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August 2014

# Notes on Copyright for Educators and Librarians

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## **Copyright for Librarians and Educators**

Coursera MOOC Course – August, 2014

Notes for Penn Group

Shawn Martin

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## *What is Copyright?*

- Here are a few general ideas about things mentioned in the lecture, and are covered in more detail elsewhere, but worth explaining more:
  - Copyright only protects expression, not the idea itself
    - You cannot protect an idea via copyright (you can through a patent, but that is beyond the scope of this course)
    - Copyright only protects the way you talk about an idea, or, your words, video recording, etc.
    - If someone else uses the same idea in a different way, even if you copyright it, the other person is still able to use it
    - A good example of this is Steve Jobs who copyrighted (and didn't originally patent) his operating system for MAC. Bill Gates made a similar system for Windows and this was perfectly legal (according to the courts). Jobs later learned his lesson and patented many of his inventions.
  - Related to the idea of expression, in order to have copyright, things must be in a "fixed tangible form"
    - In other words, there has to be some physical (or now virtual) expression of an idea
    - For example, if I say something to you, whatever ideas I express are not copyrighted. However, if I record our conversation, then the ideas are now in a "fixed tangible form" and therefore copyrighted.
  - "Limited Monopoly"
    - Copyright only lasts for a certain number of years, currently life + 70
    - This can get complicated however. For more info about the term, see <http://copyright.cornell.edu/resources/publicdomain.cfm>
  - Financial Incentive
    - At its heart, copyright was created to "promote the sciences and useful arts"
    - That has been interpreted over the years to mean that congress created a market for "intellectual property"
    - Much of copyright law today focuses on how that market does (or does not function). It is Congress' role to make sure that the market created in the constitution functions properly
    - Others are now beginning to interpret "promote" to mean more than just creating a market, and projects like CreativeCommons (<http://creativecommons.org>) are trying to spur that kind of dialogue around copyright

- More information about some of these issues is mentioned in later lectures, but these are some general ideas that struck me in relation to these introductory comments.

### *History of Copyright*

- Here are some further resources for those who may be interested in this area:
  - Specific to the history of copyright in the US - <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.U9KMp7HJ3fs>
  - One of my favorite sites, which gives original source documents for copyright law <http://copy.law.cam.ac.uk/cam/index.php>
- Copyright Law originates from “Letters Patent” (not to be confused with scientific patent)
  - Patents (originally) offered limited monopolies over all sorts of things (creating clothes, importing goods from specific countries, etc.)
  - Modern copyright law derives from this idea of the ruler giving limited monopolies to investors so that they could then retrieve their investment and hopefully open the way for others to profit

### *Ways the Monopoly is Limited*

- Copyright, like all intellectual property, is a kind of strange property and does not behave in the same ways as physical property
  - Kevin Smith noted Thomas Jefferson’s hesitations about monopolies over ideas.
  - As a side note it is worth noting that Ben Franklin also expressed the same hesitations - <http://www.ushistory.org/franklin/autobiography/page55.htm>
- US Government publications – though it is generally true that US Government publications are free of copyright, there are some things worth noting:
  - This is not true of organizations which have contracted with the government (NGOs writing reports for government agencies, for instance)
  - Also, third party materials, like photographs, are often used in reports. Unless these photographs were created by government employees “acting within the scope of their employment” (i.e. they were paid by the government to take the photographs and that was mentioned within the job description), then such third party materials could be copyrighted
- There are a variety of exceptions within copyright. Most relevant to us:
  - 107 – “Fair Use” – Broadest of the exceptions
  - 108 – Preservation – mostly of help to librarians
  - 110 – “Public Performance” – which includes teaching

- There will be more about these exceptions in future lectures, I'm sure, so I won't go into much detail here.

