# Copyright Basics: Enriching Scholarship 2019

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*Session Notes*

Thank you for joining me today to learn some of the basics of US copyright law. Our focus will be on foundational concepts with time for questions and discussion. You can also find resources from the Copyright Office at the U-M Library on the library’s website at [www.lib.umich.edu/copyright](http://www.lib.umich.edu/copyright). You can contact me directly if you need particular help - or feel free to email our group at [copyright@umich.edu](mailto:copyright@umich.edu), and one of us will respond.

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What is ‘intellectual property’?

Copyright...creative expression

Trademark...corporate identities, products, source of goods

Patent...useful inventions

Trade Secret...formulas and processes not easily discoverable

Why do we have copyright?

According to Article 1, Section 8, US Constitution:

...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.

17 United States Code

What is copyright?

The ‘bundle’ of rights metaphor.

The right to reproduce the work

The right to distribute the work

The right to prepare derivative works

The right to perform the work

The right to display the work

The right to license any of the above to third parties

How does copyright start and how long does it last?

Copyright exists from the moment of creation - ‘fixed in a tangible medium of expression’

The life of the author plus 70 years.

‘Formalities’ - You used to need a little © and register with the US Copyright Office – no longer required but may be advised. So for example...

ⓒMelissa Levine, 2019

Copr., Melissa Levine, 2019

Copyright, Melissa Levine, 2019

Concept of ‘orphan problems’ - where copyright exists as a legal matter but one cannot identify or locate a rightsholder.

Conversation: Are you a copyright holder?

What does copyright protect... and not?

Copyright protects…for example:

Writing

Choreography

Music

Visual art

Film

Architectural works

Copyright does not protect:

Ideas

Facts

Titles

Data

Useful articles (that’s patent)

Who is the copyright holder?

Creators - Usually the initial copyright holder. Often transferred or assigned by contract or license.

Joint copyright holders - Two or more people jointly create a work, with equal rights unless address by agreement.

Works made for hire - Generally, work created as a part of a person's employment, copyright belongs to the employer.

Independent contractors - exercise independence and expertise with less oversight from contracting party; importance of contracts before the start of work.

Academia - issues of first author, faculty/grad student assumption

Note on joint works in the academy.

In academia, there is often an emphasis on the first author - that’s the person who will sign the contract, or be considered the primary owner of the work. In fact, from a copyright standpoint, as long as a contributor added some element of written work, that contributor is an equal © holder.

It is important to understand the way copyright holdership works both for yourselves as creators, and for situations when you want to use someone else’s work. For published work, the most likely copyright holder is the publisher. Usually there’s a copyright notice that indicates as much.

Copyrights ‘in’ copyrights - compilations

Newspapers

Websites

Books with editors and chapters by different authors

Journals and magazines

Movies

Art

A note on U-M policy SPG 601.28

Faculty and students at U-M hold the copyright in their scholarly works by policy.

Faculty work might otherwise be works for hire held by the university (as work by employees)

Practical and academic freedom problems

A note on Plagiarism versus Copyright Infringement

Infringement - Unauthorized reproduction of a work that is still protected by copyright. Can be intentional or negligent.

Plagiarism - Reproducing someone else's work and calling it your own. Problems with ‘collaboration’. Can be intentional or negligent.

You can have one or both in a given situation. But they are not the same thing and have different consequences.

Conversation: What happens if...?

JK writes a book.

JK writes a chapter.

JK paints a painting.

JK paints a mural.

JK produces a movie.

JK writes a script.

JK designs a t-shirt.

Other ideas?

Fair Use 17 USC 108

*Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in* [*copies*](https://www.law.cornell.edu/uscode/text/17/107) *or* [*phonorecords*](https://www.law.cornell.edu/uscode/text/17/107) *or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple* [*copies*](https://www.law.cornell.edu/uscode/text/17/107) *for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—*

Fair use 4 factors

The nature of the work (factual, creative)

The purpose of the use (educational, for-profit)

Amount of the work being used

Potential impact of use on the market for original.

That notice at the beginnings of movies and sporting events: bunk.

Importance of being a student and educational context.

ARL Fair Use Best Practices

CAA

The “Circle” of Copyright

Copyright gives automatic protection to certain types of works. It does this by giving the creator (the copyright holder) a set of exclusive rights. These rights include making copies, making derivative works, distributing those copies, publicly performing the work, and publicly displaying the work. The copyright holder controls who can do these things to their work. For example, if you take a photograph and someone wants to publish it in a magazine, they have to come to you and ask you for permission. You are the only one who can say how your photograph can be used, with exceptions like fair use.

