

Copyright For The Rest Of Us:

A guide for people who aren't lawyers



By Marcia W. Keyser

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With great appreciation to
Lauren Arndorfer, my student assistant
And
Mary-Elinor Kennedy, my editor

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Chapter 1: Defining Copyright

Our written, recorded, and broadcast world is surrounded by warnings about copyright. If you look in the opening pages of most books, you will find a warning like this:

“All rights reserved. No part of this book may be used or reproduced by any means, graphic, electronic, or mechanical, including photocopying, recording, taping, or by any information storage retrieval system without the written permission of the publisher except in the case of brief quotations embodied in critical articles and reviews”.

Even more familiar is the FBI warning at the start of most DVDs viewed by Americans today:

“All rights reserved. These DVDs are authorized for sale or rent only in the country where originally sold (i.e., only in the U.S. or only in Canada, respectively). Unauthorized reproduction, distribution, or exhibition violates federal laws with severe penalties and violates ____ Pictures Home Entertainment’s standard terms of trade”.

These statements inform the viewer that they must respect “all rights,” may not use or reproduce the contents, or endure “severe penalties”.

Just what are the “All rights” that are “reserved”? Can you reserve just any rights? Do you *have* any rights?

By the end of this chapter you should be able to answer:

- I. What is copyright?
- II. What can be copyrighted?
- III. What are the rights of the copyright owner?
- IV. What are the benefits of registering a copyright?
- V. How long does a copyright last?
- VI. What is the public domain?

- VII. What is copyright infringement?
- VIII. Are there limitations on the copyright owner?

I. What is Copyright?

Copyright is a right given to authors and inventors in the Constitution. It is “the exclusive right to their respective writings and discoveries.” (Article 1, Section 8 Constitutional Convention, 1790). The “exclusive right” means that the author, and the author alone, has the right to publish and distribute his work. The same clause includes inventors and their inventions. Many authors will authorize a publisher to print and distribute their work. To do this they must transfer their rights to reproduce and to distribute to the publisher, normally for a limited period of time. Likewise, an inventor *patents* her work, and then sells patent rights to industries ready to use it.

The copyright right begins when an item with a “modicum of creativity” is created in a fixed medium. No registration is required; once the item exists, it is protected by copyright. (More on this below).

Since 1790, in different acts of Congress, music, photography, movies, computer software, graphic arts, and boat hull designs have all been granted copyright protection. (U.S. Government) Both legislation and court cases have led to the development of several “doctrines,” or common practices, about copyright. In this chapter we will cover the most basic ones needed to understand the broad field of copyright law.

II. What can be copyrighted?

Any creation in a fixed medium that expresses a “modicum of creativity” (Holmes 1903, 239) is considered copyrighted at the moment of its creation in a fixed medium. (U.S. Copyright Office 1992) Only a small amount of originality is required. If a student takes notes in class and does not write the instructor’s lecture down word for word, then his or her notes have sufficient creativity to qualify for copyright. An artist of limited talent nevertheless may retain copyright in his or her works. Copyright is not a mark of quality, but of minimal creativity recorded in a fixed medium. (U.S. Copyright Office 1992) The limit of the “modicum of creativity” is expressed by the “Merger doctrine”. If there are only one or two ways an idea can

be expressed, then it is not copyrightable. If it were, then its' distribution could be limited by its owner.

A "fixed medium" is anything that can be returned to at a later time, which will display the same information or illustration as before. Paper, computer storage, stone or clay, paints, and a computerized piano keyboard's recording system all are considered fixed medium. No registration or special symbols are needed to gain copyright; it is present as soon as the somewhat-original work is created. (U.S. Copyright Office 1992)

III. What are the rights of the copyright owner?

The copyright owner has six basic rights: to make copies, to distribute those copies; to make derivative works; to perform or display the work in public; and to perform the work by means of a "digital audio transmission." Any of these rights can be licensed to another person or a company such as a publisher.

Making copies refers to making any type of copy: a photocopy, a photograph, a hand-drawn copy that is indistinguishable or close to it; and computer copies of any sort. These actions count as infringement even if it can be shown that no one has viewed the work.

Distribution is placing the copyrighted work in a way that copies are available to many people. Placing the work on a public Internet site is one form of distribution. Making copies and selling them from a store, or giving them to your friends on a casual basis is another. All of these actions are forms of distribution.

Derivative works are new formats or types of works made from the original item. A novel could be rewritten as a movie; an event from a short story may become a poem or a song. A blog posting could lead to a reader creating a short story. The right to make or prevent derivative works belongs to the copyright owner.

Display or performance in public means that an artwork is made viewable to the public, or that a play, song, or movie is performed in a place the general public can access. (U.S. Copyright Office 1992) Some relatively private areas, such as a college dorm meeting room, at a church outside of services, or a business-dining hall, may seem as though they are not public, but they are. A person not known to the others may walk in at any time. (Note that some campuses define dorms as a "house" where you cannot expect a large number of strangers to congregate. On these campuses, a dorm is not public). (Univ. of Connecticut 2008)

To perform the work by means of a “*digital audio transmission*” generally means that the music or dramatic work is shared via the Internet or digital radio.

IV. What are the benefits of registering a copyright?

Once a creator has their creation saved in a “fixed medium,” they have the option to register it with the Copyright Office. Registration is done online at <http://www.copyright.gov/>. It requires a copy of the work to be registered and a fee of either \$35 or \$45. (U.S. Copyright Office 2010) If the creator plans to sell or distribute their item, or display it online, registering the copyright adds a level of security. It establishes that the owner cares about her creation, and it shows a level of knowledge about copyright. Persons who might be looking for materials to illegally copy and re-distribute are more likely to not use copyrighted items. However, registration is not required in order to put a copyright statement on a work. A creator may label their work “©2010 Tomas Garcia” without registration. The ultimate benefit of registering a work is that it is required if the owner wishes to sue an infringer for statutory damages. Without registration, the copyright owner may sue for actual damages. Which damages are greater is a matter of circumstances. In most cases, litigation is easier if the work is registered with the Copyright Office before the infringement occurs.

V. How long does copyright last?

Copyright protection lasts for the lifetime of the author plus seventy years. That means, for example, if a young person today were to register a novel or a song in 2011, that novel would be protected by copyright throughout his life. When he dies, for example in 2075, the copyright would pass to his heirs and be effective until the year 2150 (U.S. Copyright Office 1992). If a work was published prior to 1978, its’ copyright is governed by the 1909 Copyright Act. If so, its copyright lasts for 28 years, and may be renewed in order to gain 28 more years.

VI. What is the Public Domain?

When a copyright expires, or is given up by the owner, the work it was part of becomes *public domain*. (U.S. Copyright Office 1992) An item in public domain can be used, performed, or re-written, without permission, in any way possible. For example, Disney made a movie called

“Treasure Planet” in 2002 that retold the story of *Treasure Island*, but based in the distant future, using space ships instead of sailing ships. (Clements and Musker 2002) The original *Treasure Island* was published in 1883; its copyright has expired. Other writers may wish to re-write *Treasure Island* their own way, or use only one character or scene from it; it is up to them. Likewise, thousands of other novels and other works are now in public domain. Many items in public domain can be found on the Project Gutenberg web site [http://www.gutenberg.org/wiki/Main_Page_\(Project_Gutenberg_2010\)](http://www.gutenberg.org/wiki/Main_Page_(Project_Gutenberg_2010)).

Ideas are not protected by copyright, only the unique way in which they are expressed. If you wish to quote an idea from another source, you only have to cite the source, not seek permission. Likewise, if you wish to use the idea to create a new resource or graph, you only need to cite where you found the idea. (U.S. Copyright Office 1992)

Most US Government office publications are public domain from the day of their creation. To see some, start searching at <http://www.gpoaccess.gov/>. In some cases, a writer or photographer hired by the government may negotiate to keep their copyright; these items are normally clearly labeled. For more information about government works and their copyright status, go to <http://www.usa.gov/copyright.shtml> (U.S. Government 2010)

Practical items are not protected by copyright. A practical item could be a lamp, or a pair of scissors, etc. If the items are decorated by a bit of artwork, the artwork itself could be copyrighted, but the item remains a practical item.

Titles, names, slogans, or short phrases are not sufficient to qualify for copyright protection. In some cases, a title may be protected by trademark. (U.S. Copyright Office 1992)

“Sweat of the brow” compilations do not qualify for copyright protection. These compilations, such as the phone book, are made with a lot of effort but little originality. Many examples can be found on the Internet: bibliographies, listings of collector’s items, locations of historical sites, and so forth. While it is frustrating for the creator of such a list to see it reproduced elsewhere, the list itself does not require enough originality to qualify for copyright protection.

Finally, items, which are not sufficiently original in ways other than “sweat of the brow” lists, do not qualify for copyright. A story that slavishly copies the characters, setting, and plot of other story, or a piece of artwork that reproduces another piece of art in another medium, does not qualify for copyright protection. (U.S. Copyright Office 1992)

VII. What is copyright infringement?

Infringement is the legal term for a person using one of the copyright owner's rights without permission. It is said that the person has infringed on the other's copyright. (U.S. Copyright Office 1992) Infringement can be a minor situation (copying two textbook chapters before the bookstore has additional copies available) or major (scanning the entire textbook and making it available on the Internet). Serious infringement cases will often lead to legal action. Cases are often settled out of court. In court, cases are often settled with *statutory damages*. "Statutory" means that the fine is determined by legal statute, not by the judge. Statutory fines for copyright infringement are "*not less than \$750 or more than \$30,000 as the court considers just.*" (U.S. Government). The fine is calculated per incident of infringement. If 500 people accessed a scanned version of a textbook, then the fine for the person making it available will be (at a minimum) \$750 x 500, or \$375,000.

VIII. Are there limitations on the copyright owner?

Copyright is not solely about the owner's rights. Fourteen sections (§107 – §121) of the Copyright Act provide many limitations on the owner's rights. Reviewing these sections shows that owning a copyright is not the same as owning a piece of property, such as a laptop or a car. There are many ways in which the public can make use of a copyrighted work. The most important of these is covered in the next chapter: Fair Use.

Online Resource:

Nolo's Plain English Law Dictionary <http://www.nolo.com/dictionary/home.html>

U.S. Copyright Office <http://www.copyright.gov/>

GLOSSARY, CHAPTER 1

Copyright: The creator's right to use a work they have created, as defined by Title 17 of the US Code.

Publisher: A company that creates and distributes copies of a work. May also be an independent person publishing content via the Internet.

Legislation: A bill passed by Congress that becomes a law.

Court case: A formal situation, presided over by a judge, in which legal issues are decided. Court cases normally have a plaintiff (who brings the complaint) and a defendant (who is accused of it), their lawyers, relevant witnesses, and potentially a jury.

Doctrine: A formal statement of how certain circumstances should be interpreted. For example, the “Doctrine of First Sale” states that once a copy of an item is sold, the former owner cannot control what is done with the copy.

Fixed Medium: A material on which words, sounds, or artistic creations can be fixed, and then referred to several times without a change in the creation. Paper, computer storage, stone, canvas & paint, etc., are “fixed mediums”.

Modicum: A very small amount.

Public: A place where any member of the general public, unknown to the proprietor or other persons present, can be present.

Registration (in copyright): The recording of copyright ownership over a specific item with the Copyright Office.

Duration (in copyright): The fixed length of the copyright protection. Duration has changed many times since 1790.

Public Domain: Content (music, literature, art, photos, etc) that is not protected by copyright. Items in the public domain may be used and adapted by anyone, without permission.

Infringement: “The unauthorized violation of a copyright owners exclusive rights in a work.” (Nolo’s Plain English Law Dictionary (Hill 2009))

Statutory: Established by legislation and not by court decision. The fines in a typical copyright case are statutory, not judicial.

Limitation (in copyright): The copyright owner has six defined rights in their work, but sections 107-121 outline several significant limitations to the copyright owner’s rights.

Scenario Exercises

How to analyze a scenario (Chapter 1):

- 1) Consider the six rights of the copyright holder (reproduce, derivative works, distribute, perform, display, digital audio transmission). Which rights the person or persons in the scenario are using?
- 2) What requirements for copyright are met? (Fixed medium, originality, beyond *de minimis*?)
- 3) Can you make an argument for taking the risk of not considering copyright?
- 4) If not, then the user should get permission, find a different work to use, or use only a small portion of the work.

Scenarios for “Copyright Basics”

- 1) Roommates Steve and Bruce have recently acquired some new music via the Internet. Their friend Paul comes to visit. Steve and Bruce play some of their new music for him. Without considering the potential legality of the downloaded music, has an infringement occurred when Paul heard the music?
- 2) Paul is musically talented. He is inspired by a portion of a song he heard at Steve & Bruce’s place. He creates a new song using some of the chord sequences in it, along with his own words. Has Paul infringed on the copyright of the original song? If so, when and by doing what is he infringing?
- 3) Paul plays “his” new song for a group of friends gathered in a park a few days later. He has not written down the music or chord sequences. By performing this song in public, is Paul infringing?
- 4) An art major, Susan, creates a painting outside of class, using paint, canvas, brushes, and the studio provided by her university. More than one of her professors made comments as she worked on it. Susan entered the final painting in a contest. It raised a problem for Susan: does the copyright on the painting belong to her, or to her university?

- 5) If a professor put a former student's work online for current students to read (in a password-protected site), but does not get the former student's permission, is the professor infringing on the former student's copyright?

- 6) Andra is writing a novel, and part way through she realizes that one of her characters is very similar to a character in *To Kill a Mockingbird*, a book she has enjoyed reading. Should Andra re-write the character (quite a lot of work), write to the Harper Lee estate for permission, or continue writing her novel as is?

- 7) Andra writes a second novel. Both are published, but neither sells many copies. After a few years, she learns that a High School drama teacher has re-written it for her students' performance. Has copyright infringement taken place?

- 8) Pat has been writing a blog for several months. When she writes about a news event, she links to the story in a newspaper and copies the first few sentences. Is this an infringing use of the newspaper's content?

- 9) Ben is preparing to publish a book. Three of the chapters begin with a complete short poem used as an epigram. Ben did not write the poems, and did not seek permission for their use. Would including these poems in the book be considered copyright infringement?

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Chapter 2: Fair Use: Copyright Owners and Users

Samira has always been a talented guitar player and a painter of (usually) creative pictures. She was delighted to find that, in a busy tourist district, she could earn a living as a sidewalk musician. One day, she used a portion of her earnings to visit a large museum of modern art. A painting there inspired her, and that night she painted it onto her guitar case. She had to change a few minor details, but she and her friends thought that the new setting was excellent. The following morning, while taking the subway to her favorite street corner, she heard an angry call: “Hey! That’s my painting! You can’t just put it on your guitar case!” Samira turned and answered, “Yes I can! It’s Fair Use!”

Who is right in this situation?

By the end of this chapter, you should be able to answer:

- I. What is “Fair Use”?
- II. What sorts of uses are eligible for Fair Use?
- III. What are the four factors of Fair Use, and how are they used?
- IV. How is it that one situation can receive multiple Fair Use interpretations?
- V. What are some important considerations in Fair Use analysis?
- V1. Why is it that some major players in the copyright world disagree about the role of Fair Use?

I. What is Fair Use?

§ 107. 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 by 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. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” (U.S. Copyright Office)

The doctrine of “Fair Use” states that certain uses of copyrighted works do not require permission from the owner. However, Fair Use does not provide specifics, such as exactly how many seconds of a song, or what percentage of a book or a painting. Also, even if Fair Use applies, people are not allowed to distribute copies at will.

II. What sorts of uses can be considered Fair Use?

The Fair Use section indicates that uses “such as criticism comment or news reporting...” are not considered infringing. However, that does not mean that any use of copyrighted materials when writing criticism, comments, or news is automatically “Fair.” See the four factors. If a reporter wrote a news story about a controversial song and included the entire song (not just the most controversial lines) it could be considered an infringing use of the song. However, the news writer could argue that the whole song was needed in order to give the full effect, and that their article would not convey its meaning without it. Such factors are key to interpreting Fair Use. Some uses are allowed; some are not. Furthermore, in many situations, both sides are

often able to develop a convincing argument. People using copyrighted works are expected to take the time to analyze their use and make a reasonable decision. (U.S. Copyright Office)

Fair Use is not a right such as the “right to vote” or “right to free speech.” Fair Use is a legal defense, for use when a person is accused of infringement. It means that the case is not settled based solely on whether there was an infringement, but on the judge’s consideration of the defendant’s Fair Use claim.

