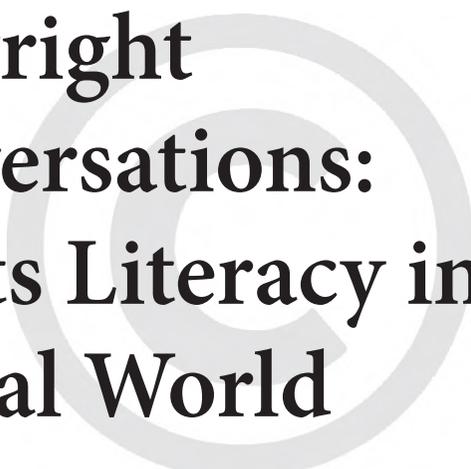


# Copyright Conversations:

Rights Literacy in a  
Digital World

*Edited by*  
Sara R. Benson



# Copyright Conversations: Rights Literacy in a Digital World

*edited by*

*Sara R. Benson*

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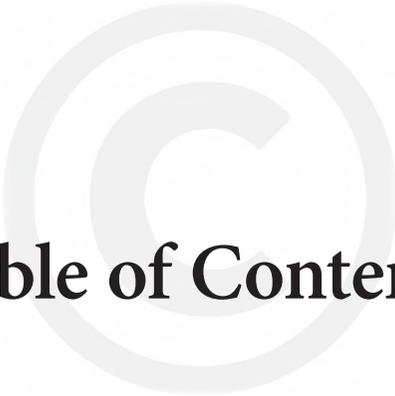
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# Foreword

The meaning of copyright reveals itself in the choices we make, and this book is essentially about those decisions. Coursing through each essay is the subtle theme of options and selections that copyright demands. Meeting that demand and making wise choices can determine the success of our copyright services. A newcomer might think that copyright is about rules, principles, and answers. The copyright professionals who have contributed to this book know differently. Their work is far from merely rehashing rules; they are called upon to interpret, navigate, educate, and finally articulate law-related concepts that are shaped by diverse forces and competing interests. Each chapter tells us, in its distinct way, that engagement with copyright is a process of assessing and choosing. Because copyright serves a blend of public and private objectives, the choices reveal much about the values and vision of the copyright official and the home institution.

The chapters of this tome are contributions by professionals, most of whom have copyright responsibilities in libraries, academic institutions, and related organizations. They have extensive experience working not only with copyright issues, but also with faculty members, authors, students, publishers, and others who are directly affected by the law and the copyright decisions we make. Indeed, the work of a copyright officer, facing complex situations, is a dynamic process built on a series of alternatives and decisions.

Consider these types of choices that the copyright officer frequently makes, and that are explored in this book.

## The Fundamental Choices: Which Legal Principle Applies?

While the essays are rooted in U.S. copyright law and built around one or more specific provisions, no one should take those basics for granted. Not every copyright question should be decided under the same terms. For example, an author of a new work might look to the statutory rights of ownership as a foundation for claiming and exercising rights. However, many authors instead make the choice to allow open access of their new works. Similarly, Congress enacted the TEACH Act for distance education in 2002, but many questions about the use of copyrighted works in online programs may best be resolved under fair use or even a system of permissions. Carla Myers examines some of the detailed decisions that an educator must make when implementing the TEACH Act. She also reminds us that we have yet to solve the larger decision: Should we rely on the TEACH Act exclusively or even use it at all for distance education? Copyright law opens these most fundamental options for our evaluation and choice.

These are domestic examples, but Bing Wang tells us that multiple treaties, some with signatories comprising most countries of the world, are adding new dimensions to copyright in the domestic law of the US and other nations. Anna Vaglio reminds us that the libraries in Italy are building services based on choices that lawmakers effectuated in the national statutes and choices that libraries make when they interpret and apply the law. Which national law applies when the library is based in one country, but the resources are accessed and used in other jurisdictions? Sometimes we have alternatives about applicable law, and sometimes we have a choice about the structure and limits of the services we are prepared to deliver when the law is unresolved.

The law itself is an embodiment of choices. Pia Hunter takes us on a venture through the history of copyright protection and duration, effectively telling us that choices made by lawmakers in international and domestic law created automatic protection for a vast sweep of works where no protection was wanted and certainly no person can realistically prove ownership. The orphan works problem is an unintended byproduct of that choice to grant long and automatic legal protection for nearly every

original work. The more we understand the choices that lawmakers faced, the better we can discern our wisest option about orphan work dilemmas or other unsettled provisions.

