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2012

Copyright

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<http://hdl.handle.net/2027.42/117262>

Preprint, October 24, 2010

Copyright

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Recommended Citation

Levine, Melissa and Billie Munro Audia. "Copyright." In *Intellectual Property in Academia: A Practical Guide for Scientists and Engineers*, edited by Nadya Reingand, 277-311, Boca Raton, FL: CRC Press, Taylor & Francis Group, 2012.

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1. Chapter 10. Copyright (Melissa Levine and Billie Munro Audia)

1.1.Introduction¹

Copyright is a constant influence on our lives. We copy and email photos and text, upload and download all kinds of materials routinely and without thought. This has not always been the case. When copyright was conceived, printing presses were expensive, precious, and few. As the technology we use has grown in complexity, the complexity of the law has grown as well. Copyright law today is highly complex. Even for experts, situations that seem straightforward veer off into complex determinations that require judgment based on knowledge of the law. Fortunately, while copyright is complex and dynamic, *the basic concepts in copyright are fairly straightforward*. This chapter seeks to introduce fundamental copyright concepts and highlights a few of the many current issues with the aim of assisting US-based scientists and academics.

Congress's authority to enact copyright law arises from Article I, Section 8 of the United States Constitution which states that it is among Congress' powers “ to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries...”

For over two centuries, the meaning of this clause has been continuously examined and debated in response to ever-changing technological innovations to the way works are created,

¹ Portions of this chapter are based on content at The University of Michigan's Copyright Office website at www.lib.umich.edu/copyright. The authors wish to thank Bobby Glushko and Greg Grossmeier for their comments. This chapter is informational only and does not constitute legal advice.

copied, stored, transmitted and exploited or used. Today's dilemmas in response to how to apply copyright (and intellectual property more generally) to the arena of quickly changing technologies are not new. For centuries, the question of what copyright protects (and how) continued to evolve in response to the advent of photography, movies, sound recordings on wax cylinders and piano rolls, through VHS recordings and MP3 files. It continues with copying and dissemination on the Internet.

Copyright law reflects a dynamic balance between control of creative works for commercial or other purposes - and the need to circulate ideas as embodied in those creations. Today, copying and printing technology is inexpensive and nearly ubiquitous. Complicating the matter, US copyright protection originally lasted for a relatively short period that once struck an effective balance between the copyright holder's ability to make money and the ability of the general public in time to freely use material in the public domain. Over the last 200 years, the term of copyright protection in the United States has changed from two 14-year terms, to two 28-year terms, to life of the author plus 50, and most recently to life of the author plus 70 (US Copyright Act of 1976, Chapter 3). Corresponding limits and exceptions to copyright such as fair use (discussed below) have not been expanded in an analogous manner causing a growing imbalance in how copyright helps or hinders scholarship and general inquiry.

Ultimately, copyright is an evolving compromise between user rights, protections for authors, and an ever-changing technological landscape. It is important for scientists and academics to be aware how their work exists as part of this compromise. Because the duration of copyright continues for a long period of time, the political context for social and legal decisions made now have a very long-term impact that can be disproportionate.

Scholarly publishing is typically motivated by the need to build reputation among peers

rather than direct payment for publications, thus academic authors and scholars have generally not concerned themselves with their copyrights (Shavell 2009). For example, the authors of this book will not receive payment or royalties from the publisher – we write this to be of assistance in the field we serve. The publisher, we hope, will earn monies to support its work and for its investment in the book project. But the authors are essentially donating their time and expertise. The results are sometimes serious unintended consequences in: orphan works that are difficult to use (where the copyright holder is not identifiable), scholarship that is bound up in exorbitantly expensive, fee-based journals that functionally limit access to ideas, limiting the speed of and opportunity for progress.

This chapter tries to provide guidance for scholars to make informed decisions regarding copyright, with the hope of limiting future problems.

1.2.Key Concepts About Copyright in the United States

1.2.1. What is copyright?

Copyright is a form of legal protection that allows creators of original and artistic works to control the reproduction and distribution of their work. This includes literary works such as books, poems and software programs, as well as photographs, musical scores and lyrics. Both people and corporations can make and hold copyrightable works. Copyright is often referred to as a ‘bundle’ of rights because it is comprised of several different kinds of rights that may be controlled together or individually. With some important limitations (addressed below), copyright holders have the exclusive right to do and to authorize others to do the following as listed in section 101 of the US Copyright Act:

- Reproduce the work in whole or in part

- Prepare derivative works, such as translations, dramatizations, and musical arrangements
- Distribute copies of the work by sale, gift, rental, or loan
- Publicly perform the work
- Publicly display the work

Section 102 of the US Copyright Act defines the scope of copyright and provides a non-exclusive list of works that may be protected. Copyright protects works of authorship' including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, audiovisual, and architectural works, as well as some other forms of creative expression including original aspects of software, databases, and mask works. In order to be eligible for copyright protection, Section 102 also states that to be subject to copyright, a work must be an 'original work of authorship fixed in any tangible medium of expression'. In other words, a work must have some element of permanence -- written on a piece of paper, saved on a computer hard drive, or recorded on an audio or video tape, for example. In order to be 'original', a work must be created independently and not copied. Further, there must be some minimal degree of creativity involved in making the work. Merely applying effort, expertise, or resources to the creation of a work is not sufficient to justify copyright protection. (Feist Publications, Inc. v. Rural Telephone Service Co. 1991)

The same Section 102 also explicitly excludes from copyright protection "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." Copyright does not protect:

- Facts and ideas

- Processes, methods, systems, and procedures
- Titles (these may be separately subject to trademark)
- Works of the United States Government (typically that of federal employees working within the scope of their employment) per Section 105 of the US Copyright Act
- Constitutions and laws of State governments (in contrast to federal employees, work by state employees may be subject to copyright; states can own copyrights in original materials created by state employees)
- Materials that have passed into the public domain for which there is no copyright protection.

These materials are categorically excluded from copyright protection although other methods such as contract, patent or trademark may be available.