Thinking of Fair Use as a defense and not a right can make it seem like something to be very cautious with, or to use only when you are really certain it is fair. However, daily life and common uses of copyrighted works are rarely certain. The average person is allowed to make a Fair Use analysis and rely on it with a comfortable amount of certainty.

According to the first paragraph of §107, making copies “for purposes such as **criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research**, is not an infringement of copyright.” If you are making one of these uses, and not making copies way in excess of what you actually need, then your uses are probably fair. (U.S. Copyright Office)

Uses such as “scholarship or research” do not have to be driven by your teachers or professors. You may, on your own, have pursued a long-term study of the lyrics of songs by the band “Nirvana”. For your own research, you may copy the lyrics and interpretations available in music libraries or on the Internet. You may even copy articles other people have written about these lyrics. However, these copies should not be used for performance or a new publication (if copied entirely).

III. What are the Four Factors of Fair Use?

For most people, the “heart” of Fair Use lies in the four factors. The four factors are not a trial of balance (“Well, I’ve got 1 and 3 covered, so I can forget 2 and 4”). They are all to be considered when determining a Fair Use. If any one of the factors is abused, then the use is not fair. Some considerations for each factor are:

- 1) Purpose: Educational use weighs in favor of fair use and commercial use weighs against fair use.
- 2) Nature: Factual works are given less protection than creative works.
- 3) Amount: Generally, a large amount weighs against fair use, whereas a small amount would be considered fair use. There is no magic number or percentage
- 4) Market Effect: If the intended use would negatively impact sales of the work, then the use would generally weigh against fair use.

To apply the factors, you should take your situation and consider each factor. Decide how strongly – or poorly – your situation meets that factor. It may help to write down the level of strength for each. In order to “pass,” a situation does not have to be all “very strong”. You may consider the location the use will take place in, and the likely audience. Interpreting the Fair Use factors is never easy, and may result in different conclusions.

Here’s an example of a Fair Use debate. A High School teacher would like to post an article from Time Magazine on the bulletin board in the hallway by the door to her classroom. Students tend to gather there during longer breaks. The article is related to her subject, but not required reading. Is the posting a Fair Use?

Factor 1: Purpose. The use of the article is educational, but weak. Why? It is not directly part of a class activity or assignment. (Let’s give it a low pass)

Factor 2: Nature. Although we don’t know what the article is about, it did come from a news magazine. We can assume it is factual, not creative. This factor is strong. (This is a higher pass)

Factor 3: Amount. The teacher posted the entire article. Normally this would count against Fair Use. However, if she can show that part of the article would make no sense without the rest, she has at least some argument for using the entire article. Still, this factor is weak. (Another low pass)

Factor 4: Market effect. Does posting this article in a High School hallway prevent a significant number of students from purchasing their own copies of Time Magazine? If she asked them to,

would they? Generally speaking, we can assume that those students who do purchase *Time* regularly would not stop doing so because one article was made available in their school hallway. (Higher pass)

This is not clearly a “Fair” use, but not clearly unfair as well. Furthermore, you can assume that the teacher will take down the article in a reasonable period of time.

The Fair Use Checklist

A checklist for using Fair Use is available at

<http://copyright.columbia.edu/copyright/files/2009/10/fairusechecklist.pdf>

Using this checklist can be helpful, but has its weaknesses for evaluating Fair Use. You must judge how “heavy,” or significant, each factor of the use is and not take every criteria to be equal. This checklist is well-known in higher education.

IV. What are some important considerations in Fair Use analysis?

The amount of the work vs. the Heart of the work: When analyzing factor 3, or the amount of the work used, a very small percentage of the work can be interpreted to weigh against Fair Use if it is the “heart of the work”. Of course, different people can disagree about “the heart,” but when there clearly is one, it is *not* eligible for Fair Use copying. A very notable use of this doctrine is in the publication of President Ford’s memoirs. *The Nation* magazine acquired a significant portion of them prior to their formal publication. *The Nation* then published only 300 words from the memoirs dealing with Ford’s pardon of President Nixon. The article was built around these core words, and was not written as historical reporting (Greenhouse 1985, 1). As this was the most significant event of Ford’s presidency, it was considered the “heart of the work” and *The Nation* was found guilty of copyright infringement. (Note that there were other factors that also led to the decision; it was not solely a “heart of the work” case).

People analyzing Fair Use cases should also be aware of the concept of “**Transformative**” **uses**. A transformative use goes beyond the original use, or is significantly different from the original use, or allows the reader to see the item or story or event in a completely different way, and for a different purpose. An example is found in the Bill Graham Archives v. Dorling Kindersley Ltd, 448 F.3d 605 (2d Cir. 2006) case, in which a book about the band The Grateful Dead included small reproductions of all of the band’s concert posters. The posters were displayed in a timeline and demonstrated the changes in the band’s publicity over the years. The owner of the posters sued, claiming it was an infringing use because the posters were

reproduced in full and for a commercial publication. (Factors 3 and 4) The judge in this case ruled that the use of the posters was transformative; the original use had been for each poster to be displayed separately in order to encourage attendance at a concert. (Patry, William F., and Dannay, Richard 2006) The new use presented them together in order to show the history of the band. It was transformative. In this case, the commercial publication of the book was not an issue.

Another consideration when analyzing Fair Use – or other uses of copyrighted materials – is risk tolerance. An organization, a business, or an individual will each have a different level of how much they wish to risk a lawsuit. Some will consider it a low possibility and be willing to take higher risks; others will consider *any* possibility an intolerable risk and avoid all potential infringements. When considering a potential use of Fair Use, consider your own level of risk tolerance. Then, if you are working for a school or other institution, consider their level of risk tolerance. A low level of risk tolerance will lead you to claim fewer “Fair Use” uses.

V. Why is it that some major players in the copyright world disagree about the role of Fair Use?

Major content owners, or those who own copyrighted material that is actively earning money for them, rarely see Fair Use in a positive light. For an example, the *Copyright Alliance* provides the following definition on their web site:

Q: Is Fair Use a Right? A: No. There is no right to make “fair use” of a work. An individual does not have the “right” to make use of another’s copyright work. If that were the case, someone might be able to publish excerpts from your private letters against your wishes or break into your house in order to get a copy of a valuable photograph under the guise that they had a “right” to get a copy of your copyrighted work to make a fair use of it. Fair use only arises when someone already has a copy of a copyrighted work and makes copies, distributes, performs, alters, or displays that work and the copyright owner subsequently challenges that use of the work as being an infringement. In that case, the person could raise a defense of fair use. (Copyright Alliance 2008)

Meanwhile, a significant number of lawyers, university faculty, artists, and other people believe that many copyright owners take their claims too far, and are focused on the analog or paper-based world for their assumptions.

But even before works enter the public domain, the public is free to make "fair uses" of copyrighted works.

By carving out a space for creative uses of music, literature, movies, and so on, even while the works are protected by copyright, fair use helps to reduce a tension between copyright law and the First Amendment's guarantee of freedom of expression. The Supreme Court has described fair use as "the guarantee of breathing space for new expression within the confines of Copyright law." (*Electronic Frontier Foundation*)

Note the difference between these two writers. One asserts their Fair Use only comes into play when a person has been challenged as an infringer, while the other writes about "carving out a space for creative uses of music, literature, movies, and so on..." This is the most common stance between these two schools of thought on copyright. One is very legalistic, quick to quote laws, and accepts only minimal use by anyone other than the copyright owner. The other argues for creativity both in real life and in interpreting copyright laws. Both sides actively submit bills to Congress to further their interpretations; some examples will be provided in a later chapter. Neither group has a formalized name, but those that favor stronger copyright enforcement are often called "The content industry" or "Copyright enforcers." The side favoring more freedom is often called "The Copyfight". Because there is intentional flexibility built into the Fair Use law, both sides are can be considered correct in their interpretation. Which side you favor is an individual decision.

VI. What about Samira?

In the opening scenario, a street musician named Samira copied a modern painting onto her guitar case. The artist sees her guitar case and accuses her of copyright infringement. Samira claims fair use. Who is right?

First step: Is it possible to interpret Samira's use of the painting as criticism, comment, news reporting, teaching, scholarship, or research? For this question, the answer is "no".

First factor: Purpose. What is Samira’s purpose in decorating her guitar case? We can argue that anything Samira does to attract passersby is a commercial purpose. The more attractive her guitar case, the more potential tips she can earn. (Rating: 1)

Is it transformative? Moving the painting from a museum to a guitar case is a new placement, but still not a truly different purpose. The painting attracts attention and inspires thought in either location.

Second Factor: Nature of the work. The modern art painting is definitely creative. (Rating: 0)

Third Factor: Amount of the work. Samira copied a significant portion of the painting, enabling her guitar case to be easily recognized by another person familiar with the painting. (Rating: 1)

Fourth Factor: Impact on the market for the painting. Limited; museums will still wish to display this painting and collectors should still be willing to purchase it. However, Samira did bypass the *permissions market*; she could have sought and paid for permission to make her copy. In this way, she is impacting the permissions market for the painting. (Rating: 2)

Samira’s use of the painting fails all four factors of Fair Use. If you consider points (a total of 4), her case is still weak. If she is lucky, the artist will accept Samira’s promise to re-paint the guitar case and not pursue damages in court.

VII. Conclusion: The Law

Average citizens such as Samira can look up the law on copyright; a later chapter explains how.

GLOSSARY, CHAPTER 2

Analog: Items from before the digital era. For example, paper, round clocks, phonograph records and cassette tapes, photocopiers, VHS tapes, etc.

Analyze: To study a situation by considering all of its parts separately, then putting them together.

Criticism: The practice of evaluating and analyzing literature, music, or art.

Fair Use: A legal doctrine that outlines some uses of copyrighted works, which do not require permission from the owner.

Four Factors: The purpose of the new work; the nature of the work being used; the amount of the work used; and the effect of the use on the market for the original work.

Heart of the work: The most significant or important part of a work.

Legal right: ability a person has due to legal definition. For example, it is legally defined that an adult citizen of the United States will have the right to vote.

Market effect: An activity that negatively affects the market for a work, either on the open market, or the business-to-business market, or on the market for permissions. Essentially, if money is being lost, then the other factors need to be considered strongly before “Fair Use” can be claimed.

Transformative use: A use that adds something new, re-purposes the work, or allows the work to be seen in a new and different way. (Hoffman 2006)

How to analyze a scenario

- 1) Consider the six rights of the copyright holder (reproduce, derivative works, distribute, perform, display, digital audio transmission). Which rights are being used by the person or persons in the scenario?
- 2) What requirements for copyright are met? (Fixed medium, originality, beyond *de minimis*?)
- 3) Can Fair Use (or any other part of the copyright law) be used to justify this use?
- 4) Can you make an argument for taking the risk of not worrying about copyright?
- 5) If not, then the user should get permission, find a different work to use, or adjust their needs so that only a small portion of the work is being used.

Scenarios

- 1) A significant portion of an episode from a humorous TV show is posted on YouTube. Is this a copyright infringement?
- 2) A student has created a web page with lyrics from her 30 most favorite songs, juxtaposed with her own original artwork. A password or any other form of protection does not protect the web site. Is the content on this web site infringing on copyright? If so, whose? Would a password affect the infringement status of the site? And does the number of songs affect the infringement status?
- 3) A student has collected the flyers from events on his campus for four years as a means of documenting his college years. Now he is scanning the flyers. Is a copyright infringement taking place? Why or why not?
- 4) Dave is making a pamphlet for a social club he is involved with. The club is not part of his schoolwork; anyone is welcome to attend. In the pamphlet he quotes two lines from a song from his favorite band paired with a picture he took of the band that is not related to the song. Dave wrote to the band for permission, but was denied. Believing that his use is Fair, he decides to use the two lines anyway. Is this copyright infringement?
- 5) A manager has provided her 35 employees with a copy of a 4-page article about workplace safety. The copies were made on the company photocopier, no permission fee was paid, but the company subscribes to the journal. The article was provided to educate the workers on an important issue. Has a copyright infringement taken place? Why or why not?

The Cindy stories (Scenarios 6-9) Note in these scenarios how one act, by Cindy, leads to several more acts by her friends.

- 6) Cindy is working on a community health issues paper when she discovers an excellent web site. It is so useful that she downloads its entire content, formats it into a pamphlet, and prints out 25 copies for her Student Health Club. She does cite her source. When she hands it out, is she infringing on the original site's copyright? If so, what rights of the copyright owners are infringed?
- 7) Another student in the Health Club, Susan, found the content of the brochure so inspiring that she set it to music and created a song. At this point in time, she has not written down or recorded the music. Has a copyright infringement occurred?

- 8) Following the Student Health Club meeting, another student posted the contents of the brochure to the club web site. The web site is available to the general public. Has a copyright infringement occurred?

- 9) Cindy's cousin Greg, at another campus, made a link from his web site to the Student Health Club web site after it contained the information from Cindy's brochure. Is Greg's linking to this content an activity that could be considered infringing?

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Chapter 3: Other Legal Uses

Daniel was concerned about his work as a volunteer in his 8th-grade son's middle school. He was used to making loads of copies; in fact, making copies was one of his primary tasks. However, this week he was asked to copy two chapters from a textbook not used by the school – and then to make 50 copies of each chapter. He also noticed a sticker on the textbook, indicating that it had been given to the teacher as a “review copy only”. The teacher had said that this textbook covered some issues not touched on by the one adopted by the school district. Daniel shrugged to himself and figured it was an educational purpose; that was Fair, wasn't it?

After studying this chapter, you will be able to answer:

- I. What is “educational use”?
- II. What is a Creative Commons license?
- III. What is the Idea/Expression Dichotomy?
- IV. What is the Doctrine of First Sale?
- V. What other uses are not infringing?

I. What is “educational use” and how does it differ from Fair Use?

Many Educational uses are covered by §110 of the Copyright Act, in addition to Fair Use. Educational uses are described in §110 as:

Notwithstanding the provisions of section [106](#), the following are not infringements of copyright:

- (1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction...

There is probably no simpler way to say this: performance or display of a work, in a classroom at a nonprofit school, is not an infringement of copyright.

However, the section goes on to specify some particulars that must be met:

- The copy must be legally acquired
- It must be directly related to the teaching of the class
- Only members of the class may view the content
- The school must educate both students and employees about copyright law in order to encourage compliance
- The content shown must include a copyright notice.

Section 110 contains a variety of other situations in which copyrighted works may be displayed or performed, but these portions are the ones most relevant to typical in-the-classroom teaching. So long as the above guidelines are followed, a teacher or school does not have to secure permission to use a copyrighted work in class.

Students enrolled in a class at an accredited, non-profit institution may make use of copyrighted materials to fulfill class assignments. Those assignments may be displayed to the class members but, technically, to no one else. (U.S. Copyright Office)

II. What is a Creative Commons license?

Creative Commons is an organization started in 2002 by then-Stanford Law professor Lawrence Lessig. It provides licenses for people who wish to share their creations without charge, but without giving up all of their rights as copyright owners. There are four basic rights that can be reserved by Creative Commons licenses, and they can be applied in almost any combination.

The first Creative Commons right is **Attribution**, in which a person using a work used must give credit to its author. The next right is "**Share Alike**." If a person creates a derivative work under a Share Alike license, the derivative work must be shared under an identical license. The third Creative Commons right is "**Non-Commercial**". In this case the original creator allows their work (and its derivatives) to be re-used for non-commercial uses only. The fourth right is "**No Derivative Works**," which means that the work may be reproduced but no derivative works may be made from it. The four rights may be combined in many ways. All Creative Commons licenses allow free distribution, but within the stated

Attribution	Non-commercial
Share-Alike	No Derivatives

parameters. More detail about the licenses and their combinations may be read at <http://creativecommons.org/about/licenses/>. The main Creative Commons site is at <http://creativecommons.org/>. (Creative Commons 2010)

Creative Commons licenses are free, and they come in three formats: Plain English, Legal English, and Computer Code, which allows a search engine to locate it. While they are not for everyone, Creative Commons licenses are suitable for academic works (which often do not earn their authors money) and for new artists who have not established a reputation. If a new artist or musician distributes their work under a Creative Commons license, their work is protected from being appropriated by more experienced (or immoral) artists. More established artists or musicians may use a Creative Commons license to distribute samples of their work at no charge.

This book about Copyright is available under a Creative Commons license. It is free, so long as the original author is credited, and not for unlimited uses, and can be adapted to different classes as needed.