## The Literacy Choices: How Much Do We Need To Know?

The growth of copyright makes the very idea of a concise copyright session bewildering and maybe even defiant. No one can know everything. Copyright officers are frequently expected to educate the community about copyright. What depth of detail do our students and colleagues actually need? Melanie Kowalski and Lisa Macklin take us through the process of planning for such educational sessions, and they remind us that we need to rely mostly on fundamentals when bringing newcomers into the copyright fold. Indeed, for all its legal and policy elaborations, we always need to be ready for just the basics. The student or colleague may not have the time or inclination for details; frankly, most situations can also be resolved through application of copyright fundamentals. Sometimes we need to save the esoteric copyright rigors for the classroom or even the courtroom.

Indeed, Allison Nowicki Estell's essay uses wise adjectives such as a "reasonable" knowledge of copyright, and Estell even questions how to spot the "baseline" of needed information. Sarah A. Norris and colleagues also confirm that one of the objectives of copyright education is to instill a level of confidence—a confidence that is imperative for good decision making. Sara Benson argues that copyright literacy should support legal interpretative skills and empower individuals "to feel more comfortable making daily fair use determinations." We could go even further and state that awareness of even the basics of copyright is imperative if individuals are to make any fair use or other copyright decisions at all—even if we are left feeling undeniably uncomfortable.

Andrea L. Schuler brings these concepts specifically to the decisions that graduate students face as they complete their dissertations or theses: "Students need to be able to navigate the complex copyright issues that may arise while writing a thesis or dissertation, and this is where librar-

ian-led copyright instruction tailored for graduate students is crucial. It offers an important opportunity to equip a key population with copyright literacy skills and alleviate some of the stress and misinformation that graduate students may have about copyright.” Informed choices about copyright can help advance the merit and virtue of the scholarly work. By specific example, Schuler points to the student’s decision whether to make the dissertation open access. She notes the important role of the copyright librarian not to resolve the question, but to arm the student with the information and understanding needed to make choices—choices with long-term implications—about the exercise of copyright ownership rights.

## The Interpretation Choices: What Does the Law Mean?

Copyright law gains practical meaning through the choices we make about the interpretation of the law. The work of a copyright professional is rarely a simple process of learning and applying principles, but it is instead an essential art of informed decision making. Interpretive decisions bring meaning and life to the rules, as Malina Thiede and Jennifer Zerkee write: “Copyright decisions often require interpretation or assessment of each situation and involve some level of legal risk. Critical-thinking skills and an understanding of all of the applicable ‘rules’ are necessary to making these interpretations and decisions.”

For many librarians and educators, these choices are unsettling and sometimes unwelcome. Fair use is dismissed as ambiguous; the risks of legal liability can haunt our imaginations. Instead, the inescapable fact is that the law leaves us with questions to answer; we need to embrace the opportunity to pursue the right option. Writes Carrie Russell: “Some librarians want clarity, fair use guidelines, and definitive answers. When educating librarians, the benefit of a flexible exception like fair use cannot be overstated.” Choices are important; choices are welcome.

As Alexandra Kohn crafts her approach to risk analysis, she finds: “However, regardless of the scope of the ERM [enterprise risk management] analysis, application of elements of the ERM framework for risk analysis

and management can enable both librarians and their users to have a better sense of their institutions' priorities and appetite and tolerance for risk. This, in turn, can facilitate a more balanced and nuanced cost-benefit analysis when grappling with copyright issues and will allow users and librarians to make a more effective case for recommendations in this area to their administration." Risk management decisions are strengthened by understanding copyright, by distinguishing accurate information from the mythology that distorts much of the subject, and by discerning the limits of our own abilities. We always have to know when to reach out to colleagues and supervisors for support, and we need to comprehend the risks.

## **The Practical Choices: How Do We Implement Our Copyright Standards?**

Copyright officers implement copyright standards through various means, including the development of policies and practices, and the negotiation of agreements that define terms of acquisition and use of new works in library collections. The institutional policy has become the familiar instrument to implement change in the creation, use, and management of copyrights. It is the institutional policy that can reach with some authority across multiple constituents of the community. It is the policy that brings local meaning to the sometimes nebulous and distant principles of national copyright law. The chapter by Colin B. Lukens and other tells us that policies on open access can help articulate priorities, guide authors through their decisions as they negotiate and sign publication agreements, and define the interrelationships of the players—especially authors and librarians—within the university.

