Small quantity (favors fair use)
- ❑ Portion used not central to the work (favors fair use)
- ❑ Significant and key portions of work used (against fair use)
- ❑ Portion used is at the “heart” of the work (against fair use)

EFFECT ON THE MARKET

- ❑ No significant effect on the market or potential market (favors fair use)
 - ❑ Scholarly article, dated material, no author identified
 - ❑ One or a few copies distributed

- ❑ One time, spontaneous use (favors fair use)

- ❑ Restricted access (favors fair use)

- ❑ Cumulative effect of copying substitutes the purchase of the copyrighted work (against fair use)
 - ❑ Art, music, fiction or consumable works (workbooks and tests)

- ❑ Numerous copies made and repeated long term use (against fair use)

FAIR USE

- ❑ Tips for using copyrighted material
 - ❑ Include the original copyright notice and site to the original work.
 - ❑ Limit access to course participants.
 - ❑ Link to the source of a document rather than scanning the document.
 - ❑ When in doubt, it's best to ask for permission.

FAIR USE

- ❑ Tips for using copyrighted material
 - ❑ Purchase the rights or a license for use of copyrighted material.
 - ❑ Get permission if the use of a copyrighted work is going to be long-term.
 - ❑ Don't use a lot of somebody else's work.
 - ❑ Note that making copies of electronic reserves is subject to the copyright laws.

TEACH ACT

- ❑ Permits teachers to display and perform, electronically, materials that would have previously only been permitted to have been displayed face to face in the classroom
- ❑ Deals with distance education via digital transmissions
- ❑ Several requirements under the TEACH ACT. First look to TEACH ACT for distance education. If you meet this criteria, proceed.

TEACH ACT

- ❑ Fair Use or Permissions still play a role because of the initial copy you intend to display via digital transmission.
- ❑ Only for in class displays and performances; not for example, supplemental reading material (still need to rely on Fair Use)

TEACH ACT

- ❑ Step 1) Is there an existing agreement regarding the copyrighted materials?
- ❑ Step 2) Could these materials be used during an in class lecture (Fair Use)?
- ❑ Step 3) Are the requirements of the TEACH Act met?

TEACH ACT-Use

☐ Types of Works Included

- ☐ “performances of reasonable and limited portions of works other than nondramatic literary and musical works” House Report on TEACH Act.
 - ☐ Must be related to the materials being taught (not for entertainment use).
- ☐ Works in a comparable format as in-class teaching (note exceptions below)

☐ Types of Works not Included

- ☐ Entire videos. (They *may* still be available through fair use).
- ☐ Digital materials designed and sold for the purpose of online education. (In-Part or Have not been Purchased).
- ☐ Textbooks, course packets, e-reserves (materials traditionally purchased by in class students).

TEACH ACT-Use

Nondramatic literary work	Entire Work
Music	Entire Work
Audio Visual Works	Limited Portion
Motion Pictures	Limited Portion
Work Produced Solely for Online Instruction	None-unless you have permission (through copyright, purchase...etc.)

TEACH ACT: Requirements

- The materials are of the proper type and amount the law authorizes:
 - Entire performances of nondramatic literary and musical works (short stories, poetry)
 - Reasonable and limited parts of a dramatic literary, musical, or audiovisual works
 - Displays of other works, such as images, in amounts similar to typical displays in face-to-face teaching (still images)

TEACH ACT: Requirements

Cont' d

- ❑ The institution must be a nonprofit accredited educational institution or a governmental agency
- ❑ The institution must have a policy on the use of copyrighted materials
(UP Policy 10-04-01)
- ❑ The institution must provide accurate information to faculty, students and staff about copyright
- ❑ The systems will not interfere with technological controls within the materials to be used

TEACH ACT: Requirements

Cont' d

- ❑ The materials you want to use are specifically for students in your class
- ❑ Your class is part of the regular offerings of the University
- ❑ Only those students will have access to the materials

TEACH ACT: Requirements

Cont' d

- ❑ The materials will be provided at your direction during the relevant lesson
- ❑ You may only make the materials available to the students for a period of time that is relevant to the context of a class session
- ❑ The materials must be directly related and of material assistance to the teaching content

TEACH ACT: Requirements

Cont' d

- ❑ You must include a notice that the materials are protected by copyright
- ❑ “These materials are protected by copyright- unauthorized reproduction or further distribution is prohibited”
- ❑ You must also use technology that reasonably limits the students’ ability to retain or further distribute the materials

TEACH ACT: Requirements

Cont' d

- ❑ You may only store the materials on a secure server and transmit them only as permitted by this law
- ❑ You may not make any copies other than the one you need to make the transmission (unless otherwise agreed to by the copyright holder)

TEACH ACT: Requirements

Cont' d

- The following materials are specifically excluded from coverage under the TEACH ACT as unlawful:
 - Materials specifically marketed for classroom use for digital distance education
 - Copies which are known to be illegal
 - Textbooks, coursepacks, electronic reserves and similar materials typically purchased individually by the students for independent review outside the classroom or class session

TEACH ACT: Requirements

Cont' d

- ❑ If you are using an analog original, check before digitizing it to be sure that you copy only the amount that you are authorized to transmit.
- ❑ You may make a digital copy only when there is no digital copy of the work available in the format and length that the statute authorizes.

Repeat Problems

- ❑ You Tube® Uploads (share the link)
- ❑ Images and Pictures (share the link or create your own)
- ❑ Using Music from a Website (make sure you have the rights)
- ❑ Digitizing Entire Movies on Blackboard (don't do it)
- ❑ Copyright Credits in Blackboard (do it)
- ❑ When in doubt, get a permission for electronic and digital uses!

USEFUL LINKS

- ❑ ACADEMICINTEGRITY.ORG
- ❑ COPYRIGHT.GOV
- ❑ LIBRARY.PITT.EDU/GUIDES/COPYRIGHT/
- ❑ PITT.EDU/HOME/PP/POLICIES/10/10-04-01.HTML [COPYING COPYRIGHTED MATERIALS]
- ❑ PITT.EDU/HOME/PP/POLICIES/11/11-02-02.HTML [COPYRIGHTS]
- ❑ COPYRIGHT.CORNELL.EDU/TRAINING/Hirtle_Public_Domain.html [Chart Covering Public Domain]
- ❑ COPYRIGHT.CORNELL.EDU/TRAINING/Hirtle_Public_Domain.html [Chart Covering Public Domain]
- ❑ COPYRIGHT.CORNELL.EDU/POLICY/Fair_Use_Checklist.pdf [Fair Use Balancing Test]
- ❑ CREATIVECOMMONS.ORG
- ❑ Podcasting Legal Guide: http://wiki.creativecommons.org/Podcasting_Legal_Guide
- ❑ Bookstore Copyright Clearance Contact: Ann Schober , 624-1468

QUESTIONS