III. What is the Idea/Expression Dichotomy?

The Idea/Expression Dichotomy states that the **idea** presented by a copyrighted work is NOT protected by copyright, but the way in which it is **expressed** is protected. Copyright is about original expression of ideas, not about the idea itself. A fact cannot be copyrighted, only the way in which you express the fact. (U.S. Copyright Office)

Consequently, writers or other creators may freely use the IDEAS from a copyrighted work if they express them in an original way. Also, the writers must cite the source of their ideas; otherwise, they are committing plagiarism.

IV. What is the Doctrine of First Sale?

The Doctrine of First Sale states that once a copy of a copyrighted work is sold, the copyright owner may not dictate what the buyer does with the work *so long as* the buyer's actions are outside of copyright. Selling or giving away a work would infringe on the copyright owner's right to distribution, but these activities are allowed according to §109. (U.S. Copyright Office) In other words, author or other copyright owners still has the six

rights of the copyright owners (copies, derivatives, distribute, play, perform, transmit) but cannot stop the buyer from giving away his copy, selling it at a steep price, renting it out, or ripping out half the pages, burning the whole book, etc. (Bob Merrill v. Straus, 1908) (Anonymous1908)

V. What other uses are not infringing?

Titles are not covered by copyright. You may quote a title of an article, song, or movie as needed. You may even use an already-published title on your new publication – so long as the original title is not protected by trademark.(U.S. Copyright Office)

A use that parodies the original use of a song, poem, movie, etc., is considered a Fair Use. In order to be a parody, the new version must comment on the original in some way. (U.S. Copyright Office) A famous example is 2 Live Crew’s version of “Pretty Woman.” The original song by Roy Orbison portrayed the woman as wholesome and desirable; the 2 Live Crew version portrays women who are pretty, yes, but are completely trashy when you get closer to them. In contrast, a song that uses the tune and re-writes the lyrics to a well-known song (such as those made popular by Weird Al Yankovich) is committing satire, not parody. “Weird Al” must acquire permission for most of his songs.

Read more about the “Pretty Woman” case at <http://www.benedict.com/Audio/Crew/Crew.aspx> (Copyright Website , 1)

“Scenes-a-faire” refers to commons settings in major genres of literature or movies. A western movie, for example, will commonly have cowboys, cattle, horses, tumbleweeds, small towns, a saloon, etc. Such commons scene elements cannot be copyrighted. “Scenes-a-faire” is French for a “scene that must be done”.

VI. Conclusion: Was Daniel right to be concerned?

Yes, Daniel was right to be concerned about making 50 copies of two chapters of a textbook. Section 110, which covers educational uses, allows for a “performance or display” of a legally acquired copy during class time. While the textbook copy was legally acquired, the copies were not for performance or display during class time. Fair Use *might* apply to the making of these copies, but §110 does not.

Glossary:

License: A deed by which one person or organization gives another person or organization permission to do something.

Legally acquired: Not stolen, illegally downloaded, or received from someone who is likely to have stolen or otherwise illegally acquired it.

Scenarios:

Section 110 Educational use.

Scenario 1) Cindy was working on a power point presentation for her child psychology class. Knowing that power points can be dull, she wanted to use some photographs to liven it up. Yet she didn't have time to set up and take the photos herself, and didn't want to "break the law" by stealing them off the Internet, like her roommate was doing. What should Cindy do?

Scenario 2) Mr. Frazier, a 2nd grade teacher, had discovered that movies, especially animated movies, were a great motivation for his students. If 80% of them could score an A or B on a certain number of assignments, he would let them watch a recent popular children's movie. He would rent the movies at a nearby store, and use a school DVD player. Is Mr. Frazier's motivation in violation of copyright?

Creative Commons:

Scenario 3) Blogging.net set up its free blogging software in 2006. They set up each blog so that its content was automatically covered by a Creative Commons Attribution-No Derivation-No Commercial use license. While bloggers could opt out of this license, most were not aware of it. Are there any reasons for or against this approach?

Scenario 4) Sarah and Steven are delighted with their 3-year-old's creativity. Like many parents, they see a lot more originality in these pictures than other people do. They have been scanning his pictures and displaying them on the Internet. To protect the pictures, Steven has been registering each one with Creative Commons. Remembering that Creative Commons is based on basic copyright law, is there anything wrong about this situation?

Idea/Expression:

Scenario 5) Gary is an artist who has used news photos to base his paintings on ever since he began painting. He would rarely use the whole photo; normally he would select a detail, often not the main focus of the photo, and make that detail into a new painting. His paintings are "modern," often making use of shading and coloring to convey a feeling or message. Despite

these differences, a news photographer from the Chicago Tribune has accused Gary of copyright infringement. Gary's painting of the angry strikers at a labor dispute can clearly be identified as "very similar" to the strikers in the background of the news photo. What factors of this situation argue for infringement? What factors argue for non-infringing use?

Scenario 6) Julia is a professor of biology at a State University. It is a few days before the semester starts, and she has just found an excellent set of class exercises at the end of the chapters in a textbook not used at her university. What steps should Julia take to use the exercises – or others that are based on them – in a non-infringing manner?

Titles

Scenario 7) Ryan wrote a song about a woman he'd met. Although it did not sound at all like the Roy Orbison song, he titled it "Pretty Woman," as it seemed the most appropriate title. Is Ryan infringing on Orbison's copyright?

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Chapter 4: Copyright Law

Jack Valenti, while president of the MPAA (Motion Picture Association of America) made the following statement in an interview with the Harvard Political Review: “What is fair use? Fair use is not a law. There’s nothing in law.” How can we verify or contradict this statement? (Slater 2003)

By the end of this chapter, you will be able to answer:

- I. Where is the law of the United State found?
- II. Where is copyright law found?
- III. What is the DMCA and what were its impacts?
- IV. What is the TEACH Act?
- V. Where can I go to see proposed copyright laws?

I. Where can you find the law of the United States?

The law of the United States is published in the “United States Code.” The United States Code is abbreviated as the “USC” or the “US Code.” It can be found online in many places. The most reliable place is at the Office of the Law Revision Council, which prepares and publishes the US Code. It can be found at <http://uscode.house.gov>

The Code can also be found at Cornell University’s Legal Information Institute, or the LII. <http://www.law.cornell.edu/uscode/>

Every six years a new printed edition of the US Code is made. The printed version can be found at most public, academic, and law libraries in the United States.

II. Where is the US Copyright Law found?

The US Code is divided into chapters, and each chapter is called a “Title.” Currently, there are 50 Titles. Copyright is found in Title 17. Title 17 is also known as the “1976 Copyright Act.” Within the Copyright Act there are several chapters and within the chapters, sections. A section is designated with the symbol “§”. The very first section, §101, provides definitions of many terms and concepts used in copyright law. It is written in a readable manner and worth reviewing for any person interested in copyright law. (U.S. Government)

The easiest way to find a certain section or topic within the copyright law is to use the online search functions provided by either of the online versions cited above.

The 1976 Copyright Act was the first major overhaul of copyright law since 1909. It was in development from the early 1960s. It went into effect in 1978. When you consider when this law was written and enacted, it is not surprising that its writers were thinking about printed copies and photocopiers, not digital copies, scanners, or the Internet. Several laws, or “acts,” have been passed since 1978 in order to keep the law up to date. However, many people believe that such “patchwork” laws are only temporary, and a complete rewrite is overdue. (Samuelson 2007, 2011)

Copyright law is also affected by court decisions, especially those in the nine Circuit Courts of the US. Past copyright court cases also tell lawyers how a court might judge a particular case. Several major court decisions will be outlined in this book. A longer list of copyright court cases can be found via Wikipedia (Sept, 2010):

http://en.wikipedia.org/wiki/List_of_copyright_case_law#United_States (Gross Public Policy 2010)

(While Wikipedia is not accepted as a scholarly resource, at the time of this writing, it had the best list of copyright case law on the Internet. Remember that the quality of any Wikipedia page can change at any time).

III. What is the DMCA?

“DMCA” stands for the Digital Millennium Copyright Act, which was passed in 1998. It addresses several issues that made people nervous in the early days of the Internet. (U.S. Government 1998) Some of them are:

-Liability of the Internet Service Provider. The DMCA provided that the Internet Service Provider (or ISP) was NOT liable for infringing content that passed through their servers. In order to qualify for this safety net, the ISP has to list a “copyright agent” with the Copyright Office. A content owner who believes their content is being infringed on a site can send a take-down notice to the copyright agent for the ISP. Once received, the ISP has a limited amount of time to respond. Most often, they will either take down or block access to the content in question. The site manager responsible for the content has the option to file a “DMCA Counternotification” which outlines why the content is not infringing.

An example may help clarify the “liability of the ISP” issue. A statewide Internet Service Provider, LightningNet, has registered one its top executive assistants, Stan Lerner, as their

Copyright For The Rest Of Us: A guide for people who aren't lawyers. <http://hdl.handle.net/2092/1591>

copyright agent with the Copyright Office. Some weeks later a client, using the web space he contracted from LightningNet, posted the entire contents of a recent CD by a popular artist. When the artist's recording company became aware of this infringement, they notified Stan, who then blocked access to the client's site. If the client does not come up with permission (or a good Fair Use justification), LightningNet will take down the site.

-The DMCA limits the liability of colleges and universities that serve as ISPs for infringement committed by faculty and graduate students. To qualify, the college or university must provide all of its Internet users with information about copyright and "promoting compliance" with copyright law. Undergraduate students are not mentioned in this part of the law.

-Anti-circumvention. The DMCA made it a crime to circumvent (or bypass) any software which is intended to prevent illegal copying of a digital item. The law was intended to protect CDs, DVDs, software, and so forth, but has also been applied to garage door openers and other devices with encryption software. Devices and information which can be used to break encryption software are also outlawed. In some settings, an exemption to this section allows encryption software to be broken in order to conduct encryption research, assess product interoperability, and test computer security systems.

-The DMCA allows some libraries and archives to bypass digital encryption for specific purposes.

-The DMCA requires the Register of Copyrights to consult the relevant parties and develop a law to promote the use of technology in Higher Education while protecting the rights of creators of digital technologies. This provision led to the TEACH Act of 2002.

-The DMCA specifically states that nothing in it is meant to affect the limitations on copyright owners, including Fair Use.(The UCLA Online Institute for Cyberspace Law and Policy 2001)

IV. What is the TEACH Act?

The TEACH Act was passed in 2002. It is an acronym standing for the "Technology Education and Copyright Harmonization" Act. (U.S. Government 2001) Its purpose was to balance the rights of digital technology creators (such as those creating digital products that could be used in online education) with the rights of educators. While it may or may not

actually do so, it was finalized with a list of requirements so stringent that many universities decided to use Fair Use instead of TEACH to legally justify their online teaching activities.

A partial list of TEACH Act requirements includes:

- the college or university must educate all of its members on copyright law.
- The college or university must ensure that only items “legally acquired” are being used in its online education.
- Only students may have access to the material, and only during the lesson in which it is needed.
- All items must be directly related to and important for the class instruction. Course readings are not covered by the TEACH Act.
- Many more requirements may be read at the TEACH Act checklist provided by Colorado University (Colorado University 2004)

<https://www.cusys.edu/ip/copyright/downloads/TeachActChecklist.pdf>

The most useful provision of the TEACH Act (once an institution has met all of the requirements) is that an entire non-dramatic film (such as a documentary) may be shown to students in an online class. While some institutions interpret Fair Use and §110 to allow such use, it is controversial.

V. Where can I go to learn about proposed copyright laws?

Proposed laws (or bills) submitted to the House and the Senate may be found on THOMAS, an online repository of congressional actions. <http://congress.gov/>

In the middle of the first THOMAS page, there is a box titled “Current Legislation.” You may search the bill summary and status by “word/phrase” or by “bill number.” The simplest option is to type “copyright” into the search box and press enter; it’s pre-set onto word/phrase searching. The resulting list can be anywhere from a few bills to over a hundred. The first line, immediately underneath the bill number, will be the name or title of the bill. If you find it interesting, click on it to read more.

VI. Conclusion

Online searches of the US Code for the words “Fair Use” quickly find Title 17, Section 107. Fair Use, despite what Jack Valenti said, is in the law.

Glossary, Chapter 4 (Scenarios are not provided for this chapter).

Act: Legislation passed by the House and the Senate

Proposed Bill: legislation submitted to the House and/or the Senate.

Circuit Court: The Federal Courts of Appeals are divided into 12 regional circuits. As copyright is a matter of Federal law, cases involving copyright are heard in the circuit courts.

DMCA: Digital Millennium Copyright Act

TEACH Act: Technology Education and Copyright Harmonization

Title: A chapter within the US Code

US Code (or USC): “The law of the land,” or the law of the United States.

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Chapter 5: Music Distribution and Performance:

The Role of Licensing and DRM

There are so many ways to buy music: CDs direct from the artist, used CDs, ripping CDs from the library or friends, downloading from peer to peer networks, iTunes, Rhapsody, even going to a store. And once you own a copy, do you own copyright in it?

By the end of this chapter, you will be able to answer:

- I. How does copyright law affect the process of acquiring music?
- II. How does copyright law affect how we listen to music?
- III. How does copyright law affect sheet music?
- IV. How does copyright law affect performing music?

Q: I've heard that copyright is completely different for music than for other things like books or movies. Is that true?

A: No, it's not true. The basic rules of copyright (covered in chapter 1) stay the same, and apply to all types of creativity. However, as each genre is used and distributed a bit differently, different copyright concerns are stronger in each genre. For example, since the days of Napster and Grokster, recording companies have been very concerned about the distribution of music. Book publishers, however, are more concerned about significant portions of their books being re-produced in other books. Every form of creativity has its own concerns; that's why a chapter will be dedicated to each of the forms: music, movies, and art.

Q: Has the Internet and downloading changed copyright?

A: No, but yes. If you look at how music producers viewed potential music pirating activity in 1985 in comparison with today, then the answer is yes. Music distribution companies – those that manufacture, ship, and profit from the CDs and ringtones – are much more concerned with pirating activity than they used to be (probably by 1000%). But, the law of copyright has not changed. An infringing copy was just as infringing in 1985 as in 2011. The Digital Millennium Copyright Act of 1998 added protection for software that prevents excess copying of a CD. It made it illegal to bypass this software, or share information on how to bypass it.

I. How does copyright law affect the process of acquiring music?

Q. I've been buying my music from iTunes for five years now. I know it's a legal way to buy music, but now one of my friends says that "DRM" keeps me from really owning it. What gives?

A: You're right: buying music from iTunes is legal. And your friend is right – up until 2008. In the earlier years of iTunes, songs from it came not only with purchase agreements (also known as click-through licenses), but they also had DRM, or Digital Rights Management, packaged with them. There are many forms of DRM. Most keep the buyer from making unlimited copies of the song, or from playing it on more than a set number of devices. DRM was developed to fight the "Napster effect" of digitized songs being shared with thousands of other people. In 2007, Apple began to remove DRM from some of the songs sold on iTunes. In 2008, Apple initiated a policy that DRM would not be used unless the producer of the song demanded it. Steve Jobs, founder of Apple, wrote an interesting essay about iTunes and DRM called "Thoughts on Music". (Jobs 2007, 1)

If you would like to learn more about DRM, see "How Stuff Works: DRM" at <http://www.howstuffworks.com/drm.htm> (Layton 2006, 1)

Q: Is it really illegal to download music (or movies) from peer-to-peer networks?

A: It is illegal to download anything from a peer-to-peer (or P2P) network if the copyright owner does not give permission for the song to be there. In some cases, the owner does allow P2P distribution. Often, this helps a new musician become popular. Or, a recording may be in the public domain, so that copyright law does not apply to it. However, the majority of songs on P2P networks are *probably* not there with the permission of their copyright owners. In those cases, yes, it is illegal to download them.

Q: If I purchase a CD, can I loan it to a friend?

A: Yes, the Doctrine of First Sale allows you to do what you want with a copyrighted item so long as you do not use the six rights of the copyright owner. You may even copy it, and edit out the bass line or lyrics, sell it to your neighbor, etc. You should not sell copies, or edited versions. If your friend copies a CD that you loan her, that's her responsibility, not yours.

II. How does copyright law affect how we listen to music?

Q: If I download a great new album from Rhapsody, can I invite friends over to listen to it?

A: Yes. The Doctrine of First Sale leaves you free to use the music in any way that does not contradict the six rights of the copyright owner. (U.S. Copyright Office) Playing the music in your private home, even with friends present, does not constitute a public performance.

Q: What if my friends and I go to a park and listen to this music on my portable speakers?

A: The use of small consumer electronics in a public area is normally not a copyright infringement. If the music from the speakers cannot be heard more than ~15 feet away, it is not a public performance. (15 feet is not a legal ruling, just a guideline). (U.S. Copyright Office)

Q: What about my friend who's always cranking his car stereo?