The contracts we negotiate may be as profoundly influential as an institutional policy. Rachael G. Samberg and Cody Hennesy report on the evolving law and the importance of contracts with respect to data management and mining. The copyright specialist has a critical role in exploring alternative contractual arrangements when the library licenses the use of databases, when the archive acquires unique manuscript collections, and when authors seal their deals with book and journal editors. The choices that become provisions of our contracts tell much about our understanding of copyright and our ability to use it in furtherance of our mission and goals.

## The Future Choices: How Do We Advocate for Copyright Change?

Choice and change are partners in the growth and future of copyright. Each development in the law, and each decision about its meaning and application, is an exercise in shaping the future direction of the law. As Mark Swartz and colleagues tell us, recent changes in Canadian copyright law have led to a need to grapple with “how these changes have transformed the way that copyright is managed in higher education.” Changes in the law can lead to revised practices. The act of deciding how to adopt to the law, and then later review and revise, are acts of making choices. Their essay details the ability of the library to make readings available for education in an environment where the statutes are in revision and the court decisions are critiqued and appealed. Choice becomes a consequence of uncertainty.

Mélanie Brunet and Amanda Wakaruk find a central duty of copyright librarians in advocating for change. They write about librarians: “They have the professional education to think critically about multiple viewpoints on the copyright spectrum and are positioned to testify to the shortcomings and strengths of existing copyright laws and policies. As such, they have a role to play in advocating for copyright reform at institutional, professional, national, and international levels for both users and creators.” Nowicki Estell similarly places our understanding of fair use and copyright services as part of the broader ethical obligations of the library profession.

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We have a tendency to attribute much of the change in copyright to the profound influence of technology. While much of the dynamic of copyright is associated with technological change, the more immediate force is the set of priorities each of us brings to our copyright decisions. Further, developments in the law in turn engender further need for more decisions in the face of more choices. Perhaps most significant is that many of the changes in law and technology have had the effect of placing in the hands of individuals the opportunity and ability to make decisions about the meaning of copyright and its consequences for the institution and our

colleagues. The ability to make these decisions brings great responsibility. The decisions themselves also reflect our choices and opportunities.

We therefore read a book such as this one, not merely for the insights into copyright and professional practices, but also to learn from the experiences of our professional colleagues. The authors of essays in this volume are professionals who have responsibility for addressing copyright locally, and they often take the lead in shaping our understanding of the law for the wider community. These are the copyright professionals who are steadily making selections from a dynamic and sometimes elusive array of alternatives. This book is a sharing of their experiences, the pressures that shape their decisions, and the lessons gained from being willing to take on the noble responsibilities of leadership.

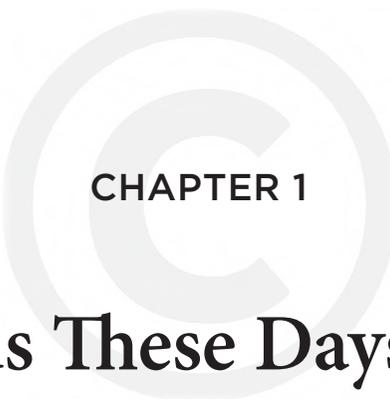
—Kenneth D. Crews  
*August 19, 2019*





**COPYRIGHT LIBRARIANS'  
ROLE AND ADVOCACY**





## CHAPTER 1



# “Kids These Days”... May Know More About Copyright Than You

*Nancy Sims*

Congress passed the Higher Education Opportunity Act in 2008 (HEOA), creating new obligations for colleges and universities that receive federal financial aid to take steps to curb unauthorized file sharing on campuses.<sup>1</sup> The act required colleges to inform students annually about copyright law and relevant campus policies to “effectively combat the unauthorized distribution of copyrighted materials” on campus via “technology-based deterrents” and to “offer alternatives to illegal downloading.” Although many institutions already had programs in place to address this type of network use,<sup>2</sup> the legislation imposed additional burdens and created some uncertainty for institutions.<sup>3</sup> In 2009, one report on campus IT issues noted that institutions were confused about how to “offer alternatives,” given that many of the few commercial music services offering educational institutional licenses had ceased that year.<sup>4</sup> Implementing regulations issued in 2009 clarified that HEOA did not actually require institutions to provide content alternatives for students but required schools to regularly review options and inform students about them.<sup>5</sup> The regulations also required schools to write down and regularly review their plan to “effectively combat” file-sharing and expanded on the meaning of “technology-based deterrents.”