It is important to note that copyright protection begins the moment the work is created, that is “fixed in a tangible medium of expression.” Formal procedures such as copyright notice, registration, or publication are not required to obtain copyright today; such requirements were necessary in the past and may determine the copyright status of older works.

While you do not *have* to put a copyright notice on your work to receive copyright protection, it is prudent to include a copyright notice along with your contact information. A practical copyright notice will help people who may want to use the work to find you. It may include both the formal notice as well as the copyright holder’s contact information, for example:

© 2007 M. Levine and B. Audia.

For permissions and questions, contact [email].



This example makes the attribution clear and lets people know they can use the copyrighted work provided they make proper attribution; they would not need to obtain permission from the authors in this case. (Creative Commons 2010) This is an example of a Creative Commons license. Creative Commons is a non-profit organization that created a set of simple, easy-to-understand copyright licenses. These licenses allow creators to mark a work with permission to make a variety of uses, with the aim of expanding the range of things available for others to quote, adapt, and build upon. These licenses are immensely helpful for both users and creators of copyrighted material because they easily and effectively communicate copyright status and a mechanism for obtaining permissions as needed. Creative Commons licenses (1) allow creators to share their work easily and inform users about the copyright holders intentions with regard to copyright and permission and (2) help people to find work that is free to use without permission (or find the right person to seek permission if needed). For more information, review the Creative Commons website at <http://creativecommons.org/>.

1.2.2. How long does copyright last?

Generally speaking, copyright protection lasts from the moment a work is created until 70 years after the death of the author. Copyright in works "authored" by a company last for 95 years from the date of publication or 125 years from creation. Determining whether a work is still protected by copyright is extremely complex and requires a substantial amount of

information about when, where, and by whom the work was originally published. Copyright duration for certain non-US works in the US is also complicated, as they do not necessarily conform to the 'life plus 70' formula (Hirtle 2010). Note: for works that are jointly authored, copyright lasts for 70 years from the date of the death of the last surviving author.

Despite the long term of copyright, it does not last forever. The 'public domain' in copyright law refers to works for which the term of copyright has expired or for which the copyright holder has dedicated the work to the public domain. Public domain content may be used by anyone for any reason – permission is not required. Attribution is not legally required but is appropriate in the academic environment.

1.2.3. Who Is the Holder of the Copyright?

The creator of a work is usually the initial copyright holder. If two or more people jointly create a work, they are joint holders of the copyright, with equal rights. Regardless of who may be the 'lead' author for scholarly purposes, for copyright purposes all of the authors share equally in the copyright ownership unless they have agreed otherwise in writing – regardless of the order in which their name appears in an article (Seymore 2006). If a work is created as a part of a person's employment, that work is a "work made for hire" and the copyright belongs to the employer, unless the employer explicitly grants rights to the employee in a signed agreement. By tradition, faculty writings are not treated as "work made for hire". Most academic institutions have written policies that address how they treat the copyright in faculty and employee's work (University of Michigan Board of Regents n.d.) (University of Michigan 1997). If you are affiliated with an academic institution, you should be familiar with your institution's policy and contact the appropriate person with any questions or concerns.

In the case of independent contractors, the contractor holds copyright in their work unless

otherwise agreed to in writing before the work commences. If you commission copyrightable work product (graphic design, editing, writing...), consider requiring the contractor to sign an agreement in advance that will allow you as the commissioning party to own the copyright in the resulting work. This will allow you may use it in any manner you may require without further permission or payment. Alternatively, if you are acting as an independent contractor, perhaps consulting on a project, you may want to reserve certain rights to use the resulting work in particular ways whether or not you agree to treating the work product as work for hire. The best way to handle these matters will vary with your situation.

1.2.4. Student work

Students typically hold the copyright to the academic works they create, such as their papers, projects, theses, and dissertations, provided their work is an original and creative protectable work. There may be privacy concerns related to the use of student work. If you wish to use student work, it is generally best to ask for permission. Work performed by graduate students may be work for hire depending on the policy and practice of the hiring academic institution. In hiring graduate students to work on a project, consider whether a written contract is appropriate or necessary. Many colleges and universities address this matter in their hiring and contracting policies and practices.

1.2.5. How is copyright transferred?

Copyright may be transferred or assigned in full or in part – meaning each of the ‘sticks in the bundle of rights’ can be treated individually. This is common in contracts for publication. Publishers often hold the copyright to a work for economic or administrative reasons. Increasingly, academics are retaining their rights or at least the rights they need formally to do their work through open access agreements (more below). A valid copyright assignment or

transfer requires a signed, *written* agreement though non-exclusive rights may not require a written agreement to be effective.

1.2.6. Copyright Registration

As previously discussed, copyright exists automatically upon the creation of an original work fixed in a tangible medium of expression. While today's law does not make copyright registration a pre-requisite for protection of creative works, registration does provide certain benefits to the copyright holder, such as an award of statutory damages in the event of a successful copyright infringement lawsuit. If you sue a person for copyright infringement and you have a registration that was filed prior to the date of the infringement, a court must presume that the defendant's use is an infringement (they have the burden of proof to show that they did not infringe on the registered work). Registration with the US Copyright Office is fairly simple, relatively inexpensive and may be done online. Forms and current fees are maintained at the United States Copyright Office website. You may register a work at any time while it is still in copyright. Registration of copyright is not required in the same way that is demanded in patent and trademark. In the past, registration and notice (the © symbol or variant) was required – in the absence of these formalities, works entered the public domain and were not subject to copyright. These formalities were eliminated from US law in order to meet international treaty requirements for the Berne Convention. As a signatory to the Berne Convention, US works are protected in signatory countries on at least the same level of protection received by works in that country.

1.3. Selected Limitations to the Exclusive Rights of Copyright

1.3.1. Fair Use – Section 107

For research scientists and academic scholarship, the limitations on copyright are important to understand. The key limits involve fair use and the special copying that qualified libraries and archives are permitted. Permission is not required from the copyright holder to make qualified copies under these limits, and scholars commonly rely on these limits to comment, educate, rely on works preserved by libraries, or benefit from interlibrary loan (17 USC 107 and 108, United States Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress March 2008).