### *A Framework for Analysis*

- Is the work protected by copyright?
  - Unless it is in the public domain, in most cases yes. Again, you can determine public domain status by looking at <http://copyright.cornell.edu/resources/publicdomain.cfm>
- Is there an exception for my use?
  - For education/libraries the primary exceptions are 107 (Fair Use), 108 (Preservation), and 110 (Public Performance).
- Is there a license?
  - This is complicated but usually this requires asking the author if s/he signed something to another party when creating the work.
  - If there is a license, that could potentially supercede any of the exceptions mentioned.
- Is my use covered by fair use?
  - Fair Use (107) is the broadest of all the exemptions, and, potentially can cover a large number of potential uses
- Do I need permission?
  - If the work is protected by copyright and does not fall under one of the exemptions, then yes you do.

### *How Copyright Happens*

- Copyright "formalities" (i.e. © or copyright registration)
  - As noted, this is mostly an artifact of old law and not really required
  - Not mentioned, however, is that if you want ultimate protection over a work you should use a statement along the lines of "© Shawn Martin, all rights reserved." The reason for this is because some jurisdictions which have not signed the Berne convention (very few, but there are a few) could theoretically pirate your work if you do not have such notices. So it can still be beneficial, particularly if you are trying to protect work that might be pirated in some countries without strict copyright laws.
- Generally, it is a good idea that you do register copyrights
  - This is especially true if there is monetary value to the work
  - Can register at <http://www.copyright.gov/eco/>
  - Cost \$35

- Should do so as soon as possible after the work is created
- Kevin Smith also brought up an example of how an author technically owned copyright but then licensed his work to a publisher. This is quite common with academic publications, and in most cases the author does not really retain copyright because of these licenses.
- Creative commons (<http://creativecommons.org>) also serves as a kind of formality in that it helps the user understand what rights s/he has in using the work.

## *Authorship*

- “Originality” – how creative does an author’s work need to be to merit copyright
  - Cannot be a “slavish” copy – this often plays out in cases where all I have done is make photocopies of something else (let’s say something in the public domain). Do I have the right to sell my copies to someone else? Yes, however that does not mean that I own any copyright in my copy.
  - The case of the phone book being uncopyrighted was also mentioned. Another factor in that case was the fact that phonebooks only contain “facts” (i.e. people’s phone numbers). Under copyright law you cannot copyright a fact, only the expression of a fact. So, the court found that the expression of the facts in a phonebook was not creative enough (i.e. alphabetical order) to warrant copyright protection. A counter example, however, particularly in a scholarly community, would be an anthology of quotations. An anthology which is utilizing quotations from other authors and providing context, might very well be protected under copyright because there is more creative expression.
- Scope of employment
  - For universities, I think this is a particularly important point.
  - Theoretically, one could argue that since professors are paid to research, the university as an employer should own the copyright over their scholarship.
  - Universities generally don’t assert this right, however (eg. see Penn’s copyright policy, <http://www.upenn.edu/almanac/v47/n24/ORcopyright.html>)
  - However, universities have started to recognize the need to assert some rights. Harvard was the first (<https://osc.hul.harvard.edu/policies>)
  - Penn also has a policy (<http://www.upenn.edu/almanac/volumes/v58/n03/openaccess.html>)
- Faculty as independent contractors – particularly for funding agencies
  - Some funding agencies are also requiring some ownership rights over faculty articles

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- Most well know is the National Institutes of Health (NIH) - <http://publicaccess.nih.gov/>, and our help guide <http://guides.library.upenn.edu/nih-policy>
- Also the Office of Science and Technology Policy for the White House is considering extending some kind of policy over all federal agencies (under certain conditions) <http://www.whitehouse.gov/blog/2013/02/22/expanding-public-access-results-federally-funded-research>
- Joint authorship
  - If multi-authored work, all authors own copyright equally.
  - So, one does not necessarily need permission of all authors to use the work, unless money is involved
  - Theoretically, if one author provides open access, that is all that is needed.