At the time of this bill’s passage, the idea that campuses were hotbeds of file-sharing was already outdated. Commercial ISPs far outstripped

educational institutions as the recipients of Digital Millennium Copyright Act (DMCA) takedown actions by at least 2005.<sup>6</sup> The era of file-sharing without legal repercussions was already past its peak: *Grokster* had been decided by the Supreme Court three years earlier.<sup>7</sup> And although the criminal prosecution of several individuals responsible for torrent site The Pirate Bay would not finally conclude until 2012, the original raid on their offices took place in 2006 and charges had already been filed in early 2008.<sup>8</sup>

Despite this, the HEOA provisions presume that students lack information about copyright and that steps beyond education are needed to curb the behaviors of these copyright scofflaws. Like many moral panics, these presumptions are fairly widespread—as is their focus on youth.<sup>9</sup> I once had an audience member at a talk repeatedly press me to agree with her that students have no respect for the law. Librarians, educators, and members of the public often commiserate with me over the presumed difficulty of my job policing copyright infringement on campus (despite the fact that my work has no compliance or policing components).

I suggest another framing of this situation: laws reflect moral and ethical values of certain groups—primarily those with the most power to shape and interpret the law. Most students are no more ignorant or disrespectful of copyright law than other individuals and, in many cases, their behaviors and beliefs that diverge from legal norms also reflect divergent values around complex related issues. Many communities of creation and use that are *not* perceived as willful legal violators also possess beliefs or engage in behaviors that do not comport with realities of the law, and their community norms also reflect important ethical and moral values. Due to the moral weight often given to copyright and related issues, and the very practical impacts the law can have for almost any individual, education and training around these topics is useful for many different populations. However, information outreach is more effective when we engage with and validate complex values and norms around copying, sharing, permission, and attribution.

## Presumptions Embedded in the Law

It is perhaps easiest to illustrate the various ways in which copyright law embeds moral and ethical values by considering the international arena. International copyright law today is largely a reflection of the values of

dominant populations of Europe and North America, but many other countries and cultures have their own divergent values around copying, permission, and attribution. China is often offered as a comparison to “Western” nations on these points: people there are said to de-emphasize individual authorship and “lone genius” creators and to emphasize copying as itself an act of respect for preexisting works and as a way of acknowledging the tradition in which one is working.<sup>10</sup>

Abrahamic religious legal traditions also offer different perspectives on these values. Miriam Altman shows that both Jewish and Islamic legal traditions initially considered knowledge as a public good and/or common property or owned by god.<sup>11</sup> However, Jewish traditions were concerned from fairly early on with attribution to individual thinkers<sup>12</sup> and have, over time, modulated to the point where they align fairly well with secular international legal approaches.<sup>13</sup> By contrast, Islamic traditions of attribution were historically more concerned with attesting the source of information for preservation and authentication, rather than individual credit.<sup>14</sup> And while today many Islamic jurists agree that secular intellectual property laws should generally be obeyed and upheld, there is still dissent among Islamic legal scholars as to whether “Western” intellectual property laws are compatible with Islam.<sup>15</sup>

But one need not reach to deeply embedded cultural philosophies to see how different countries may have different values around intellectual property law. Developing nations frequently disagree with more developed countries about the appropriate extent of ownership and control of intellectual property in policy and enforcement arenas. While this is true on the world stage today, it is also very true historically. When the United States was young, our cultural economy included a great deal of content imported without authorization from England and Europe, and we strategically refused to recognize protection under US law for foreign authors.<sup>16</sup> Then in the late 1800s, as US authors and publishers grew in prominence, we began to recognize the advantages of international recognition of ownership and control over creative works.<sup>17</sup> A similar pattern of growing literary export leading to recognition of multidirectional international copyright enforcement can be seen in Sweden around the same time period.<sup>18</sup>

Despite the fact that copyright laws, and the values and norms underlying them, quite obviously vary across geographies, cultures, and time periods,

there is still a widespread perception that many of these legal provisions represent universally shared mores. For example, in the US, libraries do not pay any copyright fees to lend books; the right to lend is generally considered to attach to the ownership of the physical copy of the book.<sup>19</sup> By contrast, in many European countries, statutes set out a “public lending right” in which libraries pay a pre-set fee each time they lend certain items; these fees and their distributions are often administered by central collecting societies.<sup>20</sup> The experience of checking out books is fairly similar in these places; users generally do not see the fees (though they may come out of taxes, directly or indirectly.) In my experience, European librarians are often shocked to contemplate that we lend books without compensating authors, while people in the United States (librarians and layfolk alike) are often appalled to think that libraries would pay fees to lend books for free.