Fair use is a limitation on the otherwise exclusive rights of a copyright holder that allows use of copyrighted material without permission from the copyright holder for purposes such as criticism, parody, news reporting, research and scholarship, and teaching (17 USC 107). It evolved over a century of American jurisprudence as an equitable concept that was ultimately included in the US Copyright Act when it was updated in 1976 (Bracha 2006).

The law provides four factors to be considered to determine whether a particular use is ‘fair’ for copyright purposes. All of the factors are considered together, though all the factors do not have to be in favor of a use to make it a fair one. The four fair use factors are:

1. The purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work, such as whether the work is fiction or non-fiction, published or unpublished;
3. The amount of the work used in relation to the copyrighted work as a whole, such as

using a poem in its entirety, or using one chapter from a long book;

4. The effect of the use upon the potential market for the copyrighted work.

Fair use works within copyright law to facilitate education, research, and scholarly exchange as well as to protect the freedom of speech and inquiry. Its inclusion in the Copyright Act itself underscores the law's respect for social and scientific progress. Most day-to-day fair uses involve making responsible, reasonable judgment based on a particular situation. For example, the desire to copy and distribute someone else's work for a non-profit educational purpose does not automatically mean that the use is fair. Conversely, a commercial use may be a fair use. While many educational uses may be fair, each use must be evaluated independently to determine whether it is fair (and thus whether permission should be obtained and possible fees paid to the copyright holder). Guidelines are handy but should not substitute for a vigorous assertion of fair use where appropriate. Many academic and scholarly organizations provide guidelines and best practices for making fair use determinations, but there are no specific parameters – each case should be evaluated individually in consideration of the four factors and guiding case law.

1.3.2. Classroom Use: The TEACH Act - Section 110

Scholars with teaching responsibilities should be generally informed about the special rules that govern the use of materials in a face-to-face classroom. These rules grant more rights than fair use alone and provide additional flexibility with regard to what you may copy, display, and distribute in classes. The Technology, Education, and Copyright Harmonization Act (TEACH Act) also allows teachers and students at accredited educational institutions to use works for distance learning without permission under certain circumstances. In order to be

covered by the TEACH act a scholar must be an educator at an accredited educational institution, supervise their students' use of copyrighted materials, use the material as an integral part of a class session, use the material as an integral part of their curriculum, and use material that is directly related to and of material assistance to their teaching content. Further you must use the copyrighted works in the following ways:

- performances of nondramatic literary works (i.e., a recording of a novel being read aloud);
- performances of nondramatic musical works (i.e., a recording of a symphony);
- performances of reasonable amounts of any work (i.e., an excerpt from a movie); or
- display of any work in an amount comparable to what would be used in a live classroom.

The TEACH Act allows display or performance copyrighted work in your class without obtaining permission or doing a fair use evaluation when the classroom use meets all three of the following requirements. The use must be (1) for instructional purposes, (2) in face-to-face teaching, and (3) at a nonprofit educational institution. Examples of permitted uses include showing all or part of a movie or television show, playing music, and using pictures, images, graphs, and charts in your lecture slides provided they meet the required criteria described above.

1.4. Use of Copyrighted Material in Presentations and Conferences: Considerations

The same fair use provisions that protect the use of quotations and excerpts in scholarly writing also protect those uses in scholarly presentations. It is typically permissible to include copyrighted text, images, or videos in presentation slides for face-to-face talks. However, if the presentation is recorded, podcast, or maintained on the web, for example, it may be best to

exercise care and use works with permission or those in the public domain. Generally, if you use copyrighted works in a face-to-face presentation such as a classroom lecture or professional meeting, you probably do not need to obtain formal permission, although attribution is always appropriate. If the presentation is being recorded in any manner for public distribution or access (say for podcast) you should consider obtaining permissions if copyrighted material is incorporated in the presentation -- unless fair use applies. As a practical matter, many people simply use the copyrighted material in their classroom presentation -- but remove it from the PowerPoint slides that are put on the web or otherwise circulated. Consider leaving a placeholder in the presentation citing the copyrighted work used in the full presentation, or using content that is in the public domain or made available under a Creative Commons license.

If conference organizers plan to use your presentation after it is over – for example, if video of your presentation is posted on the conference website, or if the slides are made freely available for download – your ability to include copyrighted work may be more limited. Clarify these issues in advance so that you have time to clear rights for the copyrighted material in your presentation if need be, create a second version for distribution that does not include the copyrighted material, or choose alternative material that you are free to use. Incorporating Creative Commons-licensed materials helps ease this problem.

1.5. Comments on Contracts

1.5.1. Form Agreements – What do they mean?

You write a scientific paper and it is accepted for publication in a journal or for a conference proceeding. The publisher or conference host asks you to sign a form that transfers your copyright as the author to them. The implication of doing so depends entirely what the form

says. If you ‘transfer and assign’ your copyrights without any reservation, you have no legal rights in the material. These forms are legally binding contracts. If the form does not include and reservation of right for you to use the work in the future, typically you are expected to obtain permission to use or reuse the material you created in the future. (Keep in mind that permission is never required to cite a work.) Rather than signing these forms without thought, consider reserving certain reasonable rights that comport with typical behavior in the academic world such as the right to deposit the article or presentation in your university’s institutional repository, use in whole or part on your personal or professional website, and/or copying for teaching purposes. The terms of each contract you sign may affect your ability to use all or part of the material in later works regardless of format, media or context such as thesis, other publications, or video. If you transfer your rights without condition, the person or company you transfer rights to will determine whether and how others may use your work without your permission (again, unless your agreement says otherwise). This means they can also use your name in association with the work even without your additional permission. These forms are often negotiable. Whether you choose to negotiate – and how aggressive you are – depends on our bargaining strength and how important it is to you to be published in the particular journal or context.