A: Cars tend to move, and therefore do not collect an audience for more than a few minutes. Admittedly, anyone within a mile can hear their music – but then it becomes a noise violation, not copyright infringement. In the unlikely case that one person with a powerful system went to the same location every day and played a predictable style of music, attracting a similar crowd every time, then that person would be creating a public performance and in violation of copyright.

Q: If I pay for a legal copy of a song, can I rip it to use part of it as a ring tone, or copy it to my phone just for listening?

A: It depends. If your purchase included a click-through agreement, chances are that you “agreed” to not do things like this. Click-through agreements have been challenged in court, and have been declared legally sound (Davis 2007, 577).

If you purchased a CD without DRM software, then you may make limited copies for your own use.

Q: I want to use music from a current musician’s CD as background for a film I’m making for my campus student film contest.

A: Displaying a film with the music from the CD playing constitutes making and distributing a copy. It is acceptable to make a copy for private needs, such as keeping a backup copy, or copying a song from a CD into your MP3 player, but copying and re-using the music in such a way is copyright infringement. (Boyles, Aoki, and Jenkins 2006)

Q: OK, I’ll use classical music then. I KNOW Beethoven died before 1923!

A: While you are correct about Beethoven’s age, you should also know that copyright for sound recordings sits with the recording, not the date the music was composed. Any recent classical recording is most likely to be under copyright, and the owners of the recording will expect a permission fee for its use.

Q: Finally, what if I’m making the film for a class? I’ve heard that everything’s OK if it’s done for a class.

A: Not everything is OK when done for a class, but many things are. In a non-profit accredited educational setting, you may create a film using images or clips of film from other artists, and you may use any music you like for the background. The creation you make is only “safe” within the educational setting. You should not use it for your portfolio or to show to a gathering of friends.

III. How does copyright law affect sheet music?

Q: If I buy the sheet music for a song, I can only play it at home, right? It says “for home use only.”

A: You may play the song at home, or at a friend’s house, or at your music teacher’s studio. You may also play it in an educational recital. None of these settings constitutes a “public performance”. In addition, if you go to college and your dorm has a piano in the lobby, you may play it there. Although technically a public area, you are not a professional musician, and are not likely to attract a significant crowd. (Washburn University Copyright Committee 2008)

Q: My sister and I both enjoy playing the piano, and have been sharing our sheet music to popular songs since we were in middle school. Now we’re in different colleges, hundreds of miles apart. Whenever one of us buys a song in sheet music, we automatically copy and send it to the other. Is this wrong?

A: Yes, you are making a copy, which is one of the rights of the copyright owner. The four factors of Fair Use, and other limitations on the copyright owner, do not offer an exception for your situation. It is frustrating, since as siblings at home you once shared everything, but you’re separate adults now. Each of you should buy your own copy.

Q: I’m a vocal performance major and have been looking for sheet music for a song that is out of print. How should I go about getting the music legally?

A: First, check the large online sheet-music sellers such as Sheet Music Online or Musicnotes.com. If they do not have the song you need, and your library also does not, and you need it for your research as a student, then you could request it through Interlibrary Loan at your library.

Sheet Music Online <http://www.sheetmusic1.com/>

Musicnotes.com <http://www.musicnotes.com/Default.asp>

(Several more online stores sell sheet music. Explore with your favorite search engine).

Q: I'm in a singing group outside of school. Can I buy the sheet music for a great new song and then photocopy it for the other 10 singers?

A: Making and distributing copies in such a way infringes on the copyright owner's right to make and distribute copies. Fair Use and other limitations do not apply to this situation, even if the group is not earning money.

IV. How does copyright law affect the performance of music?

Q: The "cover songs" my band has practiced are entirely from bands from other countries. That means we don't have to worry about copyright, right?

A: Wrong. The United States has copyright agreements with most other countries in the world. Not only does that prohibit you from using a foreign musician's music freely, it also prohibits them from using yours. Our international copyrights are governed by the Berne Convention. To see what countries are part of the Berne Convention, go to:

http://www.wipo.int/treaties/en/SearchForm.jsp?search_what=C

...and pull down the menu labeled "All Contracting Parties". Most countries in the world are part of the Berne Convention. (World Intellectual Property Organization 2010)

Q: How do professional musicians get to do "cover songs"? They record the same song as the original musician and distribute it like their own.

A: Professional musicians get permission to do this, usually by paying a fee or percentage of proceeds to the copyright owners.

Q: Two friends and I have formed a band because no one else was making the kind of music we wanted to. Our music is original and we really think we're on to something. We're getting ready for our first concert, but my father says that if we don't register the copyright to our songs before performing, they'll be public domain and anyone will be able to copy from them. Half the songs aren't "finalized" and we don't have the \$35 plus a decent recording needed for all 12 songs. In order to get fans, do we have to just give our songs away?

A: Your father is wrong about registration and ownership. If your band created the song, then the song is jointly owned by the three of you. However, if no song is in a “fixed medium,” then it is not eligible for copyright. A fixed medium is either a recording or a written transcription. If this is your case, your songs are not protected by copyright. Once they are represented by a fixed medium, they are automatically protected by copyright, whether or not they are registered. (Anonymous1992)

Q: My band is expert at playing “covers” of popular music. We play every weekend at certain bars in our town. We have never thought about copyright; it seems like lots of bands do what we do. One of our members is majoring in music, and she recently learned about the ASCAP. In fact, she’s being encouraged to join. She’s also been told that we cannot play in public without the original artist’s permission. What is this? Have we been breaking the law for over two years?

A: Yes, public performance is one of the rights of the copyright holder, and if you cannot claim Fair Use or another limitation, someone has to pay the song’s creator or current copyright holder. In the case of recorded music, musicians have created organizations called “Music royalty management” groups. The three main organizations are ASCAP, BMI, and SESAC. Any public venue that has a public performance of music that is not original to the performers must arrange a license for the performance. If it is a place that frequently hosts such performances, then the owner will pay for an annual license. If they don’t have such a license, the owner AND the band are liable for copyright infringement for every single song performed. Before accepting a hire to perform, check to make sure the bar has a BMI or other license. (Legislation Committee, Music Library Association 2010)

Q: Our band creates auditory mash-ups. We use sounds – found in real life, on the internet, or on sound effects CDs, mix them with existing recorded songs, and often substitute one set of lyrics for another. We (and our fans) believe that our new arrangements lead people to see new meanings and interpretations of the earlier songs. Using a tune or lyric that is already familiar helps us introduce nuances and meanings that would be much more difficult to present if we started from scratch. We thought if Weird Al Yankovich could re-write songs like he does, then we could go a step further. Is our form of creation legal, or a major copyright violation?

A: You pose a difficult question, but without difficult questions life would not be interesting. First, see the previous question. If you are performing in bars or similar venues which have a

BMI or similar license, then your use is probably covered. (unless the license is for performance and not adaptation). Second, if your songs really do present new meanings to the old content that you use, then you could argue that your work is transformative, and that it is a Fair Use. Unfortunately, you may have to go to court to prove this. Third, artists like “Weird Al” purchase a license before they re-write a song.

Q: My roommate and I re-wrote the words to a popular song in order to show just how very wrong a certain political candidate was. We re-recorded the song with our lyrics and posted it on the Internet. Next thing we knew, we had a “cease and desist” letter and an appointment with the campus IT office. What happened? I thought parody was not protected by copyright!

A: Parody is protected, but what you did was satire, not parody. The difference is that parody uses a song or other work by another artist, and re-writes it in order to comment on the original song or other work. It’s a specific protected zone of work. Using a song to comment on another topic (the politician) is called satire. You must either use a song that is in public domain (like “This Land Is Your Land”) or purchase a license to re-work the song. (Stanford University Libraries 2007)

Q: I am a choir director for a public middle school. Does my school need to purchase a license for music performed at our concerts?

A: Not in most circumstances. Section 110(4) exempts from infringement the performance of a nondramatic literary or musical work, not including broadcasts, when the performance takes place without any commercial advantage whatsoever, and without any fees paid to performers or other associated people. Either there should be no admission charge OR proceeds after reasonable costs must be used for educational, religious, or charitable purposes. (Paraphrased from the Music Library Association web site) (Legislation Committee, Music Library Association 2010)(United States Copyright Office 2010)

Conclusion:

Music is covered by copyright, and by all of the same copyright rules as literature or art. However, the click-through agreements attached to music purchased online, or shrink-wrapped with the CD, can change the playing field of “users rights” from copyright to licensing terms. Knowing the terms you purchased music under can save you a headache later on.

Likewise, performance of music is covered by the same basic copyright rules. The music royalty organizations (SESAC, ASCAP, BMI) often contact music venues to make sure that royalties get paid. A new musician may be surprised by details of these rules, but they are part of the law, and all musicians should understand them.

Glossary:

Berne Convention: An international agreement to support reciprocal copyright agreements between all participating countries. Some standard practices in copyright law are accepted in member countries. For more information, see

http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

DRM: Digital Rights Management. Software designed to prevent copying, or repeated copying, of a digital recording or of software.

License: A contract that provides one party with permission to do a specific activity. In the music world, a musician may license the permission to use a certain song repeatedly, or to use a specific portion of it.

Music royalty management organizations: These are organizations which musicians hire to manage the royalty (or licensing) fees for their music. The biggest music royalty management groups in the US are the ASCAP, BMI, and SESAC.

ASCAP: American Society of Composers, Authors and Publishers <http://www.ascap.com/>

BMI: Broadcast Music International <http://www.bmi.com/>

SESAC: Formerly “Society of European Stage Authors & Composers”; now international, and known simply as “SESAC”. <http://www.sesac.com/>

Online Music Providers: Online stores or services, such as iTunes or Rhapsody, which sell or lease access to music.

Parody: A new work that uses a portion or all of an earlier work to comment on that earlier work or the ideas that it proposed.

Peer-to-peer networks (P2P): A method of connecting computer users that bypasses large servers and connects users directly to each other. P2P networks are used for many activities, but they are most commonly known for the illegal, or partially illegal, distribution of music, movies, games, and software.

Satire: A creative work that pokes fun at, or insults, a public figure or an issue. Often a satiric work uses a popular song or other work to start from.

Scenarios

- 1) A person you've only recently met sends you a text message with a song attached. There is no apparent DRM on the song file. What should you do?
- 2) You've just paid full price for a new song from an online music store. Your roommate asks you to send him a copy. What should you do?
- 3) Your piano teacher copies your sheet music so that another student can play it also. What should you do?
- 4) Your band is working on a new song, written by yourself and the other band members. So far, you've written down a series of guitar chords, by hand, with arrows and other marks indicating when to play them. One of your friends even jokes about your poor handwriting and how some marks are scratched out and written over. Does this page of notes constitute a "fixed medium"? Is the new song already under copyright?
- 5) Your band has decided to skip the "original artist" approach and play covers for a while. At your second gig, the bar owner insists on \$300 up front to pay for the "BMI License". What should you do?

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Chapter 6: Litigation, Copyright, and Music:

Napster, Grokster, & the RIAA Lawsuits

From the late 1990s to 2008, the Recording Industry Association of America (RIAA) brought multiple lawsuits against companies and individuals they claimed were either infringing copyright or helping others to infringe on copyright. These lawsuits led to a greater awareness of copyright issues among average Americans and college students. As they have had a lasting impact, the biggest lawsuits are described here.

I. Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984)

The story of lawsuits against modern entertainment technology begins with a case in 1984 in which a television company brought suit against a maker of home videotape recorders, now known as VCRs. Universal Studios was aware that consumers could use the VCR to record commercial television programs, and believed that such recording was in violation of copyright law. They brought suit against the manufacturer, claiming it was guilty of contributory copyright infringement because they sold the means to commit infringement to the public. The Supreme Court examined the Fair Use doctrine, and decided that a device with “substantial non-infringing uses” should not be kept from the public because some users might use it to break the law. The Court also ruled that “time-shifting,” or recording a show in order to watch it later, was a legitimate fair use. This case was decided 5 to 4, with five judges ruling for it and four ruling against. In this book this case will be referred to as “Sony,” but in some publications it is called the “Sony Betamax” or the “Betamax” case. (Justia.com, 1)

II. Napster

In 1999, a college student named Shawn Fanning created a computer program to help himself and his friends find and share music files via computers. He was frustrated with the then-currently available methods. MP3s files had flexibility and portability; each of his friends had thousands of them. All that was needed was an easy way to find and download the available music files. (Funding Universe 2005).

“Napster,” as the program came to be called, was tested and perfected by Fanning and his friends in the spring of 1999. It was instantly popular, and quickly spread outside the initial intended circle of friends. By June of '99, Fanning established Napster as a business with his uncle, John Fanning (Funding Universe 2005).

Napster spread quickly among college students and thousands of other computer users (Funding Universe 2005). On college campuses, use was so high that some schools reported that 80% of their bandwidth use was for Napster. Soon, many schools began banning Napster from their networks so that bandwidth could be used for scholarly purposes (Ante 2000, 112-120). People enjoyed Napster not only because it provided free music, but for its easy interface and extensive variety of available music. Napster was an excellent resource for discovering and trying out new bands and musicians. Anyone who has spent money on a CD only to find it's pretty bad knows the appeal of a service like Napster.

Shawn and his uncle, John Fanning, carefully considered the copyright question of their service even before officially opening Napster in June of 1999. They studied the law and concluded that, after a big court case, their service would be declared legal. “In an e-mail obtained by BUSINESS WEEK, John Fanning even suggests that there is only a 10% chance that Napster could lose a court case.” (Ante 2000, 112-120).

The RIAA (Recording Industry Association of America) brought suit against Napster in December of 1999. During the trial, which took place in 2000, the RIAA argued that “Napster users are engaged in the wholesale reproduction and distribution of copyrighted works, all constituting direct infringement. The district court agreed” (Anonymous 2001, 1004).

The court further conducted a four-factor Fair Use analysis, and concluded that typical uses of Napster could not qualify for Fair Use. Following is a summary of their analysis:

- 1) Purpose & Character: The use of music via Napster was not transformative simply for reformatting it into the MP3 format. Also, the transfer of files through Napster was commercial because it substituted for a purchase.
- 2) Nature of the use: Most items transferred through Napster were very creative, and therefore “closer to the core of copyright protection.”
- 3) Amount of the work: Napster users predominantly copied the entire song. While some complete copies could be supported under Fair Use, this was not one of them.
- 4) Market Effect: Napster harms the market for music in two ways. It reduces the demand for CDs among college students, and it became a barrier to businesses seeking to enter the digital downloading music market.
(Anonymous 2001, 1004)

During the trial, Napster claimed that its users downloaded music in order to decide whether or not to buy the CD. The court determined that such “sampling” is a commercial use and that the music companies already did supply short samples of their music. Claims that Napster did not harm the CD industry were refuted with statistics citing falling sales of CDs.

In addition to losing the fair use argument, Napster was also found guilty of *contributory* copyright infringement AND of *vicarious* copyright infringement. “Traditionally, one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a contributory infringer. In other words, liability exists if the defendant engages in personal conduct that encourages or assists the infringement.”(Anonymous 2001, 1004). Vicarious infringement means that “the defendant has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities”(Channel 2004, 6-12).

The Napster program encouraged users to copy files from other users, with no notification of whether those files were “legal” to download. Many users had no knowledge whatsoever of the copyright issue, and simply took what they wished. By the end of the trial, it was clear the Napster, as it had existed, was doomed.

III. Grokster

While Napster was being shut down by legal decree, dozens of other programmers were at work. The Napster idea – of free sharing of music and other files by thousands of Internet users – was too big an idea to just go away. Very soon after the demise of Napster, other services such as Grokster, KaZaa, Gnutella, and others became available. (Ante 2000, 112-120). These services operated without a central server or listing of available files, and were able to connect one user directly with another. Monitoring of a service like Grokster or KaZaa could not provide a list of users.

Visitors to the Grokster site could download – for free – peer-to-peer file sharing software. The software allowed computer users to connect directly to each other and trade digitized documents. Grokster did not provide a central server or any support for their activities. Because it was not involved with the user’s activities, the people creating Grokster believed that they were not liable for potential copyright infringement. Grokster sold advertising both for its web site and for spots inside the software, only seen when the software was running (Woellert 2004, 50-51).