### *You Own Copyright?*

- Most important for our purposes is this idea of a license
- In the lecture license/permission kind of got conflated
- To a degree they are the same thing, but in essence a copyright holder can give a license or permission to use their work under certain circumstances
- All academic authors (and most non-academic) are required to sign licenses when they publish with a publisher
- Most academic publishers require an “exclusive” license
  - This means that once signed, only the publisher has the right to redistribute or exercise any of the other “bundle of rights” that the author may have signed
  - This includes using it in class, copying etc. (except in cases where fair use or other exceptions may apply)
- Most commercial (non-academic) publishers require a “non-exclusive” license
  - This means that the publisher has a right, however, authors may give that right to others as well, may re-publish, or may post their work on a website
  - Some publishers will require an “exclusive” license for a period of time (six months) or will refer to this as a right of redistribution for six months or a year so that the publisher can make money, but once the article is out there and no-longer of commercial value to the publisher the exclusive license expires
- Also, authors can give a license/permissions under very circumscribed conditions
  - For example, I can give a license to my work to be used in a print coursepack, but it does not apply to an online coursepack (the example given)

- I can also give a license for one time use only, this is common for courses like MOOCs where one can get a one time use, but then has to repay or renew the license for every subsequent use of the work
- Incidentally, Kevin Smith wrote an article in *Library Journal* about this phenomenon for the MOOC we are now taking - <http://lj.libraryjournal.com/2014/07/opinion/peer-to-peer-review/taming-a-wild-country-peer-to-peer-review/#>

### ***Students Own Copyright Too***

- As far as I know, Penn has no policies on copyright of student work. The closest I found was this <https://provost.upenn.edu/policies/pennbook/2013/02/15/fairness-of-authorship-credit-in-collaborative-faculty-student-publications-for-phd-students>
- Our colleagues at Penn State have written such a policy - <http://www.research.psu.edu/patents/policies/student-ip>
- It may be possible the schools have some policies, so if anyone is aware of one, please post it to the Google group
- What does come through quite clearly, however, is the awareness that Penn does have policies for use of third party materials in student work. Here are a few examples:
  - <https://provost.upenn.edu/policies/pennbook/2013/02/13/photocopying-for-educational-purposes>
  - <https://provost.upenn.edu/policies/pennbook/2013/02/15/policy-on-acceptable-use-of-electronic-resources>
  - <https://provost.upenn.edu/policies/pennbook/2013/02/15/unauthorized-copying-or-use-of-licensed-software>
- Copyright over student work comes up quite often in ScholarlyCommons
  - Students do have to give permission to re-use their work
  - Ideally a contract should be signed with every student in order to redistribute work
  - Given that this isn't possible in some situations, it may be possible to imply that students are required to redistribute their work on the web by putting statements in syllabi, course websites, etc.

### ***Work Made for Hire and Teachers***

- We already went over this in discussion last week, so just a reminder about Penn's policy - <http://www.upenn.edu/almanac/v47/n24/ORcopyright.html>
- Interesting points from last week's discussion for reminder

- What constitutes “scope” of employment? For example, would an article I write about things related to my employment, but on my own time count?
- Difference between faculty exemptions and staff. As a staff member, anything I write on work time is technically a work for hire, though this is not true for faculty. However, even a faculty member may have some restrictions. Kevin Smith mentioned work that a dean may write on curriculum development is owned by the university; how does that fit into the faculty policy, or does it?

### **First Sale**

- First just a note of clarification, “first sale” stems from the fact that the courts recognize a difference between “copyright” (i.e. the right to make copies of an expression or idea) and a property right
  - As mentioned in the video, if I sell a piece of physical property (a house, a car, furniture, or a book) it is impossible for anyone else to utilize that property other than me
  - Therefore, I have the right to sell it
  - However, “intellectual property”, i.e. the idea itself, can be enjoyed simultaneously by many different people.
  - In other words, I can give an idea to one person and publish it in a book and make it available in other ways
  - Therefore, the courts recognized this tension and excluded books (physical property) from the higher “idea” which can be distributed in multiple places simultaneously which a book cannot be
- Second, here is some more information on the cases mentioned:
  - More about “principle of exhaustion” –
    - [http://en.wikipedia.org/wiki/Exhaustion\\_doctrine](http://en.wikipedia.org/wiki/Exhaustion_doctrine)
    - It is broader than just copyright law, but is utilized as a principle in first sale
  - More information about Kirtsaeng case –
    - <http://keionline.org/node/1686>
    - <http://www.scotusblog.com/case-files/cases/kirtsaeng-v-john-wiley-sons-inc/>
    - <http://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/56491-a-textbook-case.html>
  - More information about ReDigi Case mentioned –