1.5.2. Author Addendum–Keeping some rights

Publishing contracts come in all forms -- whether for articles, books, conference proceedings or webcasts. The contract may be titled a ‘transfer of rights’ or an ‘authors agreement’. Consider reserving the right to make certain uses that are not included in the standard agreement. For example, scholars and scientists commonly want to post their papers on a personal webpage, deposit in an institutional repository, give copies to colleagues, or make copies for teaching purposes for students. This can be accomplished by attaching an addendum

to the form agreement that states these kinds of reasonable uses. The Association of Research Libraries' Scholarly Publishing and Academic Resources Coalition provides resources for authors including a form Author Addendum (SPARC 2006). To use it, simply attach it an agreement provided by a publisher, sign, and return it along with the original agreement.

Publishers are becoming more responsive to these uses especially in the academic community and may accept such changes or mere minor adjustments. If these items are non-negotiable, you may want to whether you want to publish with that journal – especially if there is an appropriate open access alternative. The Author Addendum form provides ideas for common academic uses appropriate for all kinds of academic output. See

www.arl.org/sparc/author/addendum.shtml

1.6. International Copyright – Some Basics

Copyright laws vary from nation to nation, reflecting cultural and historical distinctions as well as variations in assumptions about the nature of property, the flow of ideas and innovation. International treaties provide some core practices and understandings that facilitate international trade and exchange in the copyright arena. The Berne Convention, signed by 163 countries including the US, requires that countries recognize the works of foreign authors the same way they recognize those of their own nationals. For example, all works performed or published in the US, are subject to the terms of US copyright law, no matter where they were created originally. When the US signed onto the Berne Convention, our copyright term became harmonized with that of other Berne Convention countries: the life of the author plus 70 years. When determining whether or not you can make a particular use of a foreign work, you will need to consider the specific circumstances of your case, such as the country where the work

originated, whether or not the work is in print, and how you plan to use the work. In that situation, it may be advisable to consult with your institution's general counsel, copyright director or other appropriate authorities who may guide you. (U.S. Copyright Office May 2010, U.S. Copyright Office September 2010)

1.7. Getting Permission

It is often necessary to obtain permission to use the copyrighted works of others. Earlier in this chapter, we considered how to determine whether a work is copyright protected and whether a contemplated use may be a fair use of an otherwise protected work. With this basic set of assumptions, one can determine whether permission must be sought for a particular use. In the course of your teaching or writing, you are likely to be in situations when you want to use someone else's copyrighted material. Your first step is to determine whether you can reasonably make a fair use of the material. If not, permission may be appropriate. Keep in mind that copyright may not be your only consideration driving the need for obtaining permission. There may be contracts, grant requirements, or licenses affecting the material, privacy implications, or professional ethics associated with the publication or use of material, perhaps moral rights. The need for permission is often only partly related to copyright.

Getting permissions is often akin to detective work. It is important to start early and maintain good documentation of your efforts. The first step is to identify the copyright holder. For many works, the publisher is the copyright holder. Look for a copyright notice such as "© 2010 University Press" or "copyright by C. Holder, 2010." Not all works will include a copyright notice. Copyrights are often transferred or assigned, so the name on the copyright notice may not be the current copyright holder. It is, however, a good starting point. For older works,

especially for materials like photographs and audio recordings, it may be impossible to identify and locate the copyright holder. These are referred to as "orphan works." It is especially important to maintain documentation of your permissions search in these cases. In the event that you cannot find the copyright holder but decide to use the material anyway, documentation of your search is evidence of good faith (Vuopala May 2010, U.S. Copyright Office January 2006).

Many publishers provide permission forms. Whenever possible, make your request in the format preferred by the copyright holder. If no particular form is provided, a simple letter is adequate in most cases. Retain copies of your correspondence, especially the signed permission forms. If you are sending your letter by mail, include an extra copy for the rights holder to keep with a self-addressed stamped envelope to encourage a timely reply. Publishers also will provide suggested lists of common resources for obtaining routinely needed permissions such as collective rights organizations.

Unless an exception like fair use applies (or there is a relevant Creative Commons license that permits your particular use), you will need permission to use copyrighted material for books, articles, or other materials intended for publication. The copyrighted material might be graphs, text, experimental results, photographs or any copyrightable content. Do keep in mind that facts and data are not in and of themselves subject to copyright protection, so you may want to question whether certain expressions of facts or data are so generic as to possibly not warrant copyright protection. If you do not receive a timely response to your permission requests you may want to rework your project to exclude the item you wanted to copy. One strategy is simply to describe the item and cite to it. It is always permissible to cite, and citation does not require permission, as you are not reproducing the relevant material. If you do not receive a timely response or permission is denied, think about how to paraphrase or otherwise describe the

element in a manner that makes your point but does not require copying.

Give proper citation and attribution accordingly in all cases. A recent article indicated there is an increase in the number of medical school applications that reflect plagiarism (Segal 2010). This is a troubling trend that may over time undermine confidence in and the validity of the scientific process. Copyright infringement and plagiarism differ; one involves potentially civil and criminal penalties while the other is a matter of ethics and academic practice. Plagiarism is corrosive and, while it might not land you in jail, it may ruin your career. Be careful to give proper attributions, mentor your students to ensure they are aware of their sources, and give proper credit.

Material from a website where there is no mention of copyright should be presumed to be subject to copyright. If a work is published online with a statement that it is in the public domain, you must evaluate the reliability of the statement. In the absence of an exception, permission is appropriate to copy material from a website like any other medium of expression.

1.8. Your Publisher – Permissions and Fair Use

If you are writing a book or article for publication, your publisher may want you to get permission for the use of all copyrighted material regardless of whether you believe that you are making a fair use of some materials. Publishers have their own policies regarding what they individually consider to be legally sufficient. Authors are typically expected to obtain permissions for extensive quotations or images that will be included in the publication that may be subject to a separate copyright. This process can be time consuming and may require paying permission fees. Additionally, there may be other legal or ethical issues to consider such as privacy depending on your subject matter or the need to work with an institutional review board

(IRB). Aside from these non-copyright matters, permissions are not needed for materials that are either in the public domain or available under an appropriate license (such as Creative Commons). Keep in mind that publishers are often commercial entities with legal risks and reward that differ from those of the individual author. Where you may have fair use in particular work as an educator, the fair use may or may not extend to the publisher. If you are unsure, consult with your editor. Publishers are often more conservative regarding the exercise of fair use than individual authors might otherwise be.

