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Copyright and Academia: Debunking Common Misconceptions and Myths

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ABSTRACT

Few words strike fear into the hearts of college faculty and administrators like copyright infringement. Misunderstandings and misinformation about copyright run rampant on college campuses today which can lead to stifling classroom teaching or even liability for copyright infringement. In this column I begin with a short overview of copyright and fair use followed by a discussion of some of the more common copyright myths I have encountered over the past few years.

Few words strike fear into the hearts of college faculty and administrators like copyright infringement. Well, perhaps “tenure committee” or “university-wide working group,” but copyright infringement ranks right up there. Misunderstanding feeds this fear, and misconceptions about copyright run rampant on college campuses. These misconceptions often lead to faculty taking one of two positions on copyright compliance: overly cautious or not cautious enough. Being overly cautious may stifle classroom teaching, while not being cautious enough may open the faculty member and the university up to liability for copyright infringement. It is a fine line to walk.

The purpose of this column is to explore some of the common copyright myths and misconceptions regularly seen on college campuses. Based on conversations with librarians and faculty around the country, these seem to be fairly universal misconceptions. All of the

examples below are actual, real-life scenarios that I have seen over the past few years. Some will be obvious, while some not so obvious.

To appreciate these misconceptions you must first understand the basics of copyright. So, first things first. What is copyright? The dictionary defines copyright as “the protection of the works of artists and authors giving them the exclusive rights to publish their works or determine who may so publish.”¹ This is a great starting point, but it paints only part of the picture and raises additional questions such as what types of works are protected, what exclusive rights are granted and are there any exceptions?

Everyone knows that literary works such as books and articles are protected by copyright, but copyright also protects pictures, paintings, photographs, music, movies and architectural works.² Unpublished works such as letters and journals are also protected by copyright. In legal terms, copyright protection begins at the moment the “original work of authorship [is] fixed in any tangible medium of expression.”³ That is, when it is put into some permanent form, be it written on paper, saved as a computer file or even painted on a canvas. The author’s exclusive rights are set out in the copyright code and include the right to reproduce the work, prepare derivative works and distribute copies of the work. A complete listing of exclusive rights can be found at *U.S. Code 17* (2000), §106. Another important point to remember is that the copyright holder is not always the author or creator. This is particularly true in academia where authors often assign their copyright, in whole or in part, to publishers through publisher or author agreements in exchange for publication of an article or manuscript.

And then there is fair use, a term everyone has heard but may not completely understand. I like to think of fair use as a “freebie.” Without getting into too many technicalities, fair use

¹ *Law Dictionary*, 4th ed. (Hauppauge, NY: Barron’s Educational Series, 1996), s.v. “copyright.”

² A complete list of protected works can be found at *U.S. Code 17* (2000), § 102.

³ *Ibid.*

allows you to use a reasonable portion of a copyrighted work without the copyright holder's permission under certain circumstances. To determine if your usage falls within fair use, you should balance these four factors:

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.⁴

Using these factors, you can determine if the proposed use weighs in favor of or against fair use. Fair use determinations are rarely black and white, however, and cannot be reduced to a simple formula. There is often uncertainty and second guessing. But if you use common sense and one of the useful online Fair Use Checklists you should feel confident in your decision.⁵

The nuances of copyright are much more complicated than the brief overview I have given above. I could easily devote an entire column to fair use alone and future columns will delve deeper into some of these topics. With that background material out of the way, I will spend the rest of the column examining some of the most common copyright myths and misconceptions.

It is for an educational purpose so it must be fair use.

This is likely the most common misconception that I hear, and it comes from all quarters of the university—faculty, administration, staff and students. While fair use certainly provides broad protection for classroom and educational uses, it is by no means a blanket protection to use copyrighted materials without permission. I have already given you the basics of fair use, so

⁴ *U.S. Code* 17 (2000), § 107 (1) – (4).

⁵ There are a number of great online checklists. Check out Columbia University's Fair Use Checklist at <http://copyright.columbia.edu/fair-use-checklist> or Cornell University's Fair Use Checklist at http://www.copyright.cornell.edu/policies/docs/Fair_Use_Checklist.pdf.

let's get to the bottom of why some people mistakenly think fair use protects all educational uses.

We will start with the source, Section 107 of the copyright code. Section 107 says that the fair use of copyrighted works for the purposes of “teaching (including multiple copies for classroom use), scholarship, or research” is not a copyright infringement.⁶ Based on that language, I can understand why some people may conclude that all educational purposes are fair use. However, in practice this does not mean every possible use relating to teaching, scholarship or research is fair use. For example, copying an entire book or creating a course pack by copying and posting articles would not likely be fair use.

The key thing to remember is that fair use is not a science. People often disagree over whether a particular use is fair use. Why else would there be copyright lawyers, right? But, as I mentioned earlier, if you plan to use a copyrighted work and feel the use is protected by fair use, it is always advisable to complete a Fair Use Checklist.

The checklists are easy-to-use. They are typically divided into four sections corresponding to the four fair use factors. Each section is divided into four columns, one weighing in favor of fair use and the other against it, with various uses and other items listed. When you look at a checklist you will notice that many of the items weighing in favor of fair use relate to educational or teaching purposes. Once you complete the checklist, you should save it in case any questions about the use arise later.

I wrote the article so I can post it on my personal web page or in my school's institutional repository.

Professors often want to make their published articles available online, either on a personal web site or in their university's institutional repository, for personal or professional

⁶ *U.S. Code* 17 (2000), § 107.

reasons. Ordinarily this would not be a problem because the faculty member, as the author of the article, initially holds copyright and under copyright law is granted the right to make and distribute copies. However, the current academic publishing model makes this more complicated.