For faculty: When you use a work in a course, you’re publicly displaying it. When you put it in a PowerPoint students can download, you’re copying and distributing the work. Think about copyright when you’re crafting your course content to ensure that you are respecting the rights of others. Keep in mind that not all works are protected by copyright, and even if they are you may still be able to use the work in a given context.

Copyright

Copyright protection begins as soon as the work is fixed

Have the exclusive rights given to all copyright holders

No hoops to jump through to get protection

Don’t have to provide a copyright notice

Don’t have to register with the US Copyright Office

When you create a course or new course materials, those materials are automatically covered by copyright as soon as they are fixed. You don’t have to follow any sort of formalities to get copyright protection. You don’t even have to put on your materials that you’re the copyright holder. None of those things are required to get protection, but they are good things to do to make it easier for others who are interested in using your work to find you and ask for permission. You don’t have to register your copyright with the US Copyright Office in order to get protection, but registering it gets you certain other legal protections if your work is ever infringed.

Being a copyright holder gives you all of the rights we discussed earlier, including the ability to control reproduction and distribution of the work. You can give other people the ability to do things like reproduce the work, but they must first come to you for permission

Metaphor: “Circle of Copyright”

Think of copyright as a circle. It protects some kinds of works (books, articles, photographs, music, etc.), but it doesn’t protect other things (data, facts, ideas, etc.). Works outside the circle fall into two categories: uncopyrightable and public domain. If the material you’re interested in is either of these, you are free to use it without worrying about any copyright restrictions. However, if the material you’re interested in using falls inside the circle of copyright protection , your use must either be covered by a user’s right (like fair use) or permission from the copyright holder.

Outside of circle:

Uncopyrightable

Public Domain

Inside circle:

Fair Use

Permission

Things outside the circle are not covered by copyright and are free to use.

Things inside the circle are covered by copyright and can be used through:

Fair Use

Permission

Uncopyrightable subject matter

To be protected by copyright, a work must be:

Original (independently created with some spark of creativity)

Fixed

No protection for ideas

Expressions are protected, not the ideas themselves

Things common to a style (Viking ships in a Viking movie) aren’t copyrightable

Procedures, processes, systems, concepts, and facts aren’t protected

X-rays, microscopy images, and histology/pathology slide images

Basic graphs, charts, and diagrams

If a work is not protected by copyright, it is free to use

Copyright only protects works of original authorship that are fixed in a tangible medium. To be original, the work has to be independently created by a human author and has to have some modicum of creativity. The bar for creativity is pretty low-- an alphabetized list of phone numbers wasn’t creative enough, but the white pages with specially arranged ads was. Copyright also focuses on the way ideas are expressed, not the ideas themselves. For example, you can’t copyright two teens from different backgrounds falling in love over the objections of their families (Romeo and Juliet, West Side Story). But if you write a novel based on that premise, you can copyright the novel. You just can’t keep another from using the same basic idea.

For faculty: When selecting course materials, it’s important to remember that much of the content you choose to use may be factual and not covered by copyright. Basic charts, graphs, and data sets aren’t protectable. Images that seek to convey facts (like an anatomy sketch) also aren’t protected by copyright. However, if you see a chart or diagram that is particularly artistic or expressive, that chart will be protected by copyright. Instead of using the exact chart, you might consider extracting the data from it and recreating it in a simpler way.

Factual - basic process

Artistic elements - the mouse

If you look at the chart on the left, you can see that it outlines a basic process. All design decisions were made to convey the information in the simplest way possible. The purpose of the chart is purely factual. On the other hand, you can see that the chart on the right has several artistic elements, including the mouse. This would be enough creativity to make the right chart covered by copyright.

Works that are in the public domain no longer have copyright protection

Copyright term of the work has expired

Copyright holder released the work to the public domain

Free to use in any way without having to give attribution or worry about copyright restrictions

Works published in the US before 1923 are in the public domain

Should consult Cornell’s [Copyright Term and the Public Domain chart](https://copyright.cornell.edu/publicdomain) for other works

Works created by the US government are automatically in the public domain

Public Domain

Works that are in the public domain are some of the best to use in courses because they don’t have any copyright restrictions at all. This is because either the term of the copyright protection has expired or the creator has given up their rights in the work. You are free to use a public domain work in any way you want-- edit it, add to it, sell it-- all without having to attribute back to the original source.