Publishers often ask for a transfer of your copyright in order to publish your work. If you transfer your copyright, you are no longer the copyright holder and may not have any privileges to use the work; some publishers even claim that you no longer have the right to distribute the work to other scholars. If you have not retained rights to use your work – or if your work product is a work for hire (you prepare the work as an employee) -- then you must treat it like any other copyrighted work. If you want to use portions of your own work later, you will need to obtain permission for subsequent uses (or decide if fair use is applicable). This kind of frustrating situation -- along with the general desire to share work product easily among and between scientists around the world – is one of the reasons for the growing appeal of open access publishing.

1.8.1. University Employees

If you work for a university, you are required to follow the *rules and policies* for your institution. There are civil and criminal penalties for the violation of *copyright laws*, and university students, staff, and faculty are not immune. Be aware of the law and your universities policies. For example, see the University of Michigan Internet Publishing Policies, Guidelines, & Instructions at http://www.umich.edu/policy_guidelinesTOC.php. If you have specific legal

questions or concerns, you may want to contact your *office of general counsel*. You may need to get independent legal advice however – the university general counsel’s client is the university in the broad sense. You may have legal questions that are independent of the interests of your university. Many universities engaged in research have offices that specialize in technology transfer. Typically they are responsible for the transfer of university technology to the marketplace. Questions about patents, trademarks, and commercially exploitable copyrights should generally be directed to *offices of technology transfer*. Most universities have policies regarding the use of their *name and trademarks*. See for example the policy resources for the University of Michigan at <http://www.logos.umich.edu/index.html>.

1.8.2. Copyrights and Universities

For faculty at universities, what rights does the university have in work produced by a faculty member such as a scientist or engineer? Universities typically have written policies or principles regarding the copyrighted work of faculty, staff, and students, as well as work by independent contractors or other non-employees. Faculty members are typically employees and, as employees, copyrights produced within the scope of employment would belong to the university as the employer. However, academic tradition in the United States typically calls for copyright to be conferred on faculty author/creators as a matter of academic freedom. For author/researchers who work for a company and produce research-related work product, the employer presumably owns the copyrights in the absence of some other policy, practice, or arrangement such as special terms in an employment contract. Contract terms will define the owner of copyrights and other intellectual property especially in the arena of patents.

Remember, facts and data are NOT subject to copyright. Legal controls over facts and data are created by contract. There is compelling growing evidence that greater access to and sharing of

facts and data leads to faster innovation. Ethically and commercially, there are considerations scientists should think about through the course of their careers rather than assume a status quo in research and publishing practices. (LeClere 2010, Kolata 2010)

1.9. Open Access

1.9.1. What is Open Access?

Open Access literature is peer-reviewed, scholarly work that is available online for free, immediate, and permanent access. Anyone who has access to the Internet may read, download, store, print, use, and data-mine the digital content of open access works. The Internet makes it possible to share work widely and inexpensively. Publishers and authors use open access to make scholarly work available to a broad community of readers rather than limiting the readership to libraries or institutions that can afford subscription fees. For the purpose of this chapter, we focus specifically on open access and scholarly articles in journals.

Open access journals are more discoverable by scholars and the public than their non-open access counterparts. This increases the likelihood that others will find your material thus aiding in the wider dissemination of the work and the potential impact of the article. It is estimated that there is an increase in article citation between 17% and 250% with downloads of Open Access articles double that of their non-OA counterparts (Joint 2009).

Open access as an approach to scholarly publishing evolved from a general desire to share scholarly communication in the context of improved technologies for sharing and publishing – and a in response to practical concerns with changes in the economics of scholarly publishing. As academic journal prices continued to rise faster than inflation, library budgets continued to be increasingly constrained (SPARC 2007-2010). Libraries are forced to make

painful decisions about what journals they are able to provide their faculty and students. Open access publishing provides one way to ensure access while keeping costs down, and provides meaningful access globally beyond the limits of the academy.

There are a growing number of quality peer-reviewed open access journals available on the web; there are resources listed at the end of this chapter. These repositories allow for work to be efficiently shared with colleagues and increase visibility on the web. However, be aware that some publishers may object to the inclusion of your article in a free database, even a pre-print draft, and may require that you remove it prior to publication. Academic and scholarly publishers are increasingly aware of these concerns, and scientists should be comfortable raising these matters with their publishers. Scholarly publishing is broadly in a state of significant transition – scholarship has to be affordable and accessible to others to be part of the ongoing progress of science and the useful arts. There will be a variety of economic models that evolve for publishing scholarly work. Authors should understand the issues and trends sufficiently to participate in the larger discussion and have meaningful control over their rights and scholarly interests as this field evolves.

The faculties of many universities have adopted open access policies as spearheaded by faculty at Harvard then MIT (SPARC 2007-2010). Some scholars suggest that there should be no copyright in academic works (primarily scholarly articles) because faculty are paid by their universities, their contributions to journals do not result in royalty payments or other direct remuneration to them personally, the copyrights are then controlled by publishers which in turn sell the same material back the university through their libraries at very high prices (Shavell 2009). Faculty is compensated by reputation enhancement – rarely in payments when it comes to scholarly articles. A basic understanding of copyright and the economics of the complex

world of scholarly publishing make it easier to understand why and how open access was conceived and why it continues to grow as one of many models for academic sharing.

1.9.2. NIH Public Access Policy Compliance and Publishing Contracts

Open access gained momentum in 2007 when the National Institutes of Health made it mandatory for articles published as the result of NIH funding to be deposited in PubMedCentral - -- the NIH's open access resource (Suber 2007). Principal investigators for NIH grants are responsible for the deposit within one year of publication or risk being barred from future funding opportunities with NIH. The NIH Public Access Policy requires that papers resulting from NIH-funded research must be available in PubMed Central no later than 12 months after publication (National Institutes of Health, US Department of Health & Human Services 2008). It applies to peer-reviewed manuscripts (including their graphics and supplemental materials) accepted for publication on or after April 7th, 2008, for work arising in whole or in part from direct costs paid by the NIH or NIH staff.