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- <http://copyrightandtechnology.com/2013/04/01/capitol-records-prevails-in-redigi-case/>
- <http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/56632-in-redigi-case-court-rejects-digital-first-sale.html>
- Also mentioned a great deal is the concept of license
  - This is especially important for digital resources since most of our digital content does not (at least currently) fall under first sale but under the scope of some kind of license
  - For instance, all of us sign a license when we click on “I agree” to almost any resource
  - There have been cases regarding “shrinkwrap licenses” in which licenses similar to the stamp on the book mentioned in the lecture have been deemed invalid
  - Often the reasons they have been deemed invalid is because the licensee (those of us purchasing or receiving the material) were unable to negotiate the terms of the license
  - In the digital world the case law seems to be going the other way, however, and these licenses can sometimes trump fair use and other provisions.

### ***The Public Domain***

- Peter Hirtle’s Public Domain page mentioned again, just as a reminder - <http://copyright.cornell.edu/resources/publicdomain.cfm>
- Also, as mentioned, in some cases, when formalities were required but unobserved, then works have fallen into the public domain
  - These rights, especially when dealing with international works, are very difficult to trace
  - The first place to try is <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First>
  - Not always reliable, however, so things may still be copyrighted even though the item does not appear in the register
- Additionally, as mentioned, patents and trademarks also apply. So, even when something may not be protected by copyright, it could still be protected through these other means.
- For all of these reasons, librarians and others have tried to get legislation passed for “orphan works;” however there is significant pushback, particularly from rights holders. For those interested, here are some more resources to understand the problem of orphan works
  - <http://www.copyright.gov/orphan/>
  - <https://web.law.duke.edu/cspd/orphanworks.html>
  - <http://www.ala.org/advocacy/copyright/orphan>

- <http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/56265-following-copyright-office-inquiry-orphan-works-legislation-appears-unlikely.html>

### ***Idea/Expression Dichotomy***

- As stated in our discussion last week, you can't copyright facts (though you might be able to do so through patent or trademark), you can only copyright expression of facts
  - Math mentioned specifically, and interestingly we had a question about it last week which is now answered
  - In cases where the ways of expression are limited, you cannot copyright those limited forms of expression
  - The process, and words around that fact, however could be copyrighted
  - Similarly, news facts can't be copyrighted, though analysis and other things expounding on the fact may be
- More information on the "Doctrine of Merger"
  - [http://en.wikipedia.org/wiki/Merger\\_doctrine](http://en.wikipedia.org/wiki/Merger_doctrine)
  - [http://en.wikipedia.org/wiki/Merger\\_doctrine\\_%28copyright\\_law%29](http://en.wikipedia.org/wiki/Merger_doctrine_%28copyright_law%29)
  - Also broader than just copyright, but is applied in copyright
- Case mentioned on stock characters is Nichols v. Universal Pictures, you can read more about it at [http://en.wikipedia.org/wiki/Nichols\\_v.\\_Universal\\_Pictures\\_Corp.](http://en.wikipedia.org/wiki/Nichols_v._Universal_Pictures_Corp.)