Grokster was very popular. Not surprisingly, the music and movie companies took legal action. The RIAA and MPAA brought suit against Grokster in the Los Angeles Federal Court in 2003. The court upheld the Grokster argument, based on the earlier case, *Sony Corp v. Universal Studios* (1984), in which the Supreme Court determined that a software or device with “substantial non-infringing uses” could not be held liable for some users who chose to infringe upon copyrights (Woellert 2004, 50-51). The RIAA and MPAA were able to appeal this ruling to the 9th Circuit Court of appeals, which also ruled in favor of Grokster. “The lower courts found the intent of the network operators was irrelevant if there was not actual participation in the illegal copying activity” (Kemp 2007, 81-89). Because the first two trials ruled in favor of Grokster, it is relatively easy to find news articles declaring the victory of Grokster over the music industry. Don’t be misled by these articles; Grokster’s fate was determined by the Supreme Court.

The RIAA and MPAA appealed the case to the Supreme Court, which heard the arguments in March of 2005. In June, the Supreme Court ruled unanimously that the Grokster service operated in violation of copyright laws, and could be held liable (Kemp 2007, 81-89). The case is seen as limiting the previous Sony decision, in which substantial non-infringing use could protect a device or service. While it was seen that Grokster’s software could be used for non-infringing purposes, estimates consistently held that 90% of its uses were infringing, and that Grokster’s advertising encouraged such uses. Furthermore, Grokster was found to be inducing its users to infringe on copyright through its advertising, its name (similar to Napster), and its

business practice of in-program advertising. More users meant higher rates for advertising, and more users could most easily be found through more music on the system (Anonymous 2005, 916).

Since the conclusion of the trial, the Grokster web site has displayed this message:

The United States Supreme Court unanimously confirmed that using this service to trade copyrighted material is illegal. Copying copyrighted motion picture and music files using unauthorized peer-to-peer services is illegal and is prosecuted by copyright owners. There are legal services for downloading music and movies. This service is not one of them.

YOUR IP ADDRESS IS _____ AND HAS BEEN LOGGED.

Don't think you can't get caught. You are not anonymous. <http://www.grokster.com/> (Grokster 2005)

IV. The RIAA lawsuits

Although the music industry was successful in shutting down Napster, Grokster, and a handful of other services, online sharing of music files continued. The music companies developed a new strategy: targeting the people who download music. On September 8, 2003, the RIAA filed the first 261 lawsuits against alleged illegal downloaders, commonly referred to as "pirates" (Kravets 2010). Over the next several months, thousands of lawsuits were filed. An RIAA executive said: "Nobody likes playing the heavy and having to resort to litigation, but when your product is being regularly stolen, there comes a time when you have to take appropriate action....We simply cannot allow online piracy to continue destroying the livelihoods of artists, musicians, songwriters, retailers and everyone in the music industry." (Boliek 2003, 54-55).

The RIAA's procedure took two steps. First, they employed a careful interpretation of the DMCA §512(a-c,h). This section allowed the RIAA to serve a subpoena on an ISP that is classified as an intermediary in music downloading activity. The ISP identifies the individual users associated with the music, allowing the music companies to seek damages from the individual (Zilkha 2010, 668-713).

While most ISPs complied with the RIAA subpoenas, Verizon chose to challenge it. The issue went to court in Recording Industry Association of America, Inc. v. Verizon Internet Services. The judge in this case decided that the particular clause of the DMCA (§512h) applied only to ISPs that stored information on their servers, not those that served as intermediaries (Zilkha 2010, 668-713).

Following this suit, the RIAA developed its “John Doe” approach. Using “John Doe” to refer to a person whose name is not known, the RIAA would serve subpoenas to persons whose IP addresses were associated with downloading music illegally. Often a “John Doe” subpoena would identify dozens of IP addresses at a time (Zilkha 2010, 668-713). Once a person received a subpoena from the RIAA, they would typically have a short time to settle the claim out of court. If they did not settle, a lawsuit would be filed against them. Most persons so targeted would settle, usually by paying \$2,000 - \$5,000 (France 2003, 94-96).

The RIAA lawsuits were a public relations disaster. The people targeted seemed to be randomly chosen; they included a 12-year-old girl who lived in public housing, (McBride and Smith 2008, B1-B7) a senior citizen who only used email (BBC News 2003), a deceased person (McBride and Smith 2008, B1-B7), and a Des Moines, IA school board member (private interview). The vast majority of those receiving a subpoena settled out of court. In most cases it was one individual with no legal experience facing a large conglomeration with hundreds of lawyers. They sincerely felt they stood no chance. A few individuals have challenged the RIAA, but have not been successful.

The RIAA chose to stop using lawsuits to fight illegal downloading in December of 2008, after filing nearly 35,000 lawsuits (McBride and Smith 2008, B1-B7). It was just over five years from the first lawsuits. It has since begun a procedure of working with ISPs to deny access to “serial downloaders” (Zilkha 2010, 668-713).

Conclusion

We can learn from this history that when an established, profitable industry is threatened, the owners of the industry will work to defend it. In the case of the recording industry, they used copyright as their tool. In its simplest state, a copyright guarantees payment to the creator. The RIAA used the image of the musicians, studio workers, and music store owners losing their livelihood to illegal downloading. However, one long-term recording musician told it another way: “Costing *me* money? I don't pretend to be an expert on intellectual property law, but I do know one thing. If a music industry executive claims I should agree with their agenda because it will make me more money, I put my hand on my wallet...and check it after they leave, just to make sure nothing's missing” (Ian 2002).

Glossary:

Contributory liability: “when the defendant also knows of the infringement and materially contributes to it.” (Kemp)

IP Address: An “Internet Protocol.” The IP address is a string of numbers which can identify a particular machine on an Internet network.

Subpoena: A court order issued at the request of a party requiring a witness to testify, produce specified evidence, or both. A subpoena can be used to obtain testimony from a witness at both depositions (testimony under oath taken outside of court) and at trial. Failure to comply with the subpoena can be punished as contempt of court. (Nolo.com Dictionary)

<http://www.nolo.com/dictionary/subpena-%28subpoena%29-term.html>

Vicarious liability: “when the defendant directly financially benefits from the infringement.” (Kemp)

Study questions:

- 1) Why was Napster found to be infringing copyright?
- 2) Why did the Fannings believe that Napster was a legal system?
- 3) Why was Grokster found to be infringing copyright?
- 4) What role did the Sony decision play in the Napster and Grokster lawsuits?
- 5) Why did the Supreme Court come to a different ruling than the 9th Circuit Ct or the Los Angeles Federal Ct about Grokster?
- 6) What are some reasons a musician would oppose downloading?
- 7) What are some reasons a musician would approve of downloading?

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Chapter 6: Napster, Grokster, and the RIAA Lawsuits

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Chapter 7: The Orphan Works Challenge

In Artwork and Photography

Danielle is the Vice President of Marketing for the dance team at her University. This position requires her to advertise the team's auditions and the games they are performing at so that more people attend. Danielle was extremely busy one week because of exams and group projects and she completely forgot to make a poster for auditions. Generally, Danielle takes her own picture for the poster, but this time she just went online and looked for dance photos. She ended up selecting one that had been taken by a semi-professional photographer. She put the picture on the poster with the time and date for auditions, and printed out 30 copies. Then, she then posted them all around campus. A few weeks later, a woman came forward saying that she had taken the picture and Danielle could not use it without compensating her or at least asking permission. Danielle said that because it was on the Internet she could use it. What should Danielle and the other photographer do?

By the end of this chapter, you should be able to answer:

- I. What rights do I have in the paintings I create?
- II. What rights do I have after I sell my paintings?
- III. Is creating a collage an infringement?
- IV. What rights do I have in the photographs I take?
- V. Can artwork be used in a scholarly publication?
- VI. What are "Orphan Works," and how can they be used?

Q: I've heard that copyright is different for art than for other things like books or music. Is that true?

A: No, it's not true. The basic rules of copyright (covered in chapter 1) stay the same, and apply to all types of creativity. However, as each genre is used and distributed a bit differently, different copyright concerns are stronger in each genre. For example, since the days of Napster and Grokster, both music and movie companies have been very concerned about the

distribution of music. Book publishers, however, are more concerned about significant portions of their books being re-produced in other books, but they're also making sure that e-books are distributed only with security management software. Artists who make "commercial art" may seek a trademark for their work rather than rely on copyright. Other artists will claim some of their copyright rights on their works even after they are sold. Every form of creativity has its own concerns; that's why a chapter will be dedicated to each of the forms: music, movies, and art.

Q: Has the Internet and downloading changed copyright in the arts?

A: No, but yes. If you look at how music producers viewed potential pirating activities in 1985 in comparison with today, then the answer is yes. Many artists use web sites to display their works and attract buyers. Unlike in the physical environment, most artists displaying their work online will label their work with strict copyright warnings or require click-through agreements before showing works. And today, there are more things you can do to digitized art. But the law of copyright has not changed. An infringing copy was just as infringing in 1985 as in 2011. Digital technology (cameras, software, etc) makes it easier to create and infringe on copyrighted works. The Digital Millennium Copyright Act of 1998 added protection for software that prevents copying. It made it illegal to bypass this software, or share information on how to bypass it. (More details on the DMCA are in Ch. 4)(U.S. Government 1998)

I. What rights do I have in the paintings I create?

Q: I am studying art, specifically painting, at a university. I create a lot of drawings and paintings. I have heard that it costs \$35 per item to get a copyright. After paying tuition and fees, I just can't do that. How can I get copyright in my own works at this stage of my career?

A: You do have copyright in your drawings and paintings already. Once you have created them in a fixed medium – on paper or canvas, or digitally – there is automatic copyright protection. Registration (for \$35) is required if you plan to protect your work against infringers in court and collect statutory fees. Without registration, you may still sue infringers for actual damages. Another advantage of registration is that it helps you to retain some of the copyright owner's rights once you sell a painting. (Anonymous1992)

Register your works at the Copyright Office <http://www.copyright.gov/>

Q: I am going to college next year, and would like to take my favorite painting, which is owned by my aunt, with me. She won't give it up, of course, so I decided to take a digital picture of it and print out my own copy. My aunt got all upset because she thinks this would be violating copyright! I say that I'm not going to put it online, or sell it, so it's OK. Who's right?

A: A strict reading of copyright would favor your aunt. The rights of the holder of copyright in artwork are to make and distribute copies, make derivative works, and to display in public. You plan to make a copy (with the camera), and then make a derivative work (the printout). If the artist does not wish his or her work to be presented in a lower-quality format, then the artist has the right to prevent this action.

Another way to read this situation, however, is that one copy, displayed in a private room, is not a public display. It is highly unlikely that you'll get caught (unless your roommate turns out to be the artist's relative). You *might* be able to claim it as a "personal research" copy, like copies of articles or book chapters. If the subject of the picture can be at all related to your studies, you could try this argument.

Q: I am studying fine arts, focusing on painting. I would like to make copies of my favorite paintings in different styles in order to develop my technique. How do I contact the artists in order to get permission to do this?

A: To contact artists, start with a search using more than one online search engine. Many artists have web sites they can be contacted through. If the artist is dead, their descendants may still be managing the copyright. If you do not find them this way, go to ASA (American Society of Artists) or AIGA (Graphic arts)

However, to copy a painting solely for educational purposes – or to develop your technique – is not an activity that needs copyright permission, so long as the copies are not displayed.

Q: Can I copy artwork just for fun, or will I get in trouble?

A: It is not likely to be a copyright infringement if you copy artwork just for fun, so long as you do not display or distribute your copies.

II. What rights do I have after I sell my paintings?

Q: I have been selling my artwork in the form of hiring myself out to paint any surface – cars, motorcycle helmets, instrument cases, laptop cases, etc. I have only recently begun to think about copyright. Obviously, I need to give up the right to display publically, but what about the other rights?

A: The copyright owner's rights are to make and distribute copies, make derivative works, display or perform a work in public, and to perform a recording by means of a digital transmission. Those that apply to artwork are to make and distribute copies, make derivative works, and to display in public. If you were to assert copyright over your future works, you could claim the rights to make and distribute copies, and to make derivative works. When you sell a painted item, you should (by contract) assign the right to control how it is displayed publically to the purchaser. Whether you keep or assign your other rights is up to you.

Q: I made a great painting, and it was purchased by a local restaurant. Four years later, I discovered a sculptor selling sculptures based exactly on my painting! I picked up the sculptor's card, but I'm not sure what to do next. Can a sculptor create works based on someone else's paintings, but without the painter's permission?

A: If a sculptor re-creates an exact scene from a photograph or painting, their actions can be considered infringing. Changing the format from 2-dimensional to 3-dimensional is not enough to establish originality. This issue was addressed in the court case *Rogers v. Koons*, in 1992. Rogers, a commercial photographer, took a picture of two people holding several puppies. It was used on greeting cards and similar items. Jeff Koons, a sculptor, saw the photograph and used it as a model for a statue, changing only some very small details. When Rogers sued for copyright infringement, Koons claimed his statues were a parody of the greeting card. The court decided that an exact copy was simply a case of using the image in a different form, and did not count as parody. (Laws.com 2010)

III. Is creating a collage from clips of other people's art an infringement?

Q: I enjoy creating collage art. I take pictures from magazines, drawings from friends, photos from web sites, strips of cloth, food labels, and what-have-you and rearrange them until they mean something to me. In recent years I've found that other people enjoy my collages, and I've been able to sell some of them. But I'm still confused; can I claim copyright on these works?

A: There are two major schools of thought about collage: Some say it is not infringing, and some say that it is. And there are some strong arguments either way. However, consider that one artist's drawing or photograph is recognizable in one spot in one of your creations. It's smaller than its original size, but it is clearly recognizable. Remember the rights of the holder of copyright in artwork: are to make and distribute copies, make derivative works, and to display in public. Technically, you are infringing on all four of these rights. However, if you consider Fair Use (Ch. 2), the first factor is the "purpose and character of the use". You are using the other artist's work in conjunction with many other images and creating something new. In most circumstances, such a use could be seen as transformational, and therefore more likely to be "fair".

A court case in 2003, *Kelly v. Arriba Soft Corporation*, dealt with the recreation of art images as "thumbnails" or very small images that were displayed as a result of a search engine search. The Arriba search engine was among the first to display images rather than text. The images could not be enlarged and were just barely large enough to be recognizable. When a user clicked on the image, they were taken to the artist's original web site for large examples of the art. The appeals court decided that the thumbnails, although being examples of copying and distribution, were a fair use of the art. The full analysis is available here <http://caselaw.findlaw.com/us-9th-circuit/1456066.html> (Findlaw.com 2003)

How does this case apply to the collage question? When a piece of art is reproduced in a much smaller form, then used as part of something else (even another piece of art), the use can be seen as transformational. The creator of a collage is still at risk of a lawsuit, but there is an argument for Fair Use. (Ovenall 2001)

Finally, there are several web sites which distribute "royalty free" art specifically for collage work. Check these out:

Reusable Art: <http://www.reusableart.com/>

Public-Domain-Photos: <http://www.public-domain-photos.com/>

GIMP Photo Archive: <http://gimp-savvy.com/PHOTO-ARCHIVE/>

Internet Archives (all formats) <http://archive.org/>

(Many more such collections exist; use a search engine to find them)

IV. What rights do I have in the photographs I take?

Basic Facts: The photographer holds the copyright of any image they capture using a camera. That means if you loan your camera to a friend, and she takes “the world’s greatest picture,” then your friend owns the copyright in that picture. The photographer owns all the standard copyright owner rights (as applied to artwork): to make and distribute copies, make derivative works, and to display in public. If the photographer displays the images online, they do not “automatically” become public domain. If another person re-uses them without permission, then they have committed copyright infringement. (Anonymous1992)

Q: I took a digital photography class. To create photographs for the class I used school-owned cameras and computers with expensive software for enhancing the photos. With all this equipment contributed, does the school have some copyright in the photos I created?

A: It’s the photographer that owns the copyright. If you took the picture, and you processed it into its final form, then it is your insight that created the photograph. You own the copyright, even if you’re using someone else’s equipment.

Q: I took several pictures of the Vietnam War Memorial in Washington, DC. My professor told me that I have violated the copyright of the designer of the memorial, as it is very unique. Could this be true? Other people were taking pictures, too.

A: Always remember that if a large number of people are all doing the same thing that does not mean what they are doing is not against the law. That being said, we can address the question of taking a photo of a memorial. Section 120 of the copyright act addresses the “Scope of exclusive rights in architectural works”: (a) Pictorial Representations Permitted. — The copyright in an architectural work that has been constructed does not include the right to prevent the

making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.” Your photograph of a public memorial is not an infringement.(American Society of Media Photographers 2011)

V. Can artwork be used in a scholarly publication?

Q: I am working on an article for an academic journal in which I will be analyzing the style of three different 20th-century painters. It would greatly enhance the article to display certain paintings along with it. Since this is for scholarly research and not for profit (I’m not being paid for the article), I don’t have to pay copyright clearance fees, right?