Publishers are well aware of the NIH's Public Access Policy. The following language ensures publishers are indeed aware of your obligations involving a publishing contract for any article subject to the NIH Public Access policy. You may also want to consider an Author's Addendum, as discussed above.

The research embodied in this article was conducted with grant support from the United States National Institutes of Health (NIH). In order to comply with NIH regulations, issued pursuant to U.S. federal law, the Author hereby reserves the right to deposit this paper in PubMed Central, a public open access digital repository, subject to an embargo period not to exceed twelve months from the date of publication.

The policy applies to peer-reviewed manuscripts accepted for publication on or after April 7, 2008 and arising from any direct funding from an NIH grant or cooperative agreement active in fiscal year 2008, or an NIH contract signed on or after April 7, 2008, or the NIH Intramural Program. Manuscripts should be deposited upon acceptance for publication by the journal, after completion of the peer review process.

1.9.3. Institutional Repositories

Digital repositories that permanently preserve and ensure access to scholarly materials support open access. Many universities now have institutional repositories for public access and long-term digital preservation of content produced by their students and scholars. For example, The University of Michigan Library supports its faculty who wish to publish in open access journals or otherwise make their material available for open access. Deep Blue is the University of Michigan's Institutional Repository that provides a “permanent, safe, and accessible service” to collect the intellectual output of the University community (Lynch February 2003). The University of Michigan encourages interested authors to use an Author’s Addendum (modeled on the SPARC version) with publishing agreements to facilitate legal deposit and access in Deep Blue. Faculty at universities with open access policies may not need to use any such addendum because they and their scholarly work is *subject to* their university’s particular policy – their publishers are thus on notice that deposit in the repository is required as a condition of employment. Most policies do provide for the possibility embargo periods (where the repository copy is not made public for some period of months from first publication) or waivers in limited situations. Typically the policies (like the Author’s Addendum) require deposit of a copy of the published work in the repository. Author’s benefit from using the Addendum (or its key elements) to reserve the right or have permission to make non-commercial educational use and

post a copy on a personal website.

1.10. Common Copyright Questions and Hypotheticals

1.10.1. University/Industry Collaborative Work

QUESTIONS: If work is sponsored by industry (private sector sponsor), does the scientist have a right to publish as if it is federal research? Do they have to submit to the sponsor for approval? For how long to wait for an answer, is 30 days enough? Can scientist transfer rights in publication of sponsored work to the publisher? Can the results of industry-sponsored research be included in the book, written by the university scientist? Does he need to ask a permission?

ANSWER / DISCUSSION: In general, each university handles these situations a bit differently. There are two common approaches. In the first, the university is the party to the sponsored research but waives its work for hire rights as to its employee (the faculty member) and gives the copyright to the faculty member. The other model, the university may take the position that the faculty member owns the copyright in scholarly publications so the faculty owns the copyright from the outset.

Federally sponsored research, (such as funding from the NIH or NSF) requires that there be no restriction on publication by any intermediate sponsor. This is the case with federal funds for medical research or certain types of fundamental research. In some cases, agencies like DARPA, NASA, or Defense may contractually require or encourage dissemination; in other cases the same agencies may have publication approval clauses or outright publication restrictions depending on the nature of the research. This is less a matter of copyright than simply contractual restrictions in which the university and the participating scientists (as employees of the university) agree that they will obtain the federal sponsor's approval before

publishing research results. These questions go to the interaction between contractual confidentiality clauses and contractual publication clauses rather than copyright per se. The question is not about who owns the research result or published work product -- but rather whether publication is permitted at all.

Implicitly, there may be situations where a government sponsor actually *requires* that research results or publication connected with sponsored research be treated as a work for hire that will belong to the sponsor rather than the scientist (or university). This would restrict the right to publish research for any number of business or national security reasons. Completely unrelated to copyright, there are extensive regulations concerning the export of military-specific technology or technological information that would provide a benefit to countries for which any exports are forbidden such as North Korea and Iran. The act of publishing certain technical information even in the United States can be deemed to be an export or a transfer of that embargoed information. (U.S. Department of State, Directorate of Defense Trade Controls 2009)

1.10.2. Work sponsored by Department of Defense, Homeland Security and other Federal Agencies

QUESTION: What rights does the U.S. federal government have in publications related to work in government-sponsored contacts?

ANSWER / DISCUSSION: This depends entirely on the terms of the contract documents -- including for example any request for proposals (RFP) (in the case of procurements) or grant requirements (in the case of grants and sponsored research). In the Federal Acquisition Regulations (FAR), the government may incorporate into a contract for a sponsored research project clauses in the FAR that have the effect of restricting publication of research results. Its not just agencies related to national security that do this; the Center for Disease Control (CDC)

frequently seeks to restrict publication because that agency wishes to control the manner in which research concerning public health issues is disseminated to the general public. As a general rule, the government agency's desire to restrict publications will be identified in their initial program announcement or RFP. Researchers can evaluate early on the likely terms of the government sponsorship. It is common for a university's sponsored research office to be able to negotiate away an agency's publications restriction -- especially where the limit is not substantively critical for, say, security or privacy reasons. *These are contract issues, not copyright matters.*

1.10.3. Contracts with software developers

QUESTION: A university enters a contract with a software developer to develop a software program. Which party owns the copyright in the resulting software?