All works that were published in the US before 1923 are now in the public domain, as well as all works created by the US government. Some other works that were published before 1989 could also be in the public domain because they didn’t comply with formalities that were required at the time (but were no longer required after 1989). If you’re interested in a certain work, you can use Cornell’s Copyright Term and the Public Domain chart (linked above) to help figure out if the work is in the public domain.

Just because a work is covered by copyright doesn’t mean that you can’t use the work in your course. Your use could be covered by a user’s right-- an exception put into copyright law to allow some kinds of favored uses. There are several different user’s rights, but the most important one is fair use. Fair use allows you to use a copyrighted work without getting permission from the copyright holder. Certain uses like criticism, commentary, teaching, scholarship, and research are especially favored under fair use. To know if your use is a fair use, you have to consider four factors.

Key exception: 17 USC 107, Fair Use

In certain instances, allows use of a copyrighted work without permission from the copyright holder

Examples: commentary, search engines, criticism, parody, news reporting, research, and scholarship

Four factors to consider:

The purpose and character of the use (commercial or non-profit/educational)

The nature of the copyrighted work

The amount and substantiality of the portion of the copyrighted work used

The effect the use has on the market or potential market for the copyrighted work

The four factors are weighed based on the circumstance, context specific

‘Transformative’

The first factor is the purpose and character of the use, meaning whether or not the use is commercial or non profit and educational. If you are using material in your course, that would be an educational purpose and would weigh in favor of fair use. If your use was instead commercial in nature, it would not weigh in favor of fair use. This is also where you look at how transformative your use of the work is compared to the original work.

The second factor is the nature of the copyrighted work: whether the work is factual or creative. If works are purely factual, they do not receive copyright protection. But for charts (like the mouse one) that are both factual and protectable, the copyright protection given to them is thinner than one given to a creative work, and your use of that work is more likely to be fair under the second factor.

The third factor deals with both the quantity and the quality of the copyrighted work you use in your own. Taking a small portion of the copyrighted work will typically weigh more in favor of fair use than taking a larger portion or using the entire work. However, even using small portions of a work can weigh against fair use if the portion you’re taking is the most important part of the work. This factor is very context specific; the more transformative your use, the more different it is from the original work, the more of the original work you can use.

The fourth factor is the effect your use has on the market or potential market for the original copyrighted work. If your use of the work would replace the original work in the market, it heavily weighs against fair use. An exception is made for critical commentary and parody; people no longer buying the original work because they’ve been convinced not to is much different than them buying your work instead because it is basically the same.

When considering fair use, make sure that you consider all factors together and not in a vacuum. Each factor builds off of and strengthens another. For instance, if your use is very transformative and different than the original work, you may be able to use more of the work (factor three) and your work is less likely to replace the original work (factor four). Remember that there are no bright line rules for fair use. Every use has a different analysis and outcome based on the context of the use.

Other exceptions...’Limitations on exclusive rights’

17 USC 108 Reproduction by libraries and archives

17 USC 109 Effect of transfer of particular copy or phonorecord (First Sale, ReDigi)

17 USC 110 Exemption of certain performances and displays (TEACH - Technology, Education and Copyright Harmonization Act of 2002)

17 USC 121 Reproduction for blind or other people with disabilities (Chaffee, Marrakesh)

Permission

You can reach out to the copyright holder and ask them for permission to use their work.

Creative Commons licenses give blanket permission to make certain types of uses. Examples, mix as desired. “Machine, Human, Lawyer-readable”

BY: Attribution

SA: Share-ALike

NC: Non-Commercial

ND: No Derivatives

If your use does not qualify as a fair use, you can always ask the copyright holder for permission. Sometimes, asking for permission can be a tedious process. You may not always know who the copyright holder is, and once you find them, they may not respond to your emails or phone calls. Keep this in mind when you’re considering asking for permission to use materials in your course.

If you’re not looking for a specific work, you could find a work that already gives you permission to make certain uses. Creative Commons licenses are licenses creators put on their works to let the general public know how they can use their work. All Creative Commons licenses require attribution to the original creator. Some also require sharing your new work under the same license, not making changes to the work, and not using the work commercially. Creators can pick and choose which license requirements they want out of these four to do whatever works for them. As long as you comply with the terms of the license, you’re free to use the work in your course materials.