A: Your answer depends largely on the journal publisher. The publisher will have a policy on reprinting copyrighted works, and they will have the final say on whether or not a clearance fee should be paid. Many publishers insist on clearing every use of a copyrighted work, no matter how strong a case can be made for Fair Use. Some owners of artwork enforce their rights very stringently. Also, some academic journals do turn a profit, and so is seen as a commercial enterprise. A commercial publication can still claim Fair Use, but it is harder to argue for. In your situation, you should do what your publisher says.

VI. What are Orphan works, and how can they be used?

Q: I’ve found a photograph that looks to be from the early 1940s. There is nothing written on it, front or back. It was in a file in my school’s archives, labeled simply “Events”. I would like to use the photograph in a book I’ve got a contract to write, but the publisher says I must get copyright clearance for it! How should I proceed?

A: You have found an “orphan work”. An orphan work is a work made after 1923 whose owner cannot be found after a reasonable amount of work. You can’t get permission to use it, because you can’t find the owner, and you end up not using it, because your publisher is concerned about potential lawsuits.

There are thousands, if not millions, of orphan works in the United States. We can assume that many are not worth much, but many others could be used in many creative ways. Some people are willing to use an orphan work without permission, but it is a “murky territory.”

Orphan status may or may not last forever for a given work. It lasts until the copyright owner is found. The status of a work being “orphaned” is not official or set by law. “Orphan works” is only a phrase used to describe items whose owner is difficult to locate. They can be photographs, literary, musical, etc.

The U.S. Congress tried to pass a bill in 2006, 2007 and 2008 to clarify the status of orphan works and what types of searches were required before publishing an orphan work without copyright clearance. The bill was not written clearly enough to satisfy all interested parties, and it did not pass.(American Library Association 2011)

Q: I found a fantastic drawing in our collection of family records, but no one in my family knows who drew it or when. I would like to display it in an art gallery (it’s that good!) but both galleries I have talked to would not display it without knowing who the artist is and whether or not copyright clearance is required. I assumed that as a descendant of the artist, I am a current copyright owner. Is that true?

A: As no one in your family recognizes the drawing, you must consider the possibility that it was drawn by somebody from outside the family. Since this is not known, you cannot assume that you are a copyright owner of this drawing. The “zone of uncertainty” about this drawing makes it an “orphan work”: something that is presumably still under copyright, but whose owner is not findable. Whether or not to display it in public is an individual’s choice.(American Library Association 2011)

Conclusion

What about Danielle? Art and photos on the Internet have copyright protection, just like anywhere else. Danielle has infringed on the copyright of the other photographer. The easiest approach to this situation is for the two of them to come to an out-of-court settlement, either by themselves or with a professional mediator.

Glossary:

Actual damages: In a copyright case, it is the actual number of dollars lost on account of the defendant’s actions.

Statutory fees: Predetermined payments established by law to compensate for certain injuries. Statutory damages are sometimes made available because it is too difficult to calculate actual damages. (Nolo Plain English Law Dictionary <http://www.nolo.com/dictionary/statutory-damages-term.html>)

Orphan Works: Works made after 1923 for which the owner cannot be found after a reasonable amount of work. The owner may be found in the future. Using an orphan work is precarious (unless it can be claimed as Fair Use) because permission cannot be confirmed. The “Orphan Work” status can be attributed to any format – writing, painting, music, etc.

Scenarios:

Scenario 1) My roommate has been working on a collage for several months. He could not find the right materials for one portion, so when I went home, I took several pieces of fabric from my grandmother’s sewing bag. One of them was just what he needed. The collage is finished and attracting attention; he expects to sell it for a good price. It got me thinking; without my contribution, he might never have finished it. Aren’t I a part copyright owner?

Scenario 2) I created a painting based on an idea my uncle came up with during a walk we took together. He now claims copyright interest in my painting. Is this possible?

Scenario 3) My paintings are displayed in a gallery. Some photographer came in and took careful photographs of each one. He says that since he took the photos, he owns the copyright of the photos. Is this possible?

Scenario 4) I attended a sporting event with my friend, who is a photojournalist,. I brought my camera, but he did not. During the event, a fight broke out in the stands near us. My friend asked to use my camera, and took several quality pictures of the fight. He then returned the camera to me, but asked me to send “his” pictures to him after the game. I suggested that he pay me a small fee for these pictures, as it was my camera that made them possible. He says he doesn’t have to, because copyright goes to the photographer. What is the correct answer?

Scenario 5) My graduate advisor and I have put together an academic journal article on the use of fine art in psychotherapy. We would like to include three of the paintings that have been used successfully. Even though the journal we’ve submitted it to isn’t an art journal, the editor is insisting that we get copyright clearance to publish these images. Why? Isn’t this an educational use?

Scenario 6) In our attic, I found two journals full of notes from a college student in the 1960s. My father said they were written by a friend of his. He's lost track of the friend and the friend had a really common name, so I doubt I'll ever find him. I'd like to write a one-act play based on one of the events in the journals. It is different from anything else I've read or heard about the 1960s and I think it would be a good production. Is it OK to use this?

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Chapter 7: Artwork and Photography

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Chapter 8: Best Practices in Film and other formats

On August 29, 2002, CleanFlicks of Colorado, a company that issues E-Rated movies "edited for content to remove nudity and sexual situations, offensive language, and graphic violence," sued 16 movie directors in Denver's federal district court for the right to distribute altered versions of movies on DVD and VHS. The company claimed First Amendment and fair use rights. (Ardito 2002, 19; Anonymous, 2002) This suit ultimately failed, and CleanFlicks went out of business.

Subsequently, in 2005, Congress passed the Family Movie Act, which allows the use of devices either in the home, or that transmit to the home, movies with "limited portions of audio or video content" made imperceptible. In other words, those people wanting an edited version of a video may have one, and manufacturers of such equipment may safely distribute it. (Duncan 2005, 1) This is an example of *sui generis* legislation, or legislation for a specific situation.

Popular movies, documentary films, and educational video are all common parts of modern life. But their creation, and the use of portions for various purposes have led to many copyright disputes. Troubles experienced by documentary filmmakers have led to a new trend: the creation of "best practices" statements.

By the end of this chapter, you should be able to answer:

- I. Is it infringing to take clips from a movie?
- II. How can I make copies of my favorite movies without infringing copyright?
- III. Is modifying a movie always an infringement?
- IV. Does a documentary filmmaker have to avoid "surrounding culture" when he films?
- V. What are the "Best Practices"?

Q: I've heard that copyright is completely different for movies than for other things like books or music. Is that true?

A: No, it's not true. The basic rules of copyright (covered in chapter 1) stay the same, and apply to all types of creativity. However, as each genre is used and distributed a bit differently, different copyright concerns are stronger in each genre. For example, since the days of Napster and Grokster, both music and movie companies have been very concerned about the

distribution of music. Book publishers, however, are more concerned about significant portions of their books being re-produced in other books, so they're also making sure that e-books are distributed only with security management software. Every form of creativity has its own concerns; that's why a chapter will be dedicated to each of the forms: music, movies, and art.

Q: Has the Internet and downloading changed copyright?

A: No, but yes. If you look at how movie producers viewed potential movie pirating activities in 1985 in comparison with today, then the answer is yes. Movie distribution companies – those that manufacture, ship, and profit from the theater versions and DVDs – are substantially more concerned about pirating activity than they used to be. But, the law of copyright has not changed. An infringing copy was just as infringing in 1985 as in 2011. The Digital Millennium Copyright Act of 1998 added protection for software that prevents excess copying of a DVD. It made it illegal to bypass this software, or share information on how to bypass it. (More detail is in Ch. 3)

I. Is it infringing to take clips from movies?

Q: My little brother enjoys a certain scene from an Indiana Jones movie. We found it on YouTube and bookmarked it. He likes to borrow my laptop to watch it every chance he gets. It's great that my folks don't have to buy the DVD just for his temporary infatuation, but what are we teaching him? Is this legal?

A: First, you are choosing to watch a video that someone else posted on the Internet. That in itself is not against the law. If you were to download it and then share copies with dozens of friends, then you might be infringing. The second question is: did the person who posted the movie clip infringe on the copyright of the movie producers? The answer to this one is, most likely, yes. They may have sought permission for it, but chances are slim. Most people don't care to pay permission fees in order to distribute something for free. Are they at risk? There's a chance that the movie distributors will contact them with a "cease and desist" letter, or even a lawsuit. However, in this excerpt an industry insider explains how YouTube traces copyrighted material, and what responses are taken once something is found:

Copyright holders provide the company with Content IDs for material such as songs, and every video uploaded to YouTube is scanned against the database to see if it contains copyrighted material that matches one of the digital fingerprints. If it does, owners of the copyrighted material have a range of options, from asking the site to remove the video to selling ads around it, or just monitoring its popularity.

"In many cases, however, the label elects to leave it up and to reap whatever benefits the video may avail them to, such as income from advertising or promotional value," said Pauline Stack, a spokeswoman for ASCAP, in an email. (Beer. 2010)

So in many cases, the copyright owners of a movie clip have decided to leave the clip on YouTube for promotional purposes, or in order to sell advertising.

Finally, what are you teaching the little brother? Simply put, he's learning that short bits of entertainment are free online. In this example, that's all that is happening.

Q: I would like to include a short clip from a movie as part of a class presentation. Can I copy that clip onto the flash drive that holds the entire presentation?

A: For a class assignment, in a registered class at an accredited school or university, you may make a copy of nearly anything. The copy you make should not be used in any other way. If the movie is on a DVD protected by digital rights management (DRM) software, you may not bypass that software even for a legal use. (U.S. Government 1998)

Q: If I check out a DVD from a library or a store, is it legal for me to copy just a 5-minute portion of it for my own entertainment?

A: Maybe. If the DVD does not have DRM (software to prevent copying), then a short clip made for personal use is not an infringing action. However, some movie companies may not agree with this interpretation.

Q: I want to post a 4-minute clip from an older (1986) movie onto YouTube. Surely that's not still under copyright?

A: Yes, it's under copyright. However, whether or not you can (safely) post it to YouTube is another question. Some media companies have decided to tolerate this practice (see first question from this section). Others firmly oppose it. Or, a company may change its policy from one side to the other. The basic answer to whether or not you should post a movie clip onto YouTube is "maybe."

II. How can I make copies of my favorite movies without infringing copyright?

Q: I know I can make a backup copy of my music in case the CD breaks. Can I, legally, do the same thing for a DVD or videocassette?

A: Yes, for personal backup or transfer to a different device (such as your computer), you may legally make a copy of a movie. However, the decision is actually made not by law but by the movie distributor. If the DVD has software that prevents copying, you may not bypass that software, even if the copy you have in mind is legal. (U.S. Government 1998)

Q: I just found out that my girlfriend borrows DVDs and copies them so that she can view them on her phone. She says that she'd fall asleep during class if she didn't have movies to watch! I'm worried that she may be breaking the law. Is she?

A: Making a copy for *personal research* is covered under Fair Use. Making a copy for personal entertainment is not. It would be very hard to argue that a movie used for watching during class, even to stay awake, is being used for "research". However, if she owned each movie she copied this way, she could argue that the copies are for backup or for viewing convenience. Finally, if she is breaking the encryption (DRM) on the DVDs in order to make the copies, she is in violation of the DMCA. (U.S. Government 1998)

Q: My parents have hundreds of movies on videocassette. I'd like to convert approximately 25 or 30 of them to DVD format. It's for preservation purposes – those old cassettes are starting to break – but I'd also like to take these movies to college. The original videocassettes were legally purchased. Is it legal for me to convert them?

A: So long as you do not distribute those movies to other people (even for free), it is legal to make this conversion for your personal preservation needs. Where you store the preservation copy - at home or at college - is up to you.

III. Is modifying a movie a kind of infringement?

Q: With my current computer, I am able to run movie-editing software. For practice, I began editing commercial movies that I owned on DVD. I intended only to do this as practice, but after some time, I found it was fun to create alternate scenes, or change the voice of a character. Later still I found that many remakes of movie scenes are available on YouTube, seemingly without penalty. Is it legal to create and distribute modifications of commercial movies?

A: The modified version of a movie is considered a derivative work, and legally speaking, creating a derivative work is the right of the copyright owner. That's why the CleanFlicks Company, described at the start of this chapter, had to close. Some copyright owners take the creation of derivative works very seriously; others are very tolerant of it. Specific instances may be tolerated by the movie owners to take advantage of the publicity, or to sell advertising near the remakes. There is no way to know ahead of time whether your modified version will be tolerated. The safest way to create such modifications is in your own home, and for limited viewership.

Q: I bought a season's worth of my favorite TV show, but realized not far into it that the background music had changed. Why did this happen?

A: The TV show makers licensed the music for the original broadcast, but found the price to use the music in a DVD version too high. Therefore, they licensed different music for the DVD release. This was common when DVD versions of TV shows first became popular. Now it is standard practice to license music for the DVD version at the same time as the broadcast version.

IV. Does a documentary filmmaker have to avoid "surrounding culture" when he or she makes films?

Q: In my documentary film class, our instructor told us that we had to film scenes without any advertising or brand names showing: billboards, flyers, magazines, soda cans (even as trash), etc. I thought that a documentary film should show life "as it is" with all of its details. While I

understand what our instructor told us about copyright and trademark, and the need to pay clearance fees, some part of this just doesn't make sense. Why can't we document life as it is?

A: Actually, you can document life with incidental bits of copyrighted content included. Your instructor was right, but some recent events have changed the world of documentary filmmakers. In 2005, several filmmakers and interested friends met and developed a document titled "Documentary Filmmakers Best Practices in Fair Use." The list helped immensely to describe what sorts of uses of copyrighted materials could be considered Fair.

The Best Practices group was supported by the American University Center for Social Media. They worked together to find several prominent lawyers and film societies to endorse the "best practices" document. From that point, a filmmaker would need to assert that he or she was using the best practices, and work only with publishers and insurers who accepted the best practices. Very soon, the *Documentary Filmmakers Best Practices in Fair Use* became the standard procedure for handling "surrounding culture" while making documentary films. (Center For Social Media 2005, 12)

You may read the full document here:

http://www.centerforsocialmedia.org/sites/default/files/fair_use_final.pdf

Q: Are there Best Practices for other things, like for teaching film?

A: Yes, a good idea often leads to more good ideas. Since the original Best Practices were developed, the Center for Social Media has helped groups develop Best Practices for Online Video, and for Media Literacy Education. Then the Society for Cinema and Media Studies published their "Code of Best Practices" for scholars in film and media studies. Several other organizations are working on and publishing "best practices" for their fields. A statement of best practices is not law, but is widely endorsed by the members of a profession, and a few legal professionals, can become a recognized and accepted code of conduct. At the time of this writing, no set of best practices had been tested in court.

Center for Social Media collection of Best Practices: Statements for dance-related materials, online video, Media Literacy Educations, Open Courseware, Scholarly Research in Communication, and Teaching for Film and Media Educators may be found at

<http://www.cmsimpact.org/fair-use/related-materials/codes>

Several other useful documents can be found at

<http://www.cmsimpact.org/fair-use/related-materials/fair-use-related-materials>

Q: I have heard that a documentary filmmaker was interviewing a person on camera when the person's cell phone ringer went off, playing a popular music riff. Then, the filmmaker's legal office insisted that the music from the cell phone be cleared. In order to "clear" it, the filmmakers had to pay a permission fee of \$10,000. Is this true?

A: Yes, before the Statement of Fair Use Best Practices became accepted, such events took place quite frequently. Often, the filmmakers would try to edit out such interruptions, but at times these were part of the personality of their subject, or very appropriate to the circumstances. For an entertaining look at the lives of documentary filmmakers before the "Best Practices" see the comic book "Bound By Law" at <http://www.law.duke.edu/cspd/comics/>. (Boyles, Aoki, and Jenkins 2006)

Glossary

Best Practices: A method or policy that has been accepted by a relevant group and is regularly adhered to in practice. Typically a "Best Practices" document will apply to a particular activity, such as creating media for an online video. Codes of Best Practice are not law, but may provide a "safe harbor" for certain activities. Several "Best Practices" documents (and related write-ups on Fair Use for certain situations) have been developed about copyright practices, and more are being written.