### ***In Class Performances***

- Section 110 (1)
- Includes all public performance, including those in the classroom
- However only includes face to face classes, not online
- Only applies to non-profit activities (not for profit activities)
  - Eg. a performance in class to teach Shakespeare would not be the same as a student group performing Shakespeare as part of a club
- Also only refers to works "lawfully made under this title"
  - This means that you either obtained a commercial copy legally
  - Or you made a legal copy that in turn could be distributed
- In the lecture they talked about the obvious uses, but here would be some gray areas
  - Youtube videos (which are often not "lawfully made")
  - Recordings you made from television – could be lawful for your use, but not necessarily classroom use

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- DVDs or other copies made from VHS tapes (more about section 108 later, but suffice it to say that again it could be lawful for you to make a copy for your own use, but not necessarily lawful to do the same thing and use in the classroom)
- Another author policy question, not sure there is a policy at Penn about who owns recording of classroom activities. So, if you make a recording of a lecture here at Penn, one of course should ask permission of the person being recorded as a courtesy if nothing else, but who owns copyright?
  - Examples of such policies:
  - University of Virginia - <https://policy.itc.virginia.edu/policy/policydisplay?id=PROV-016>
  - University of Chicago - <https://facultyhandbook.uchicago.edu/page/audio-and-video-recording-campus>
  - Stanford - <http://library.stanford.edu/using/copyright-reminder/common-situations/recording-courses>
- It is also possible to obtain public performance rights in many cases
  - Remember that a license always supersedes the laws here
  - So, if someone has agreed to (knowingly or not) a license that precludes certain kinds of use, that license would trump any provisions within section 110
  - Also, courts tend to protect the market, so if a “public performance” of certain videos etc. are often licensed and paid for, the court will favor the market
- Also worth noting that reserve readings are never included under section 110, they may be part of other exceptions (most likely fair use), but 110 only refers to “public performances” including teaching, not reading or watching of videos that students might do outside of class

### ***TEACH Act – Online performances***

- I have some slides that I posted in the Google group that I’ve used to talk about the teach act. - [https://groups.google.com/forum/#!topic/penn-copyright-discussion/Jyw\\_Xn4lw2U](https://groups.google.com/forum/#!topic/penn-copyright-discussion/Jyw_Xn4lw2U)
- Much of the material is repeated from the lecture, but may also be helpful
- Must be “lawfully made” (same kinds of considerations as above)
- Must also be “reasonable and limited”
  - This is not really defined and there is no hard and fast rule
  - Think the same kinds of consideration as we make for “fair use” (to be discussed next week)
- Not really mentioned, but Digital Rights Management (DRM) – can never be broken (except under limited circumstances which can be found here - <http://www.copyright.gov/1201/2010/RM-2008-8.pdf>)

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- Only applies to students registered in course
- Must be informational material about copyright provided (such as our site <http://guides.library.upenn.edu/copyright>)
- A notice must appear that the material is copyrighted – our recommended text is available at <http://guides.library.upenn.edu/copyright/reserves>, though it does not have to be that exact text
- Cannot be copied and must have protection to ensure this
- Not mentioned but also must be protected in some way beyond just password protection (eg. DRM)
- Also, streaming was mentioned, but it would have to be subject to the conditions above. So, if one wished to stream a movie it would only be if you used
  - Clips (not the entire movie)
  - Showed it in class (not outside of class)
  - Only to students available in the course
  - Has some kind of DRM or other barrier that prevents copying
- Additional TEACH Act materials (beyond UNC-Charlotte which was provided)
  - University of Texas - <http://copyright.lib.utexas.edu/teachact.html>
  - Stanford University - <http://library.stanford.edu/using/copyright-reminder/copyright-law-overview/distance-learning>
  - University of Connecticut - <http://www.lib.uconn.edu/copyright/teachAct.html>

### ***A Library Exception***

- Section 108 only applies to libraries working “for the purposes of preservation” and in no other circumstance
- Only 3 copies are allowed (which shows how the law doesn’t really apply well to electronic technology)
- Can only be made available on the premises of the library
  - Generally interpreted to mean the library building itself
  - In some cases might stretch the meaning to include all people who have access to library resources (eg. all of those with a PennKey)
- Law makes differentiation between materials that have been published (are or have been commercially available) and unpublished material (which has not been sold in any way previously)