Open Access (OA)

OA materials are available online and can be used by anyone for free without any copyright restrictions

Many journals now have OA models, allowing you to share the readings freely with your students

Students can download the articles directly from the course

Great for faculty and students who don’t have credentials to get on the databases - scholarly cooperation, joint research

Open Educational Resources (OER)

[U-M Author’s Addenda](https://www.lib.umich.edu/copyright/authors-addendum)

Open Access is a movement to make research free and openly available to all. There are many journals that are either OA or have a branch that is OA. OA articles can be freely distributed however you would like. You can attach an entire OA article, or even the whole volume, to your course without having to worry about fair use or any copyright restrictions. The students could then download the article PDF from the course, save it to their device, and have the ability to access it at any time. This is great for students who are not affiliated with UM and don’t have access to the many databases the university subscribes to. There are also some textbooks that are going OA, and these textbooks can be freely downloaded and made available as well. Try to become familiar with what’s available in your specific field, and choose OA when you can.

Green and Gold

Author publishes in any journal

Self archives in freely accessible institutional archive or repository

Could be subject-matter specific repository like PubMed

May have embargo (my chapter...)

Funders satisfied.

Author publishes in open online journal

Open from the start

No embargo (Finding the Public Domain...)

Author retains copyright

Funders satisfied

To be clear...

Open access is not copyright infringement.

It is different from fair use, though they can support each other.

Open access is consistent with copyright law.

Fair use is part of copyright law.

Growing: Israel, Malaysia, Poland, Singapore, South Korea

Fair dealing in UK, Canada, Australia

Open License

As copyright holder, you can choose a CC license for your course/course materials

All require attribution, which means all reuses will be linked back to you

Choose the license that most closely matches your goals

CC licenses allow your materials to be shared and built upon, creating a larger learning community

Retaining copyright (all rights reserved) gives you more control and protection

Ability to choose who gets to use the work and how

Allows you to take down your work posted outside of your course

Note: Rightsstatements.org

But most importantly, being the copyright holder allows you to make the decision on how to license your work to others. If you are interested in making your course or course materials as easily and openly accessible as possible, you may be interested in licensing it under a Creative Commons license. This will allow others to repurpose your materials for their own teaching and help your work be disseminated and built upon, always with an attribution back to you. At AI, the CC license we use is CC BY-NC. This allows people to reuse, repurpose, and build upon the course materials, but they are not allowed to use the materials for commercial purposes. If anyone tries to sell the materials or use them for monetary gain, we can still step in and stop the use.

You may also choose to leave your course at the copyright default, which is “all rights reserved.” All rights reserved means that you retain all copyrights and don’t give permission for anyone else to use the materials. It gives you complete control of the future of the course and how the materials will be accessed. It also gives you the ability to take down the course materials if you find them posted somewhere outside the course.

You should consider your own goals when deciding which one to select.

The purpose of copyright law is to provide incentives for authors to advance the arts and sciences; it achieves this purpose by granting them temporary monopolies over their 2 works. However, these monopolies are not absolute. Significant exceptions exist in order, for example, to prevent copyright from becoming a barrier to free expression and the open exchange of ideas, particularly in institutions of higher education.

Resources

U-M Library Copyright Office Guides

Copyright Basics

Obtaining Copyright Permission

Creative Commons

Scholarly Publishing, Open Access

Harvard Resources

Fair Use: A Primer

Copyright & Licensing: Before You Sign That Contract!

Peter Suber

Other Resources

Cornell Public Domain Guide

Creative Commons Licenses

Controlled Digital Lending Whitepaper

SPARC and its Authors Addendum

Fulcrum, Lever, TOME (Toward an Open Access Monograph Ecosystem)

2.5% proposal

Reclaiming Fair Use: How to Put the Balance Back in Copyright, Jaszi and Aufderheide, Chicago University Press

The University Library Copyright Office has created a variety of research guides revolving around a variety of copyright issues. Copyright Basics gives an overview as copyright law as well as a FAQ answering commonly asked copyright questions. You may also find the guides on Obtaining Copyright Permission and Creative Commons helpful as you decide how to proceed with your content.

Other helpful resources include the Open Michigan Casebook (which includes lots of good examples on what is and isn’t copyrightable), the Cornell Public Domain Chart, and Creative Commons’ list and explanations of all their licenses, in human readable language.

Lewis Hyde

The Gift (1983) on the noncommercial part of artistic practice

Common as Air (2010) - knowledge as a commonwealth not a private preserve