Copyright rhetoric also often assumes that norms reflected in dominant laws are the “correct” or superior perspective. Martin Fredriksson notes that the rhetoric around international copyright law in particular tends to assume that nations with less recognition for individual creators or owners are less “progressed” and that it is inevitable that a “civilized” nation will come to embrace copyright concepts as they are currently promulgated by dominant groups.<sup>21</sup> He also shows how the contrasts between “developed” and “developing” countries’ perspectives on copyright are paralleled by those between younger and older people even in “developed” countries and by conflicts between powerful groups and those who resist them on the international stage.<sup>22</sup>

## **Creative Communities Often Have Norms of Sharing and Attribution that Diverge from the Values Embedded in the Law**

Several years ago, I had the pleasure of accepting an invitation to talk copyright with a large local organization of quilters. I was pretty sure about some gaps that might exist in their legal knowledge; for example, my experience is that most people are unaware that copyright attaches automatically to new creative works. I had some guesses as to some misunderstandings they might have, due to some limited experience

with textile-based crafts in general. For example, I had encountered a widespread misconception in the crafting world that things like patterns and instructions are always copyrightable. I also had a few guesses as to questions they might have, such as whether one can print out images onto fabric and use them in a quilt, and whether quilting for personal use might be different than quilting for sales or commercial use.

I ended up learning at least as much from this group as they did from me. While there was some vague interest in printing images onto fabric, there was much livelier questioning about acceptable use of fabric pre-printed with licensed characters or logos. The group also drew distinctions on personal and commercial use in places that surprised me: most of them saw little difference between personal use and work for hire, but there was fairly widespread confidence that you could never enter a quilt containing copied images or licensed designs into a competition. (A few people thought competitions might be okay if there were no monetary prizes.) My suggestion that sewing a quilt for pay is perhaps a profit-making activity with tighter legal limitations, but that entering a personal or gift quilt in a contest with a minimal monetary prize (especially one far lower than the value of the time and material invested in the quilt) is probably still personal non-commercial use, was met with some suspicion.

Most notably, we ended up having an extensive discussion around both the inability to copyright factual patterns and instructions and the public domain nature of traditional graphic elements in quilting. I had seen a few legal information resources aimed at the crafting community and a lot of claims from independent craft entrepreneurs that actively misstated the law on these points, so I was fairly sure quilters would appreciate corrections that reinforced how many things belong collectively to all of us. They did not. With more discussion, I began to comprehend that the group's resistance to my legal analysis was intimately connected to issues of attribution and credit. They were perceiving my assertion that these things were not owned as an assertion that they were not valuable, and that one need not provide credit for influences on one's own work. Our disconnect was compounded by my ignorance of the contributions the community considers worthy of recognition: the person who designs a pattern of fabric pieces, the person who “pieces” the quilt (cuts it out and sews it together), and the person who “quilt” it (sews the layers together,

often in a decorative pattern), may all be different, and are all often credited. The quilters were eventually willing to concede to my assertion that what the community values and wants to provide credit for is up to the community to decide, but I think many of them remained skeptical of my enthusiasm for the public domain.

I met with this group twice, at separate daytime and evening sessions. After the revelations unveiled to me in the first session, I thought I was more prepared for the second but found that the group had even more gnarly questions for me, underlaid with other community norms and values that I did not understand. I regret that I have not had much opportunity to continue to interact with quilting groups. I do feel certain there are some persistent misconceptions among crafters that may be imposing some unnecessary limits on their creativity, but also that I do not yet understand the culture (or cultures?) well enough to provide better information in ways that will easily integrate with existing values and practices.

### *Are Students Actually Ignorant? No More so than Most*

The limited empirical research I have been able to find suggests that yes, students' knowledge about copyright is generally lacking. Undergraduates at a Spanish university almost overwhelmingly answered incorrectly to questions assessing knowledge of basic copyright concepts in their national laws in 2015.<sup>23</sup> A researcher in 2011 interviewed an undergraduate student who was unable to contemplate herself as an author or rightsholder without significant prompting, despite the student reporting that she had received a few hours of class instruction in copyright issues.<sup>24</sup> Earlier surveys of students in Taiwan also showed confusion about relevant laws, although the straightforward survey design conflated ethics and legality.<sup>25</sup> A survey of graduate student populations in the UK in 2011 suggested a bit more robust knowledge in this group—they tended to answer questions correctly more often than not, but only by a slim margin.<sup>26</sup> I was unable to locate quantitative research specifically on the copyright knowledge of students in the United States, whether graduate or undergraduate.