As I explained earlier, faculty members often assign rights in their works to publishers in exchange for publication. This transfer is made through agreements that assign some or all rights from the author to the publisher. Think of the author's rights as a bundle of sticks, with each stick representing an individual right (*i.e.* copy, distribute, derivative works). The author can retain all of her sticks (rights) or break up the bundle and transfer (assign) some of her sticks (rights) to others. Author agreements determine what rights are assigned and retained. On a positive note, the recent trend is away from all or nothing author agreements under which authors are forced to transfer all rights to a publisher.

How does this usually play out in the real world? Take the junior faculty member who was so excited to have his manuscript accepted for publication that he happily signed whatever paperwork came his way from the publisher without reading it. Only later when he wanted to post the article to his web site did he learn that he assigned all of his rights to his publisher. This scenario plays out much more often than you may think, and I have seen it many times.

Based on personal experience and observation, it seems that a low percentage of faculty members thoroughly read and understand their author agreements before signing them. This is astonishing to me since these are legally binding contracts between the author and the publisher. Would he buy a car without reading the contract? Not likely.

With this in mind, you should advise your faculty to review their author agreements before signing them and also before posting their own articles on the web. It is worth the effort

to review the agreements. Trust me, getting a cease and desist letter from your publisher can ruin an otherwise pleasant day.

I credited the source so I am not violating copyright.

This is another very common misconception. It usually stems from confusion between copyright infringement and plagiarism, two very different but seemingly related concepts. Why do people confuse the two? It is most likely because both deal with using someone else's work. Because the distinction is so important, I always spend time explaining this in my copyright workshops. How do plagiarism and copyright infringement differ? In a nutshell, one is an academic offense while the other carries legal implications. To sort this out, a more detailed explanation may help.

Plagiarism is appropriating another's literary composition and passing it off as your own. Acts of plagiarism can range from simply failing to properly cite a paraphrased source to the wholesale lifting of entire passages from another's work. Plagiarism often leads to charges of academic fraud and misconduct within the university but rarely has legal repercussions unless it is somehow intertwined with a copyright violation.

Copyright infringement, on the other hand, is a legal issue for which the consequences are potentially much greater. Infringement usually occurs when you copy or distribute a copyright protected work without the copyright holder's permission. Of course, there is always the possibility that fair use would apply especially in the academic setting, but you should always be careful when using copyrighted materials. Unlike plagiarism which is based on poor or missing citations, even if you fully cite the source you risk committing a copyright violation if you use it without permission.

I can scan articles and make them available on my Blackboard shell.

Fair use is alive and well in the digital environment which makes this myth a little trickier because fair use may, in fact, apply here. Each semester professors across the country digitally scan dog eared, coffee stained articles for their courses. These newly digitized articles may live in the professor's online course shell or the library's electronic reserve system, possibly for many semesters to come. There is a strong argument that scanning and placing an article in a protected course shell or reserve system for one semester falls within fair use. Whether you take this position depends on your, and your institution's, level of risk tolerance. However, there is a better and safer option.

An easy way to avoid this risk is by linking directly to library licensed content. With the explosion of full text databases, many articles, even older ones, are available electronically through library databases. Many database licensing agreements specifically provide for this type of direct linking. One well known exception to this rule is the *Harvard Business Review* licensed through EBSCO. Vendors like this solution, too. I was recently on a copyright panel with a representative from a major database vendor who said his company approves of and even encourages direct linking to its content. If you doubt this just look at the number of persistent URL's included in many article databases today.

At my library, we are proactive in educating faculty about linking to library licensed content. We team with our university's instructional technology office to co-teach hands-on workshops and offer one-on-one training sessions to help faculty integrate licensed library content into their online courses. This benefits the library and protects faculty from possible copyright infringement.

It did not have a copyright symbol so it must not be protected by copyright.

At one time this was true. Until 1989 the copyright symbol, the letter c enclosed in a circle, was required to appear on every copyrighted work for it to receive copyright protection.

When the copyright law was revised effective March 1 of that year, that requirement was removed and including the copyright symbol became permissible rather than mandatory.⁷

Why is this important to know? Because much of what you find online does not include a copyright notice or symbol but is still protected by copyright. Take for instance postings I make to my blog at the library. I do not include a copyright notice on them, but they are still protected by copyright. Most photos and images found online are copyright protected. Remember that just because you found it on the internet does not necessarily mean it is free from copyright protection. In fact, I usually recommend to err on the side of caution and assume everything you find online is protected by copyright unless it clearly is not, like most government documents or works that include an express Creative Commons license.

Librarians are often seen as the copyright police on campus, a label I always disown during my workshops and presentations. It is easy to see why we have earned this label, though. We are on the front lines of access to information, often telling faculty members “no, you cannot do that.” Sometimes we say no so often that faculty members may no longer come to us for advice. This is not the reputation we want. We should be on the front lines of both promoting copyright compliance and educating faculty and administration about copyright.

There is a huge void of knowledge about copyright on American campuses today. This is not to say that librarians don’t understand copyright issues, but that they need to do a better job of disseminating that information outside of the library to the broader campus community. Many libraries have done yeoman’s work in this area, creating copyright librarians or Offices of Scholarly Communication within their libraries. But, we can do a much better job on the whole. I hope this column has armed you with enough information to feel comfortable talking to faculty about copyright issues.

⁷ *U.S. Code* 17 (2000), § 401.