ANSWER /DISCUSSION: The answer depends on many factors, such as, (a) the contract terms, (b) whether Open Source was used to develop the resulting program, and (c) whether the software developer is developing the code from scratch or adding new code atop existing code. For example, if a University's business school hires an outside software developer to develop a software program to assist its career services team in managing the flow of recruiters, interview schedules and job hire statistics, then the contract between the University and the programmer should, among other things, set out the functions that the University wants the resulting software program to perform, the development milestones with respective timeline, the payment terms *as well as the copyright ownership terms.*

As stated previously, the "rule" is that the person creating the copyrightable work generally is the copyright owner of the resulting work. Thus, in this case, applying that rule, the software developer would own the copyright to the resulting software program. If,

however, the University pays the developer to develop the software program to their specifications *and* the contract provides that the University will be the copyright owner of the resulting software program (i.e., work for hire arrangement), then the University will own the copyright to the resulting software program. In some cases, the developer may want to retain limited rights to re-use the underlying source code atop which he may subsequently create a different interface or the like for use with his other clients.

In that case, the University might want to request that the developer's subsequent use of the underlying source code be restricted to his or her non-University clients at least for a set time period. This would allow the University to have an exclusive ability to offer the career services software program that it paid to be developed to its own students for a period of time. Or, if the software developer is using open source code to create all or part of the career services program, then the University and the developer will need to review the relevant open source license's terms to determine, for example, what portion of the developed code may need to be released back to the open source community. The majority of open source software code is released for use by developers under its respective license terms and there are many different open source licenses, some are more restrictive than others. A good source for determining the license terms that may apply to a certain piece of open source code is the Open Source Initiative at <http://www.opensource.org/licenses>.

As with all copyrightable works, there are many ways to allocate the specific rights elements to a newly developed software program. Each situation involving a University and an outside software developer requires evaluation by the appropriate counsel to ensure the contract captures the parties intentions, including the rights ownership of the resulting software program. Situations will vary depending on whether a developer is university faculty

developing software under the terms of a grant or sponsored research project or as a contractor to a university (through a procurement office typically). In all cases, copyright is governed by the terms of the written contracts.

1.10.4. Reports to sponsors

QUESTION: A scientist delivers a report to a sponsor – it might be a government, a company, or a multi-university project. Can the scientist keep the copyright?

ANSWER / DISCUSSION: Generally, the party creating the copyrightable work owns the copyright unless there is a written agreement stating otherwise. Simply delivering a copy of a report to a funder (or anyone) does not in and of itself transfer the copyright to the funder. There must be a contract in place that transfers rights or reserves certain rights to the funder signed before the commencement of work on the project.

In the case of software, for example, even if there is a transfer of rights to a sponsor as a condition of funding, the university or scientist may want to try to retain the right for continued use of his or her creative product (the software they developed). Alternatively, the university or scientist might ask the sponsor (whether industry or government) for a nonexclusive, royalty free, perpetual license to continue to use that software for his research. For subsequent products, if the scientist uses that software as background intellectual property in some new research or work product, the scientist would need interrelated contracts to get permission and needed licenses from the original sponsor. Again, this is a matter of contract rather than copyright per se.

1.10.5. Hypothetical Situations Concerning Copyright, Academia, and Research

Collaborations

HYPOTHETICAL I: Two research scientists from two different US-based academic

institutions are collaborating on a project concerning the sequencing of the Gladpa genome, which has revealed unexpected relationships between the genetic make up of the animal and its biology. Bay Area Genomics sponsored the research in large part. Along with a software developer who works for the same university as one of the scientists, they developed a software program, using some open source software, to assist them in mapping the genetic sequence and enable them to manipulate it so as to better understand how this remarkable animal evolved. They wrote a scientific paper detailing their research findings and want to send it to journal or submit as a conference proceeding.

Below are a few questions the scientists have about copyright. The discussion that follows provides guidance for scientists who may encounter similar situations in their work.

QUESTIONS:

- Should they sign the “standard copyright form” that the journal sent them? What does it mean – are they transferring all rights to the research over to the journal? If they sign the form, may they use their findings and/or portions of the publication in another subsequent paper? Does Bay Area Genomics need to “sign off” before they submit the paper? Can they negotiate any aspects of the form?
- Other genome start-ups have expressed an interest in licensing the software program they developed in conjunction with this research project. May they charge a licensing fee and pocket the proceeds? Does the university own the rights to the software program because the programmer works for the university? Do they need to do anything special because the programmer used some open source in developing the program? Does Bay Area Genomics own the software program because they sponsored the research project?

DISCUSSION:

First, the scientists should consult with their respective institutions' policies on collaborative research, intellectual property and industry-sponsored projects prior to engaging in the research collaboration. In addition, they should consult with their respective institutions' general counsel offices, technology transfer office and copyright officer to ensure that the contract with Bay Area Genomics meets with institutional requirements concerning copyright ownership, attribution, and other related aspects. If the software developer developed the genome-related modeling software program as part of her work at the university, then it is likely a "work for hire" product to which the employing-university owns the copyright unless the payment for the developer's work and the rights to this software program were specifically addressed otherwise in the contract with Bay Area Genomics. All of these rights issues should be negotiated up-front with the assistance of the University's general counsel, technology transfer director and/or copyright officer as applicable.

It is a good idea to memorialize the relationship with the software programmer at the start so her contribution is recognized appropriately and the rights issues are clarified ahead of time vis-à-vis her, the university, the scientists and the company. Also, it is advisable that the contract specify whether open source software may be used and whose responsibility it will be to ensure that all requirements concerning the use of that open source software are met in a timely manner. Whether or not the scientists may license the software program to the interested start-up will depend on various factors, including which party owns the rights to the software program (university, Bay Area Genomic) and what rights the developer / copyright owners have to the software given that it includes open source.

Generally, open source code is licensed for no charge under various open source license agreements, so the scientists need to determine which license agreement applies and possibly enlist the assistance of the university's general counsel or technology transfer office to review the applicable open source license agreement's terms to determine if and under what conditions the program that incorporates the open source may be licensed for a profit (Open Source Initiative n.d.).