- For published material law tries to protect market, and good to keep in mind that section 108 should generally not be used for commercial material that is widely available and could be purchased. Also for published material (but not for unpublished material ) libraries:
  - Must have no belief that the copy will be used for anything other than personal use (eg. personal study)
  - Must have measures to prevent systematic copying
    - which is getting invoked more often by publishers lately
    - Does not mean we have to stand at copy machines and police, but does mean we should have measure in place to prevent a computer program from copying everything in an electronic database
    - CONTU guidelines -  
[http://www.copyright.com/Services/copyrightoncampus/content/ill\\_contu.html](http://www.copyright.com/Services/copyrightoncampus/content/ill_contu.html)  
Not part of the law and not necessarily anything that would stand up in court if you did follow them, but can help in thinking about copyright decisions

### *A Framework Review and a Bit About Music*

- Pre-1972 music and sound recordings are left to state copyright laws
  - In reality this is incredibly complicated
  - Not all states have such laws in which case federal law applies
  - Not all recordings fall under these common law rights (depends on the situation)
  - In many cases (as mentioned in the video) the only state right that is protected is the law of first publication
  - Some states have additional laws, but not many
- Also, interestingly they noted that the right of public performance does not apply to broadcast radio but it does apply to internet radio
  - This is the reason many internet radio stations are trying tricks to become broadcast radio (eg. <http://www.npr.org/blogs/therecord/2013/06/15/191703769/songwriters-group-calls-pandoras-radio-station-buy-a-stunt>)
  - Shows that content creation industries want to control internet differently from broadcast rights
- Worth noting too that copyright violation does not need to be intentional – the fact that you didn't mean to do something doesn't protect you
- Also anything you create cannot be “substantially similar”

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- No clear definition, but generally speaking think about what a judge might think if s/he saw your work and the work of someone else. If it looks the same to the judge, it might be a copyright violation
- This will also come into play when we consider “transformative use” under fair use next week
- More on George Harrison case - <http://performingsongwriter.com/george-harrison-my-sweet-lord/>
- More on Lion Sleeps Tonight Case - [http://www.spoor.com/articles/Copyright\\_Infringement\\_Claim\\_in\\_Respect\\_of\\_The\\_Lion\\_Sleeps\\_Tonight-260.html](http://www.spoor.com/articles/Copyright_Infringement_Claim_in_Respect_of_The_Lion_Sleeps_Tonight-260.html)

### ***Licenses and the Creative Commons***

- Linking to a resource vs. making a copy of a resource
  - Mentioned in the video, but worth exploring more
  - Copyright at its core is about making a copy of something
  - So, if one links to a resource, no copy is made, therefore the person linking has not violated copyright
  - The person who made the youtube (or whatever other resource) however may have violated copyright
  - Always safer to link to resources, which often the library has purchased valid copies of rather than making your own copy and potentially violating copyright
  - Linking is also strongly encouraged in Penn’s e-reserves policy (available at <http://guides.library.upenn.edu/copyright/reserves>)
- Plagiarism vs. copyright
  - In universities this is often considered the same thing, though it is not
  - It is very possible to plagiarize things without making any copyright violations
  - More resources available from Penn at
    - <http://guides.library.upenn.edu/copyright/plagiarism>
    - <http://guides.library.upenn.edu/copyright/citation>
- Creative Commons provides a license search at <http://creativecommons.org>
  - Same search can be done in a Google advanced image search by going to “filter by license” and selecting a kind of creative commons license
  - Must be careful sometimes with this search however because some images will appear that have questionable licenses (eg. those in Wikipedia or Wikimedia Commons)

- Recent case about this actually which you can see at -  
<http://www.washingtonpost.com/news/the-intersect/wp/2014/08/06/if-a-monkey-takes-a-selfie-in-the-forest-who-owns-the-copyright-no-one-says-wikimedia/>
- Exclusive vs. non-exclusive licenses
  - Any exclusive license means that you give whatever rights are specified only to one person and no one can then exercise them, even you
  - Non-exclusive means that you are giving rights to people but others can use them as well (including yourself)

