



COPYRIGHT IN THE CLASSROOM

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Defenses to a claim of infringement?

1. A work isn't copyrighted if it doesn't have a copyright notice on it.
2. It is all right to copy a work if you give the author credit.
3. If you alter the work a little or add something to it, it is a new work and not an infringement.
4. If it's on the Internet, you can use it.



Historical Underpinnings

U.S. Constitution provides, in Article I, § 8, Clause 8, that Congress has the power to:

"promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."



Cultural Underpinnings

The clash of two American ideals:

freedom of expression (and information)

versus

devotion to **private property** (incentive-based, market economy).



Statutory Framework

The Copyright Act of 1976, as amended, 17 U.S.C. § 101 et seq (the "1976 Act"):

Subject matter - As set forth in § 102:

"Copyright protection subsists...in original works of authorship fixed in any tangible medium of expression" 17 U.S.C. § 102.



Exclusive rights granted under the 1976 Act:

To reproduce (make copies of) the work.

To make derivative works based on the work.

To distribute copies to the public.

To perform the work publicly.

To display the work publicly.



Originality and creativity

- work not copied; independent creation.
- Creativity, artistic merit, novelty - not an issue.



Fixation

Almost any medium – paper, photograph, video, DVDs, digital copies, etc. will suffice

Professor's lecture - would have to be simultaneously videotaped or otherwise fixed to be protected by copyright.



Categories of protected works of authorship include:

- » Written works.
- » Computer programs and databases.
- » Musical works, including any accompanying words.
- » Dramatic works, including any accompanying music.
- » Pantomimes and choreographic works.
- » Pictorial, graphic and sculptural works.
- » Motion pictures and other audiovisual works.
- » Sound recordings.



Ownership: Copyright initially vests in the author of a work.

- **Exception -- works made for hire:**
- a. a work that is **prepared by an employee within the scope of his or her employment;** or
- b. a work **pecially ordered or commissioned:**
 - for use as a contribution to a collective work,
 - as a part of a motion picture or other audiovisual work,
 - as a translation,
 - as a supplementary work,
 - as a compilation,
 - as an instructional text,
 - as a test,
 - as answer material for a test,
 - or as an atlas), and
 - **if the parties expressly agree in writing that the work**
 - » **shall be considered a work for hire.**¹⁷ U.S.C. § 101.



Notice

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Or

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Terms of Copyright

- **Basic term of copyright** – life of author plus 70 years.
- **Works made for hire** - 95 years from year of first publication or 120 years from year of creation whichever is shorter.



Infringement of Copyright

Sections 501-506 of the Copyright Act - court may:

- Issue an **injunction**;
- Impound and destroy infringing articles;
- Award **actual damages** and lost profits proven by the plaintiff;
- In the case of a registered work, **statutory damages** between \$750 to \$30,000 for the infringement of any one work, and up to \$150,000 in the case of a willful infringement;
- In the case of a registered work, award **attorneys' fees and costs** and/or
- Impose **criminal penalties** in a case of willful infringement.
- Impose a fine of \$2,500 for **fraudulent removal of copyright notice**



How?

**WE MUST RELY ON THE KNOWLEDGE AND
EXPRESSION OF OTHERS IN THE CLASSROOM**

**WHILE ALSO RESPECTING THE LEGITIMATE
INTERESTS OF AUTHORS**

HOW?



Use

- Free Use
- Fair Use
- Permitted Use



Free Use

US government works (public domain)

Pre-1923 works (public domain)

Certain 1923 - 1963 works (not properly renewed -- public domain)

Your own works

Works merely displayed in a live classroom - 17 USC § 110
- (performance or display of a lawfully made copy in face-to-face, nonprofit, classroom teaching)



Fair Use

Statutory Limitations on Exclusive Rights

Fair use - an *affirmative defense* in a copyright infringement action.

The fair use of a copyrighted work for purposes such as **criticism, comment, news reporting, teaching (including multiple copies for classroom use) scholarship, or research** is not an infringement.
17 U.S.C. § 107.



Fair Use Factors

17 U.S.C. § 107: 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 the use is commercial (less likely copying will be a fair use) or for **nonprofit** educational purposes and **transformative** (more likely copying will be a fair use);

(2) the nature of the copyrighted work
Fiction (less likely a fair use), or
Non-fiction (more likely a fair use);



Fair Use Factors

(3) the amount and **substantiality of the portion used** in relation to the whole of the work

Long or complete piece (less likely a fair use),

Short/partial piece (more likely a fair use); and

(4) the **effect of the use upon the potential market** for or value of the copyrighted work

Owner/author is losing money (less likely a fair use);

No ready market for permissions (more likely a fair use.)