Regarding the copyright ownership of the research paper they plan to submit to the journal: please be aware that there are no "standard copyright forms". Every "form" is negotiable. The company issuing the form may go to great lengths to make the form appear "standard" (e.g., the name of the form is Standard Author Form; small font; emailed in PDF format and thus seeming difficult to negotiate because of the fixed format). However, keep in mind no copyright ownership forms are standard. Generally, the journal will want to own the copyright to the paper it publishes to allow them to re-use it in a subsequent collection or in an online format without the additional cost and administrative responsibility of obtaining a plethora of new permissions. However, depending on various factors such as the clout of the author(s) and the level of interest that the research is generating, the journal may consider allowing an author to keep their copyright while licensing to the journal the first right of publication and the right of subsequent attribution (e.g., requirement that any subsequent publications of the article mention that it was first published in designated journal).

HYPOTHETICAL II: Caroline is an endowed professor of psychology at a prestigious private university in Massachusetts. Two years ago while she was a professor at a top university in California, she developed an educational tool – with the help of an outside consultant -- to assist elementary school kids in expanding their learning capabilities under a

project she called “Smartsology”. While employed at the California University, she signed the faculty intellectual property disclosure forms each year, as was required by that institution. Now, she wants to use the research, data sets and analytical tools that were developed under the Smartsology project to launch an online start-up company to market and license for profit the Smartsology educational tools, under a different brand name.

Caroline has a few questions concerning various ownership aspects of the Smartsology tool, the DoD’s ownership (if any) of rights, and whether she may now use the educational tools.

QUESTIONS:

- Does Caroline need to get permission from the California University to use the Smartsology tools, data sets or research in conjunction with her new business?
- Does she own the rights to the research, as she did some of it “on her own time” while employed by the California University?
- What does it mean to sign the University’s IP and disclosure forms and do those still apply once you leave that university?

DISCUSSION:

The University’s intellectual property form probably states that research generated by Caroline that falls within the scope of her employment as a professor will be considered “work for hire” -- thus the University would own the copyright. If the University does own the copyright to the research tools, data sets, and other related work product, there may

a provision in the intellectual property form or policy that allows the professor to migrate that research to a different institution and continue using it for academic purposes as long as she, for example, gives credit to the California University in any subsequent publications. These forms vary from institution to institution, so it is advisable to have an intellectual property lawyer review the form to determine the specific rights situation.

With regard to Caroline's ability to use the research tools, data sets, outcomes and other materials from the Smartsology project as a foundation for her for-profit business venture, it is best to consult a lawyer who specializes in intellectual property matters to assess the situation and advise how best to proceed. In the case where the California University owns the copyright to the research, data sets, and other materials, Caroline will need to obtain proper written permission from the University in order to lawfully use that research in the start-up company. Generally, these intellectual property forms and policies apply to work you create during your employment at the particular University.

1.11. Additional Resources

1.11.1. More about copyright and scholarly communication

United States Copyright Office: This is the site where you can register your copyrights, renew copyrights, search copyright records, and learn more about copyright law. www.copyright.gov

NIH Public Access Policy: This website from the NIH explains the new Public Access Policy, tells researchers how to comply with the policy, and provides a detailed FAQ.

<http://publicaccess.nih.gov>

Copyright Tutorials and Presentations: EDUCAUSE, a nonprofit association whose mission is to advance higher education by promoting the intelligent use of information technology, has a collection of copyright tutorials and presentations written by EDUCAUSE and its members.

www.educause.edu/Resources/Browse/CopyrightTutorials/36099

Stanford Copyright and Fair Use Center: The Stanford University Libraries offer a comprehensive site that includes links to the U.S. Constitution and copyright legislation, a detailed overview of fair use, and articles from prominent copyright scholars.

<http://fairuse.stanford.edu>

Stanford Copyright Renewal Database: This database searches Library of Congress copyright renewal records for books published from 1923 to 1963. If their copyrights were not renewed, many of these books have entered the public domain.

<http://collections.stanford.edu/copyrightrenewals/bin/page?forward=home>

University of California Office of Scholarly Communication: The UC system's Office of Scholarly Communication offers extensive information on issues affecting academic authors. It

includes an overview of the current trends in scholarly communication, a section on negotiating publishing agreements, an interesting database tracking the vital statistics of over 3,000 major journals. <http://osc.universityofcalifornia.edu/>

Cornell University Copyright Information Center: Cornell's copyright website includes a handy chart to figure out when a work enters the public domain. www.copyright.cornell.edu

1.11.2. Open Access and Open Educational Resources

Peter Suber, Open Access Overview: Background and explanation of open access.

www.earlham.edu/~peters/fos/overview.htm

Directory of Open Access Journals (DoAJ): A list of open access journals. www.doaj.org

SHERPA RoMEO: The RoMEO project tracks the copyright permission policies of over 300 hundred academic journal publishers. You can use this site to identify publishers' copyright policies and to find a summary of permissions typically provided in publishers' copyright transfer agreements. www.sherpa.ac.uk/romeo

Create Change: This website is aimed at the academic community and explores scholarly communication issues in the digital realm. The Association of Research Libraries and the Scholarly Publishing and Academic Resources Coalition developed it. www.createchange.org

Discipline-specific Repositories:

Many disciplines and research areas have specialized online repositories where scholars can deposit data, abstracts, and pre- and post-print versions of their articles. Examples include:

arXiv for mathematics and physics articles at <http://arxiv.org/>

PubMedCentral for biomedical journal articles at www.pubmedcentral.nih.org

ICPSR (The Inter-University Consortium for Political and Social Research) for social science data at www.icpsr.umich.edu

Open Educational Resources (OER):

Open Educational Resources are learning materials that are freely available for use, remixing, and redistribution. By using OER content in research and teaching materials – and making one’s own content available for use and sharing – teaching and research is made more efficient with fewer transaction costs for permission and administration. *OER and open access approaches eliminate or minimize the need for permissions in many cases.*

Connexions: A global repository of educational content that can be adapted and updated by new authors. <http://cnx.org>

OER Commons: www.oercommons.org.

Open.Michigan: Learn how to maximize impact of scholarly work through open sharing. <http://open.umich.edu>

MITOPENCOURSEWARE: Free lecture notes, exams, and videos from MIT.
<http://ocw.mit.edu>

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