Scenarios:

1} Your friend loaned you a DVD but had to have it back before you finished watching it. Your local libraries and rental stores don't have it. Are you justified in downloading a copy just to watch the second half?

2) Alex likes to photocopy the cover art of the movies he watches and make collages of them. It's like his personal history, recorded by movie title. Is this use of the DVD cover art an infringement of copyright?

3) Is posting a 4-minute clip from a movie onto YouTube ever NOT a copyright infringement? Explain.

4) Vivian was shooting footage for her documentary film when a large truck went by, displaying a very large advertisement for a museum exhibition on its side. Is Vivian's footage now an infringement of copyright?

5) Vivian was shooting footage on a college campus and accidentally recorded a choir warming up for an outdoor performance. It's definitely a background noise: not prominent, but audible. Should Vivian use this footage as is, or try to erase the choir music?

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Chapter 8) Movies and Film

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Chapter 9: The DMCA and Other Copyright Issues that affect Universities

Dr. Mendez and her graduate student spent most of a summer putting together the best-ever analysis of science fiction in the 1960s. They are planning to publish it in an academic journal, but the journal insisted on copyright clearance for some of the longer quotes. The writers would also like to post it on Dr. Mendez's web site. Who owns the copyright of this article? Who can determine whether a quote needs copyright clearance? Who can determine whether or not to post it?

By the end of this chapter, you should be able to answer:

- I. What are the copyright responsibilities of an educational institution?
- II. What copyright rights and responsibilities do faculty have
- III. What copyright rights and responsibilities do students have?
- IV. Why are Electronic Theses & Dissertations (ETDs) becoming popular?

I. What are the responsibilities of an educational institution?

Many creative activities take place on a college or university campus, and many of the creations made on a campus are protected by copyright. Furthermore, the people teaching and learning on a campus use copyrighted materials in their studies every day. The ideal university environment is one in which copyright is understood and respected.

The *Digital Millennium Copyright Act* of 1998 requires all campuses that act as ISPs (Internet Service Providers) to educate all campus members (students, staff, and faculty) about copyright. If they do so (and also list a copyright infringement contact agent at the Copyright Office), they may claim some immunity from infringement accusations. (U.S. Government 1998) This obligation was further strengthened by the HEOA (Higher Education Opportunity Act) in 2008. In order for an institution or its students to be eligible for Federal aid, the school must do four things every year: Inform all students that the "unauthorized distribution of copyrighted materials" is against the law; provide a summary of penalties for violating Federal copyright laws; provide a summary of the institution's policies for dealing with copyright infringement;

and provide the students with a list of legal alternatives to file-sharing for acquiring music. (U.S. Government 2008)

While every university's copyright policy will be written to meet their needs, some common topics are: how to assign copyright to materials created on campus; how instructors should use materials not belonging to them; and policies to guide the licensing of digital materials. Needless to say, a university copyright policy will need updating as new media and creations are developed.

Materials created on campus belong, in most instances, to their creator. A faculty member is an employee of the university and his or her works could be considered "Works Made For Hire." Most universities, however, officially grant faculty full copyright in the articles, fiction, artwork, and scientific research they may publish. The faculty member's class outlines, notes, and syllabi also belong to them. The granting of copyright to the faculty member is a tradition in higher education, and is not based on any part of copyright law. (Crews 2006, 15)

Student creations belong to the student. If a professor were to use student work as part of their publications without notifying the student, it would be a case of copyright infringement. This is so even if the student is given full credit. If the student did not give permission for its publication, its use is infringement. A professor cannot argue that they hold copyright in the student's work because the work took place only as part of a class assignment.

The large online databases of journal and newspaper articles found in most academic libraries are licensed for use by the members of the university that contracts it. However, every contract is different. Can an article from the database be placed on E-reserves, or inside a Blackboard class? Can a professor make 60 copies of an article to hand out during class? The answer varies according to the licensing contract. A license takes precedence over copyright. Librarians and other employees involved in licensing databases can find much useful information from LibLicense, an organization that provide information about licensing and also negotiating licenses. (Yale University Library Council on Library & Information Resources 2010).

<http://www.library.yale.edu/~llicense/index.shtml>

Online Teaching

Online instruction is an area of copyright concern for university campuses. "Online teaching" typically refers to classes that do not meet face-to-face, and in which all or most content is delivered through a web site or course management system such as Blackboard. Activities that are accepted in a face-to-face classroom are often not legal in the online environment. These

activities include the “performance or display of a work by instructors or pupils in the course of face-to-face teaching activities” (§110) (U.S. Government) The works can be movies, artwork, photographs, literature, etc. The performance or display in a classroom permits “all of a nondramatic literary work” and “reasonable portions” of any other work. When a class is taught online, these exceptions for films no longer apply. The university can claim Fair Use for some content, but in many cases the material must be short and very specific.

The TEACH Act (or, the Technology, Education and Copyright Harmonization Act) was passed in 2002 with the intention of “reconciling” online education with copyright law. It became §110(2) of the copyright law. The TEACH Act provides the opportunity for an instructor to show an entire nondramatic film (or other media) if the university has met a long list of requirements. The requirements include educating all students, staff, and faculty about copyright, having educational materials about copyright available and utilizing technology to ensure the student watching the film is unable to download and copy it. (Colorado University 2004) There are many more requirements, and many universities have chosen not to use the TEACH Act and instead rely on carefully defined Fair Use for displaying films and images in online education.

II. What copyright rights and responsibilities do students have?

Students own works – as humble as class notes and as exalted as a new sonata for flute and violin – is protected by copyright as soon as it is recorded in a fixed medium. If a student’s work is infringed, the case can be taken to court even before the work is registered, but the award is limited to actual damages. Often a settlement can be reached out of court. Music created by students is copyrighted as soon as it is recorded or transcribed to paper. If new music is only sung or played, it does not have copyright protection.

Many students share their work online in order to gain fans, potential customers, or colleagues in shared areas of research. If a work is registered with Creative Commons or with the Copyright Office, before being posted, then it is clear that it is not being made available for most uses without consideration. Even if the work is not registered either way, putting a copyright symbol © on it and a brief statement of ownership (“This item is copyrighted in 2010 by Julia Smith”) can deter some potential infringers.

The vast majority of works (music, art, photography, writings, etc) found online are protected by copyright. With the high-bandwidth Internet available on most university campuses, students are in a position to infringe on lots of copyrighted materials. However, if students establish permission or a license to use the material (usually by purchase), they are not infringing. Some items are registered with Creative Commons or otherwise labeled as “available

for free download.” Students can search for Creative Commons-registered items at this search page: <http://search.creativecommons.org/>. (Creative Commons 2010b) The “Yahoo” search engine provides another search page. If you select “All search services,” one service is a “Creative Commons” search. <http://search.yahoo.com/cc> (Yahoo! 2010).

Creative Commons licensed works are not all alike. There are 11 possible combinations of licenses an artist can select. Most creators require attribution; some do not allow derivative works or require derivative works to carry the same Creative Commons registration as the original work. Some creators will allow their work to be used in commercial settings; others do not allow such use. Anyone using a Creative Commons licensed work should check its license and use it accordingly. (Creative Commons 2010a)

III. What copyright rights and responsibilities do university faculty members have?

Teaching faculty often use materials published by others, either during class or as assigned readings. A common belief is that so long as it’s an educational use, any use is permitted. While there is a generous allowance for face-to-face teaching in §110, (see Chapter 4) some uses do require permission from the copyright owner. In a setting where repeated, systematic copying of the same item occurs, it is a time to consider paying for copyright clearance. If an article is made available in the course management system (such as Blackboard) over multiple semesters, it is also a time to consider paying for copyright clearance. Although the Blackboard page is password-protected and not available to the public, if an article is made available to students semester after semester, the volume of lost copies (to the publisher) can be enough to affect the “amount of the work used” category in the Fair Use factors. If the article is available in a database licensed by the university, a link directly to it can be placed in a Blackboard page. If this is done, the student will be reading, or printing, directly from the licensed copy and not from a copy created and distributed by the instructor in the Blackboard environment.

There are many situations that develop in academic work in which it is difficult to say whether a certain use is “Fair”. A very useful tool is the “Fair Use Checklist” at the Columbia University Copyright Advisory Office. The checklist can be printed out and attached to the document to be used. Using the checklist will help the instructor decide whether to claim Fair Use. If they do, keeping the checklist is a reliable way to document how their decision was made. (Copyright Advisory Office 2009) <http://copyright.columbia.edu/copyright/fair-use/fair-use-checklist/>

It is important for faculty to document their Fair Use decisions. As explained by Mary Minow: “If you work for a nonprofit educational institution, library, or archives and are acting within the scope of employment the court can bring the statutory damage award down to \$0, *even if you are found to be infringing copyright*. For this to happen, you must show that you believed and had reasonable grounds for believing that your use was Fair Use.” (Minow 2008) http://fairuse.stanford.edu/commentary_and_analysis/2003_07_minow.html. Keeping a checklist for every item claimed as a Fair Use establishes that the faculty member had reasonable grounds to believe that Fair Use applies.

Any person, whether university faculty, student, or ordinary citizen can use the Fair Use checklist whenever the question of Fair Use arise.

IV. Why are Electronic Theses & Dissertations (ETDs) becoming popular?

Many universities now encourage their graduate students to put their theses and dissertations online for free access. Some even provide the web space, such as Bowling Green State University ((Bowling Green State University Graduate College 2010) <http://www.bgsu.edu/colleges/gradcol/etd/index.html>).

Placing a thesis or dissertation online makes it immensely more available to other researchers than preserving it in a few paper copies available only at the university where it was written. It can be found by using a search engine, and other researchers in the field may contact the writer. Even if their university does not support electronic theses or dissertations, a student may place their work online themselves if they so choose.

Many graduating students, especially on the PhD level, hope to publish part of or their entire dissertation. If they do not plan to change much of it before publishing, then they should not place it online. However, the hoped-for publication may not happen for two or more years, and it may be necessary to update some of the information. In such a case, having posted it online will not prevent a publication.

Most Electronic Theses and Dissertations can be found through the Networked Digital Library of Theses and Dissertations at <http://www.ndltd.org/> (Networked Digital Library of Theses and Dissertations 2010).

What about Dr. Mendez and her student?

This pair of researchers have run into several copyright issues with their project. To start with, until they sign it away, Dr. Mendez and her student own the copyright jointly. The journal can demand copyright clearance on anything it wants to; there is no word limit or legislation that governs the need to do this. When signing the contract to publish, Dr. Mendez can reserve the right to distribute on her personal web site. Some publishers won't allow this, but many will.

Glossary:

License: "a grant by the holder of a copyright or patent to another of any of the rights embodied in the copyright or patent short of an assignment of all rights" (Merriam-Webster 2011)

Online teaching: classes that do not meet face-to-face, and in which all or most content is delivered through a web site or course management system such as Blackboard

Scenarios:

University

Scenario 1) Dr. Michelle Anderson, a star professor in the Anthropology department at State U., has created a multi-media learning aid for students that takes their understanding of anthropology beyond "Indiana Jones." The images in it were from her own research and that of a colleague, and the music was found through Creative Commons. (It's an attribution, share-alike license). The learning aid has begun to attract attention from other campuses, and Dr. Anderson's school would like to see some of the profit. While acknowledging the idea as Dr. Anderson's, her university has suggested that she market the product commercially and share the proceeds with the university marketing department. Does copyright law protect Dr. Anderson's product, or favor the university?

Scenario 2) Grant's Hill College has a web site which outlines the basic facts about copyright and emphasizes the proper use of other people's works. They also have a copyright agent listed on the Copyright Office web site. The college's copyright site has not been updated since 2005, when it was created. Is Grant's Hill meeting the requirements of the DMCA? Or the Higher Education Opportunity Act?

Students

Scenario 3) Tom, a microbiology student, regularly posts his papers and lab write-ups to a university microbiology student blog. He labels them clearly, even stating that they are ungraded and could include errors. While any creator is free to give away their work, what steps could Tom take to prevent plagiarists from using his work?

Scenario 4) The senior microbiology study group has found a fantastic illustration of a certain process online. It will make their final presentation complete. It's licensed under Creative Commons with an "Attribution-NonCommercial-NoDerivatives 3.0" license. What kind of license is this, and what does it mean for the study group?

Faculty

Scenario 5) Stephanie Davis, a graduate student in psychology, was not sure whether a handout she was planning would be a Fair Use or not. Her campus copyright officer was not available. What should she do?

Scenario 6) Professor Donovan, a faculty member in history, has been using the online course management program Blackboard for seven years to supplement his face-to-face courses. He has placed articles and images for each course in Blackboard and prefers to use the same items every time he teaches a course. Is his use of articles and images (assuming he is not the copyright owner) an infringement of copyright? Or not?

Electronic Dissertations & Theses

Scenario 7) Bill Jackson recently completed his PhD in philosophy at a distinguished university. He would like to place his dissertation online, because he made use of online dissertations during his graduate studies. However, his advisor told him that once he did so, he would lose all copyright claims to it whatsoever. “Sure the law says it’s still yours. But what are you going to do if someone uses your arguments without your permission? Do you have the resources to sue them?”

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Copyright For The Rest Of Us: A guide for people who aren't lawyers. <http://hdl.handle.net/2092/1591>

Chapter 10: Digitization Projects

Since acquiring a good scanner, Eric has been scanning every picture and document he can find related to his favorite hobby: classic race cars. He can't afford a car himself, yet. He goes to rallies and other public displays, gets the owner's permission, and takes pictures of all the cars he can. He has also learned that some archives have older pictures of these cars, and has been able to acquire copies of some of these. He occasionally "borrows" pictures from online displays. Later on, he discovered magazine advertisements from throughout the 20th century in a large public library database of magazines. Most recently, Eric has begun to interview car owners. Altogether, he believes he's created a nice online collection on his hobby.

Are there any copyright concerns Eric should be aware of?

Since the technology became available, museums, libraries, and other organizations have been eagerly scanning pictures, documents, and other items and placing them online. It's often fun and brings publicity to an organization. It makes documents easier to find, and if a good taxonomy is followed, it makes photographs easier to find as well. However, copyright laws do not always allow people to digitize and share everything they would like to.

By the end of this chapter you should be able to answer:

- I. What are the copyright concerns when digitizing documents or photographs that you do not own?
- II. What are the copyright concerns when making digital photographs of objects or artwork?
- III. Did the "Google Books" project violate copyright?

Before getting in to copyright issues, the reader should review three online digitized collections. Below are given a small, medium, and large online collection.

The APA 32 San Saba <http://www.rpadden.com/232/232.htm> .

The San Saba was a ship that sailed the Pacific during World War II. The veterans and their descendants have collected photographs and documentation of the San Saba and the men who served on it. The web site is a small, informal collection. (Small Project)

The Drake Heritage Collections <http://www.lib.drake.edu/heritage/>

The purpose of the Drake Heritage Collections is to collect, digitize, and preserve important stories of Drake University's 125-year history. Photographs and articles are scanned and oral histories from eye witnesses are recorded. These are then presented online to reach the largest possible audience. (Medium Project)

The Library of Congress American Memory Project <http://memory.loc.gov/ammem/index.html>

The American Memory Project “is a digital record of American history and creativity. These materials, from the collections of the Library of Congress and other institutions, chronicle historical events, people, places, and ideas that continue to shape America...” (Very Large Project)

I. What are the copyright concerns when digitizing documents or photographs that you do not own?

If you own the copyright rights for a photograph or document, you may do with it what you like. Eric, in the introductory scenario, is in no conflict with copyright law when he posts pictures he has taken, or interviews he has conducted. Likewise, the photographs of the USS San Saba appear to be snapshots taken by the servicemen, or their families on shore. If a library or museum wishes to create a website showing their collections, they must first determine what they own the copyright to. An established archive usually requests a transfer of copyright when they receive or purchase an item (Minow 2002a). However, historical collections in libraries of all sizes may be made up of items that nobody knows where they came from.

If a published item is from 1922 or before, then it is public domain. (U.S. Copyright Office 1992) Unpublished items, such as letters or manuscripts, if created before 1978, are protected under a different part of the law. If the unpublished item does not have a known author or is a “work made for hire,” then its copyright period is 120 years from the date of creation (For the year 2012, that means 1892 or before). If the author is known, then the copyright extends to 70 years after their death. For a person who wishes to get permission to use such an item, they

Copyright For The Rest Of Us: A guide for people who aren't lawyers. <http://hdl.handle.net/2092/1591>

need to find out when the author died, and the name(s) of the author's heirs, and then seek permission from them. Doing this type of a search is difficult but not impossible; see the essay "Permissions, Good Faith Efforts, and Disclaimers" chapter by Mary Minow for many useful resources. (Minow 2002b)

If you have a photo or a text or recorded conversation or other resource that you would like to put online, check the ownership, and get permissions if needed.