Applying Fair Use in the real world

"The issue of fair use is the most troublesome in the whole law of copyright."

-- Justice Learned Hand, 2nd Circuit Court of Appeals

"The doctrine is entirely equitable and is so flexible as virtually to defy definition."

-- United States District Court for the Southern District of New York



CONFU Guidelines - 1976

Multiple copies for classroom use -- a safe harbor

Brevity –

poem of less than 250 words

complete article story or essay of less than 2500 words

excerpts of not more than 1000 words

one chart or photo per book

Spontaneity –

The decision to use the work did not afford time for a reply to a request for permission. (Obtain permission for materials to be used year after year.)



CONFU Guidelines - 1976

continued

Multiple copies for classroom use -- a safe harbor

Cumulative effect –

- only for one course in the institution
- one instance of copying per author
- no more than nine instances of multiple copying per semester

Other rules -

- include author's copyright notice
- provide copies to students at cost
- such copying should not substitute for the purchase of books, periodicals or tests/workbooks



CONFU Guidelines – Educational Multimedia - 1996

(e.g., posted online)

Motion media -- 10% (but no more than three minutes)

Text material -- 10% (but no more than 1000 words)

Music, lyrics and music video -- 10% (but no more than 30 seconds)

Illustrations and photographs -- no more than five images by an artist of photographer; no more than 10% or 15 images from a textbook

Other Rules

Not for distribution via multiple DVDs etc.

Limited to students in class -- password-protected site

Technology prevents copying -- or post for no more than 15 days, then place on library reserve

Attribution of source



Fair Use - Beyond CONFU

Fair use - good faith defense

"the court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107 if the infringer was an employee or agent of a nonprofit educational institution, library or archives acting within the scope of his or her employment..."

17 USC § 504 (c) (2)



Permitted Use

Boston University licensed materials –

check with the library – 617-353-2700 www.bu.edu/library/

Barnes & Noble – FacultyEnlight <https://www.facultyenlight.com>

Text – Copyright Clearance Center, www.copyright.com

Websites - Linking to the owners website

iCopyright.com

Music - ASCAP, BMI, SESAC (primarily for performance)

Movies - Motion Picture Licensing Corporation www.mplc.com

Personal contact



Seeking Permission

Contact the owner

Be ready to specify:

- title and portion to be used
- purpose of use
- duration of use
- number of hard copies/electronic use
- cost
- written confirmation -- letter, e-mail, form



Use of Copyrighted Materials

Best Practices

Keeping

- Free Use, Fair Use, and Permitted Use,
 - The statutory four factors and the CONFU safe harbors,
 - And the fair use good faith defense in mind
- the following BEST PRACTICES emerge:



Best Practices

Fair use is a judgment call, on a case-by-case basis.

But, as dictated by your educational objectives:

Use your own original works, government works and public domain works to the greatest degree feasible

In websites and on Blackboard, link to the owner' s site rather than providing a copy of the work

Display/project/play any works, without limitation, in face-to-face teaching



Best Practices *(continued)*

If you rely on fair use, limit handouts or online postings to short, single chapters, a few photos, etc.

If third party materials are used online, limit access to students registered in the course through a password-protected site

Terminate online access to third party materials at the end of the term



Best Practices *(continued)*

When possible and appropriate to your objectives, copy-protect course materials posted online

Include copyright notices and other appropriate attribution

Provide notice to students: “Posted materials are for educational use only. Do not copy or distribute.”

Educate our students on both fair use and plagiarism

Practice the Golden Rule -- would you want your book copied for free?

Warning Signs

Be wary of :

using the same third party materials year after year -- check availability for license

posting multiple chapters from the same book; multiple articles from the same journal or magazine

posting multiple photos or graphics from one textbook

posting any third party materials to sites accessible to the internet at large

using more than 10% or 3 minutes of video

using more than 10% or 30 seconds of music

failure to provide proper attribution



Questions ?



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Dennis Hart joined Boston University's Office of the General Counsel in October 1987 after serving as a corporate counsel at Digital Equipment Corporation in Maynard, Massachusetts. Prior to joining BU's Office of the General Counsel and Digital Equipment Corporation, he was in private practice at the law firm of Testa, Hurwitz & Thibeault in Boston. He handles a wide range of matters, including commercial transactions, sponsored research, copyright and publishing, intellectual property, trademark, communications and media (including matters involving the University's public radio station WBUR), information technology, bankruptcy, business ventures, and general business matters. Mr. Hart earned his law degree from Harvard Law School. He also graduated summa cum laude with a B.A. from Yale University.