### ***Asking for Permission***

- Generally a good idea to ask for permission
- However also elevates the risk if the copyright holder says no
- I usually suggest that you do a risk assessment on any given copyright problem
  - Start with the most problematic material
  - Does it have a high-risk of copyright holder suing me (like Disney)?
  - Can I even find a copyright holder easily?
  - The higher the risk, the more effort you should make in obtaining permission
  - The lower the risk, the less likely there will be a potential issue, even if a copyright holder does turn up
- In my experience permissions requests are often ignored, but always good to keep a record of those transactions showing you tried to get permissions and were unable.

### ***The Place of Fair Use***

- Balancing of the 4 factors
- Intended to do two things primarily
  - Protect freedom of speech
  - Protect viable markets where they exist
- You do not need to meet all of the factors
- The more you meet the better
- Fact based
  - Must do case by case analysis of every image, text, etc
- Not all educational use is fair use
  - Important to underline this
  - Common myth among people that anything you do for education is fair use

- Also not an “excuse” once you’ve violated the law
  - Another myth
  - Fair use is an exception that says you have not violated the law if you follow certain exceptions
- Also, law very unclear
  - Unlike other laws which have very clear guidelines, fair use does not
  - No definitive answers
  - Not a last resort per se, but can be the most difficult defense to make in court

### *Using Fair Use – The Four Factors*

- Using rules of thumb like certain percentages or numbers of words not always helpful
  - Common myths that under 10% or under 100 words is fair use
  - That is one factor, but not sufficient in and of itself
- “Heart of the Work”
  - Gerald Ford – summary of case at [http://en.wikipedia.org/wiki/Harper\\_%26\\_Row\\_v.\\_Nation\\_Enterprises](http://en.wikipedia.org/wiki/Harper_%26_Row_v._Nation_Enterprises)
  - Again main reason for the violation of fair use was that it undermined the market for the book
- 4<sup>th</sup> factor may not be the most important factor, but it is an incredibly important one
  - 4<sup>th</sup> factor also dictates the risk you are taking on
  - If you are working on something that has a healthy market and a copyright holder (eg. Disney) is making a lot of money, then you are putting yourself at greater risk
- The “5<sup>th</sup> factor” which is not in the law (and really goes more to the 1<sup>st</sup> factor in my view)
  - How good is the thing you are doing
  - If it is non-profit educational that is better than stealing something for free and selling it

### *Transformative Fair Use*

- “Transformative” uses are looking for
  - New meaning created from use of content
  - New purpose pursued from use of content
- Other Questions to ask:
  - Will incorporation of material help me to make my point?
  - Will my readers get the point better if I use the material?
  - Have I used no more than I need? (really more to the third factor, but still useful)

- Cases mentioned
  - Campbell v. Acuff-Rose Music – summary at [http://en.wikipedia.org/wiki/Campbell v. Acuff-Rose Music, Inc.](http://en.wikipedia.org/wiki/Campbell_v._Acuff-Rose_Music,_Inc.)
    - Goes to protecting free speech in the form of parody
    - Also no market competition. People generally looking for Roy Orbison music do not buy 2 Live Crew music
  - Bill Graham Archive v. Dorling Kindersley – summary [http://en.wikipedia.org/wiki/Bill Graham Archives v. Dorling Kindersley, Ltd.](http://en.wikipedia.org/wiki/Bill_Graham_Archives_v._Dorling_Kindersley,_Ltd.)
  - SOFA Entm't, Inc. v. Dodger Prods., Inc. – “Jersey Boys” Ed Sullivan case – summary at <http://jolt.law.harvard.edu/digest/jurisdiction/9th-circuit/jersey-boys-use-of-ed-sullivan-show-clip-is-fair-use-ninth-circuit-affirms>
  - Prince v. Cariou - <http://www.mondaq.com/unitedstates/x/292912/Copyright/The+Transformation+of+Fair+Use+After+Prince+v+Cariou>
  - Cambridge U. Press v. Becker – “Georgia State Case” - <http://www.arl.org/focus-areas/court-cases/106-cambridge-press-v-georgia-state-university>
  - Hathi-Trust v. Author’s Guild - <http://www.infodocket.com/2014/06/10/fair-use-appeals-court-rules-in-favor-of-hathitrust/>
  - Not mentioned in video, but worth reviewing too – Authors Guild v. Google Books - <http://arstechnica.com/tech-policy/2013/11/google-books-ruled-legal-in-massive-win-for-fair-use/>