II. What are the copyright concerns when making digital photographs of objects or artwork?

If a museum employee takes a photograph of something, then they have made a copy of it. If the museum puts it on the Internet, then they have distributed it. Both activities are exclusive rights of the copyright holder. (U.S. Copyright Office 1992) However, before declaring the museum "guilty of infringement," consider the whole situation. Is the object in the photograph original enough to qualify for copyright protection? Everyday objects such as tools, blankets, furniture, and so forth do not. Next, does the museum own the copyright, or partial copyright, in the artwork? Often when items are acquired by a museum or archive, a transfer of copyright takes place as well. The museum may hold complete copyright. If not, it may still hold the right to take photographs for museum publicity, or for research purposes, and so forth. (Minow 2002a)

III. Did the "Google Books" project violate copyright?

In December of 2004, Google announced the largest, most comprehensive scanning of books yet attempted. Google had made exclusive partnerships with five libraries (Stanford, University of Michigan, New York Public, Harvard, and Oxford) to scan all the books held in those libraries, regardless of their copyright status. Scanning was underway before the project was made public. Google created a separate search function, "Google Print," that searched only the scanned book content. If a book was from 1923 or before, it would be shown in full, and users could download or print out the entire book. Books published after 1922 are considered to be "in copyright." The searcher who finds one of these books will see snippets of text around the words they searched, along with its bibliographic information and links to online bookstores and nearby libraries. (Google 2010)

During 2005, the project was re-named “Google Books.” Various enhancements to the interface and display have followed. Over 40 other libraries, from several countries, have signed on to have their contents scanned by Google. Several publishers agreed to include some or all of their books in the Google Books search, and occasionally offered a recently-published book in full text. (Google 2010)

The Lawsuit begins

In September of 2005, the Author’s Guild and five publishers filed suit against Google. They claimed Google was committing massive copyright infringement because Google’s process always included scanning the entire book, even though only snippets of a copyrighted book were displayed to the public. (On The Media 2010) In 2006, the parties of the lawsuit began negotiations, which took two years. The initial settlement was announced, and the judge in the case put out a call for comments. There were so many comments, including a largely negative one from the Dept. of Justice, that the parties revived their talks and came out with a second settlement, known as the Amended Settlement Agreement or ASA, in November of 2009.

From the point of negotiated settlements, the Google Books question shifted from primarily a copyright decision to being mostly a business decision. The judge did consider copyright issues when considering the case, but the agreements between Google and the publishers are business agreements based on the monetary interest in books that copyright law gives to authors and publishers. Google is carefully persuading the authors and publishers that there is an advantage to them to allow Google to continue with its book-scanning project. If the settlement had been approved by the judge, it would not have constituted “case law.” The court did not make these decisions; the parties involved came up with them – in order to avoid a long, difficult lawsuit - and then sought court approval to proceed.

In March of 2011, U.S. Federal Judge Denny Chin announced that the Amended Settlement Agreement was not “fair, adequate, or reasonable.” (Hasselback 2011) The ruling took 48 pages, but the main objection was that the entire settlement assumed cooperation by copyright holders unless they deliberately “opted out”. If they did not do so, even if they did not know that was an option, their works would become a permanent part of the Google database after a certain date. (Hasselback 2011) In addition, “orphan books,” or books whose owners cannot be located, could have 20% of their content displayed, and the whole book could be sold. Judge Chin ruled that such acts were exploiting unclaimed books. (Kravets 2011)

On October 4, 2012, it was announced that Google had come to an agreement with the Association of American Publishers. The agreement is confidential, so the exact details of it are not available. There is some agreement with the AAP about how much of a book Google can display. Litigation continues between the Author's Guild and Google, so there may be more decisions – or confidential agreements - to consider in the future. (Smith 2012).

What could have happened:

The Amended Settlement was very long and provided for many activities by Google and by the cooperating publishers. It offered “a blueprint for a new digital book business.” (Albanese 2011) One part of it is worth considering because it addresses a significant lapse in the U.S. book publishing and preservation system.

The agreement would have created the Book Rights Registry. The BRR would have been an independent office that kept track of who owns what copyright rights in which book or books. It would also track partial owners of books – those authors of chapters or other portions of larger books. In addition, a fiduciary officer would be employed by the Book Rights Registry to collect and hold earnings from books that are “orphan works,” that is, in copyright but with no known rights holder. Earnings from these books would be held in hope that the author or other rights holder is found. After 10 years, if no rights holder is found, the earnings will be given to a book-related charity. (Band 2008)

In the United States, no such registry has ever existed. Even the Library of Congress and the WorldCat databases do not provide a complete listing of books published in the U.S., and the records available often do not include the rights holder for the books. Such a registry would save hundreds of research hours, not just for copyright permissions but also for research contacts and other needs.

IV. HathiTrust

In September, 2011, the Author's Guild along with other professional groups filed a lawsuit against the HathiTrust, a group of academic libraries actively making their holdings available – to their constituents only – in digital form. Many of the HathiTrust ebooks were the digital copies provided to them by the Google Books scanning process. The Author's Guild claimed that HathiTrust was guilty of “the systematic, concerted, widespread, and unauthorized reproduction” of copyrighted material (Howard 2012). You can read more about the HathiTrust at <http://www.hathitrust.org/>

In October of 2012, responding to a request for summary judgment, Judge Harold Baer Jr. of the U.S. District Court in Manhattan determined that the actions of the HathiTrust did not violate copyright law. “I cannot image a definition of fair use that would not encompass the transformative uses made” by the defendants’ mass-digitization project.” (Howard 2012).

The decision, however, did not address the use of Orphan Works – those items whose copyright holders cannot be found or identified. Many of the items in the HathiTrust collection (over 10 million works) are considered “orphaned”. The HathiTrust, working with the University of Michigan, set up a project called the “Orphan Works Project” (or OWP) to attempt to sort out copyright status on these items. Judge Baer believed he did not have enough information to issue an opinion on the OWP (Howard 2012).

V. Conclusion

So what about Eric’s “Classic Race Car” project? Eric is “in the clear” for pictures and documents that he owns, or that he receives permission to scan from the rights holder. Photographs that he takes in public events are his to post, whether or not he gets the permission of the car owner. (It’s polite, but not absolutely required at a public event). If he copies an archived photograph, he should get permission to distribute as well as permission to copy. Copyright rights are separate; getting one right (to copy) does not imply receiving others (to display or distribute) as well. Borrowing pictures from another online collection should be done only with permission; otherwise, Eric should link to these collections. Advertisements from old newspapers and magazines are commonly not under copyright, but the terms of the database license are more important than basic copyright law. Eric will need to see if the database provides its terms online, and if not, check with a librarian to see whether his use of them is permitted. (If not, an area library may have some older magazines on microfilm, from which Eric could make his own copies). And finally, Eric’s own interviews with car owners are his to post.

There are many ways a hobbyist’s online collection can grow. A copyright infringement lawsuit, even if settled quickly, can be expensive enough to stop all collecting for the foreseeable future. It’s most prudent to take the steps to remove potentially infringing material before a lawsuit is filed.

Glossary

Good faith: honesty or lawfulness of purpose (Merriam Websters Dictionary.com)

Disclaimer: a denial or disavowal of legal claim: relinquishment of or formal refusal to accept an interest or estate (Merriam Websters Dictionary.com)

Scenarios:

Scenario 1: Midlands Public Library would like to scan and display its collection of news articles and memorabilia relating to the town's annual horse show, which is unique for including a wide range of events for all riding styles and activities. The show initially began in 1936, stopped during WWII, and has been taking place annually ever since. The library has news clippings, show programs, a few ribbons, and lots of photographs. Given what you know about copyright and digitization, rate the following items according to the amount of legal risk the library would be taking to scan and display them. Rate 1 for low risk, 5 for highest risk. Be prepared to explain your assessment.

- a) News clipping from local paper announcing the first show. 1 2 3 4 5
- b) News clipping from 1958, listing winners for that year's show. 1 2 3 4 5
- c) Photograph of a horse and rider barrel racing, black & white, no name or year listed.
1 2 3 4 5
- d) Photograph of a young woman accepting a prize ribbon. On the back is given the name of a current judge of the horse show. 1 2 3 4 5
- e) Show programs from 1960 (their first year) to present. 1 2 3 4 5
- f) Photograph of a man and a fine horse, in color, but no information available.
However, the man looks very much like a city council member who has voted against the library budget. 1 2 3 4 5
- g) Hundreds more such items are in the archive. Could you come up with guidelines that you think would work for this digitization project?

II. Taking photographs of art or objects for an online display

Scenario 2) A large local business in a medium-sized city has decided it would like to honor returning veterans with an online display of the soldiers, their gear, and, if available, photographs of the countries they served in. Many veterans were eager to donate digital photographs, but offered only to let their gear be photographed. (Remember that firearms and explosives are not sent home with veterans). There are two questions about this scenario:

Are there any copyright concerns in taking and displaying photographs of military gear?

Are there any copyright concerns in displaying digital photos donated by the veterans?

Scenario 3) You own a copy of your absolute, all-time favorite book. To further your own enjoyment of it, you would like to scan the entire book, but not place it online. Is this plan an infringement of copyright, or an example of Fair Use?

Scenario 4) A religious institution would like to scan local newspaper articles about itself from its founding in 1963 to the present, with the goal of creating an online display. No online collection of local newspaper articles currently exists. Is the scanning plan of this institution a copyright infringement or a matter of Fair Use? If it is infringement, how should the institution proceed?

Scenario 5) A college would like to create an online display of photographs and short articles about the history of its sports program. However, some of the best photographs were taken by the professional news photographers and are owned by the local newspaper. Can the college scan these photos, since they represent major events in its history? Or must they purchase the right to display those photos alongside their own?

Scenario 6) A large Internet-based company undertakes a large plan to scan the contents of six major university and public libraries. For this question, assume the company has done nothing else. Is the scanning an example of Fair Use, or an infringement of copyright?

Scenario 7) The large Internet-based company uses the database created in Scenario 3 to allow searches for content that might be in the books. It does not provide the whole book to the searcher, only the sentence the search term was found in. Is such searching and display a Fair Use, or an infringement of copyright?

Discussion Questions:

What are the advantages and disadvantages of viewing advertising while reading a book online?

Would the Amended Settlement Agreement have given Google too much of a monopoly over “orphan works”? Consider that few organizations have chosen to scan them at all.

Does the United States need a Books Rights Registry? Why, or why not?

Is Google infringing on copyright with the Google Books project? Why, or why not?

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Chapter 11: Plagiarism

Zach preferred to use online sources for his written assignments. He found it especially useful to keep one or two online sources open while typing the assignment in a separate window. He was able to copy and paste, when needed, or just refer to the information right there on his computer screen. He thought he was always careful to cite where he got his information, but on a history paper he was accused of plagiarism. Zach pointed out how he'd cited every source, but the professor then showed how, in several places, Zach had used descriptive language word-for-word from the sources he cited. Zach had unintentionally used the words of the other writers even while planning to cite them. Exactly what is plagiarism, and how does it relate to copyright infringement?

By the end of this chapter, you should be able to answer:

- I. What is plagiarism?
- II. What is the difference between plagiarism and copyright infringement?
- III. How did "Turnitin.com" become the subject of a copyright lawsuit?

I. What is plagiarism?

"In an instructional setting, plagiarism occurs when a writer deliberately uses someone else's language, ideas, or other original (not common-knowledge) material without acknowledging its source." (Council of Writing Program Administrators 2003). Plagiarism is one of the forms of cheating found on college and university campuses. It can happen deliberately, or (as in Zach's case, above), accidentally. Other creations, such as artwork, photography, and movies can also be plagiarized. A major cause of plagiarism is the failure to correctly document (or cite) what resources are used in writing a paper, or to copy from them too heavily.

Three documented cases of plagiarism are sufficient to cause a student to be expelled at many campuses. The professor may be allowed to set the consequence for the first and second offenses. It may be a failing grade on the assignment, or in the class.

Some universities have classes to help students to not plagiarize; some do not. Students who are concerned about plagiarism should review the OWL (Online Writing Lab, Purdue U.) "Avoiding Plagiarism" section, <http://owl.english.purdue.edu/owl/resource/589/01/>. (Stolley

Copyright For The Rest Of Us: A guide for people who aren't lawyers. <http://hdl.handle.net/2092/1591>

and Brizee 2011) Another good resource is a tutorial, “You Quote It, You Note It” from Acadia University: <http://library.acadiau.ca/tutorials/plagiarism/>. (Vaughan Memorial Library 2008)

Plagiarism is not a crime in the working world. You cannot go to jail for plagiarizing. You can, however, lose credibility in your field of work, lose a job, or lose the possibility of advancement. Or, you could be accused of copyright infringement and be targeted with a lawsuit.

II. What is the difference between plagiarism and copyright infringement?

Plagiarism is (most often) a form of copyright infringement, but not all copyright infringement is plagiarism. It is “most often” an infringement because in a few cases, the original author may give permission for his or her work to be plagiarized. Nevertheless, if a person copies an idea, or a few paragraphs of a text, and redistributes it as part of their own work, then the person has infringed on the author’s right to make copies, to make derivative works, and to distribute the work.

Ideas are important in plagiarism, although not in copyright. If a student writes an essay using an idea borrowed from an article, even if they re-write the idea in their own words, they are guilty of plagiarism. In contrast, *ideas and facts* are not protected by copyright. A writer can quote the facts and ideas – and even use them – from another publication, so long as the source of the facts and ideas are properly cited.

III. How did “Turnitin.com” become the subject of a copyright lawsuit?

Turnitin.com is a teaching aid and plagiarism detection program. A university (or high school) can subscribe to it to help their students learn to write correctly, and to help catch habitual plagiarists. (Turn It In 2011) Turnitin.com owns a large database of student and professional writing. A student’s paper is submitted to Turnitin.com and then compared with its database. The student (or instructor) receives the paper with “potentially infringing” phrases and

paragraphs highlighted. If this program is used during the creation stages of an assignment, it can be very helpful for teaching students how to use outside sources properly.

A point of contention about Turnitin.com is that it keeps a copy of every essay submitted to it. The student who wrote the paper – and who owns the copyright to it – rarely has a choice in the matter. Either they let their paper become part of the Turnitin.com database, or they fail the course. “Consent” in such a situation is not freely given.

In 2007, four high school students brought suit against Turnitin.com, claiming copyright infringement of their work. They also claimed that that online contract (with Turnitin.com) was invalid because they were minors at the time and signed (or clicked) it under duress. A Federal Court judge decided the case in favor of Turnitin.com. He cited five previous cases upholding the legality of click-through licensing, and ruled that the use of the student’s papers by Turnitin.com was “highly transformational” and therefore not in violation of Fair Use (Dames 2008, 23-25).

Debates about the use of Turnitin.com continue in high schools and universities. It is a controversial response to a well-known problem in academic settings.

IV. Conclusion

What was Zach guilty of? By the description given, it seems that he wrote too quickly and referred to his sources so often that he – intentionally or otherwise – used the same words and sentences as his source throughout his submitted paper. Be forewarned as you complete your written assignments!

Scenarios

Scenario 1) Elizabeth, a busy reporter for the New York Times, needs to get a story submitted ASAP. She checked the Internet for resources (her usual practice) and found an article almost exactly on her topic. She “cleaned up” the opening paragraph and submitted it for publication. Has Elizabeth committed plagiarism?

Scenario 2) Rob had arranged a medley of songs for a special performance. He needed “transition music” to go between them. He played different chord arrangements on his guitar for a while, then settled on one that seemed familiar. It was just right for the setting, so he used

it. Later that week, he heard the same chord sequence in an older pop song. Has Rob committed plagiarism?

Scenario 3) Cindy had to do a “descriptive essay” for a class, which was her absolute least favorite assignment. She found a printed encyclopedia on the topic and “semi-copied” the information in the article. In other words, she copied some parts and paraphrased others. She figured that there was nothing original in a descriptive essay anyway, so it was OK to do this. Did Cindy commit plagiarism?

Scenario 4) Dr. Smith has assigned her students to create bibliographies on the class topic for years. She has photocopied the best of them, and since computers became popular, has saved them on her hard drive. After 22 years, she published her own bibliography on the same topic. Many former students looked up their entries, and found them included, letter by letter. The former students approached a lawyer about suing for copyright infringement or plagiarism, but the lawyer refused to take the case. Why?

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