## ***Applying Fair Use***

- Fair Use checklist
  - Can be useful, although again as a tool for analysis, it has not legal standing
- Similar questions to the ones they brought up come across my desk, particularly about using third party materials in books, online projects, or classes
- Sometimes helpful to think about it as two sides of the same coin
  - I have rights as an author of content
  - I also have rights as a user of content
  - Those rights are different though highly related
  - Generally speaking you should not use things in a way that you as an author might not like
- Also, must make clear in fair use what your purpose in using the material is

- Simply using an image as “window dressing” for an online project when there is no specific purpose for using it is not fair use
  - Eg. I had a case where an instructor wanted to use a picture of the Parthenon (not licensed for creative commons use) in the background when all that instructor was doing was talking about Greece
  - Had the instructor been talking about the Parthenon, you might be able to make a fair use case, but in this case there was no clear relationship between the image and what was being said
  - Therefore, most likely not a fair use

### *International Implications*

- Berne Convention ([http://en.wikipedia.org/wiki/Berne\\_convention](http://en.wikipedia.org/wiki/Berne_convention)) and TRIPS agreement ([http://en.wikipedia.org/wiki/TRIPS\\_Agreement](http://en.wikipedia.org/wiki/TRIPS_Agreement)) primary methods of enforcing “international” copyright law
- Moral rights not recognized in US (except in very specific circumstances), though part of the Berne convention and also widely part of European law
- Also no “fair use” in most international law, there is “fair dealing” which is much more specific about how you can make educational use of material. Fair dealing found in most Commonwealth countries
- This is not as true with copyright law, but difficulties can arise with patent and other IP laws which are often extremely different
- Databases also protected in the EU
- Must obey the law of the country you’re in
- In some cases must also obey the law where the servers are located
- Also often is a good idea to think about the law of the country which will be most impacted by what you were doing (if you’re creating a website that will be heavily used by citizens of another country, for example)
- Fair use fundamental to free speech
  - Gov’t officials he’s talked to seem favorable to fair use
  - Latest Developments in courts seem favorable to fair use
  - Criticisms however in regard to international treaties
    - 3 step test Berne convention ([http://en.wikipedia.org/wiki/Berne\\_three-step\\_test](http://en.wikipedia.org/wiki/Berne_three-step_test))
  - Licensing eroding fair use rights

## ***Copyright for Librarians and Educators***

Coursera MOOC Course – August, 2014

Notes for Penn Group

Shawn Martin

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- Understanding copyright in terms of international treaties
  - Limits experimentation in American copyright law
  - Requires that law provide same protection for foreign works as you do for domestic works
- Requirement of Life +50 years
  - Rooted in French Law in 1700s
  - Idea that artistic work is an extension of the Person
  - Therefore, “intellectual property” extends to heirs and the reputation of the person beyond their lifetime
- Sherlock Holmes copyright case - <http://www.cnn.com/2014/07/16/us/sherlock-holmes-supreme-court/>
- Guidelines on amount for fair use
  - Generally opinions use this factor as a red flag
  - If usage exceeds certain amount (10% in case of Georgia State) then courts look more deeply for further market harm
- Work made for hire
  - “Issue ready to explode” in academic contexts
  - Courts ruling that work made for hire belong to institution even in cases where a policy (like ours) exists
  - Policies cannot change the fact that works created in scope of employment are owned by employer