Though thin, this evidence aligns with many experiences I have had with both graduate and undergraduate groups. I often poll groups on their copyright knowledge before a training or information session. One of

the polling questions is a self-assessment of copyright knowledge: “How much do you know about copyright?” Students’ self-ratings usually spread fairly evenly from 0–4 on a scale of 0–5. Graduate student groups in technical or engineering fields tend to rate their knowledge slightly higher (often with multiple 3s and 4s), while undergraduate groups and groups in the social sciences or humanities tend to rate themselves a bit lower (more 0s and 1s.) Despite the varied self-perception of copyright knowledge among groups, almost all groups answer the follow-up question “Do you own any copyrights?” similarly—60 to 80 percent incorrectly answer “no.” Very roughly speaking, undergraduate groups tend to get this one correct more often than graduate students but it is by no means certain that this reflects better knowledge; it may be that graduate student groups are more likely to be confused about their own ownership status because they are aware that they have “signed away” copyrights in academic publications at some point (or may be called upon to do so in the future).

However, the confusions that seem to be present in student populations are by no means unique to their age group. I pose the same warm-up questions frequently to campus groups of faculty and administrators and to professionals and academics outside of my own campus and they, too, claim not to own any copyrights at similar, if not higher, rates. I was surprised enough by this that I did some slightly more rigorous research into the knowledge of faculty members. Polled on basic factual questions about copyright, faculty members performed very poorly—only 28 percent of respondents recognized the correct term for copyright in newly-created works, and only 50 percent of them recognized that copyrights came into existence as soon as new work was created.<sup>27</sup> On more nuanced questions attempting to assess respondents’ ability to correctly recognize legally relevant considerations for fair use of third-party materials, faculty respondents often managed to identify well less than half of relevant considerations.<sup>28</sup> In general, faculty respondents showed weaker knowledge of copyright basics than library workers responding to the same survey.

My 2011 research also showed a strong over-identification by faculty respondents of attribution or credit as a legal consideration for re-use of third-party materials—particularly surprising because the research did not ask about attribution or credit in most situations.<sup>29</sup> (United States law rarely considers attribution or credit relevant to the legality of a use.) In a

question about textual quotation, ten out of fifty-one respondents spontaneously raised credit as a consideration in a write-in field. In a question about image use on conference slides or posters, six out of forty-eight respondents did the same.

I am not alone in finding this a notable misconception in academia. Martine Courant Rife describes “the academic institution’s emphasis, bordering on obsessive fixation, with attribution and documentation of ‘authors,’” in her background discussion of a survey of professional writers that found that 49 percent incorrectly identified attribution/credit as “[t]he single most important thing U.S. courts look at when deciding whether or not a particular use is a fair use....”<sup>30</sup> Steve Westbrook documents a number of writing textbooks for college and university use that ignore all other considerations of legal use and emphasize only citation and attribution.<sup>31</sup>

It makes sense that academics strongly value credit and attribution, as these are fundamental elements of the economy of academia. It even makes sense that they conflate these extra-legal considerations with legal ones since credit is a big part of the moral rhetoric of copyright generally. But understanding the origins and persistence of these misconceptions among academics—and how they represent valid moral considerations within this particular culture of creators and users—should also help us recognize that other divergences from dominant expectations may also represent valid moral considerations among their own relevant communities of creation and use.

### *Are Students Willfully Disrespectful?*

Other educators and researchers relate experiences with students who are deeply thoughtful about copyright. One of two writing students Nguyen interviewed demonstrated “curiosity and awareness of copyright and intellectual property issues” well beyond what was put forth in course materials.<sup>32</sup> Lisa Dush recaps extensive discussion with her writing students of their spontaneous concerns around payment for artists in the face of file-sharing.<sup>33</sup> She also highlights how her students often thought carefully about including third-party materials in multi-modal texts they were producing, and nonetheless chose to use material on the edges of established fair use with full knowledge that this might mean their own work would

be subject to removal from public forums. For her students, the messages they wanted to convey through their new works were more compelling than ensuring the preservation and distribution of those works. Dush suggests, “Limiting students to composing with texts that will allow for the full circulation of the finished product may, in fact, lead them to produce texts that they are not all that interested in circulating.”<sup>34</sup>

For the last several years, I have met with a select group of undergraduates, often from backgrounds underrepresented in higher education, who participate in a summer seminar to produce short biographical videos.<sup>35</sup> I have also returned several times (at the instructor’s invitation) to talk with students in a writing course section specifically for those who are not native speakers of English. Each session has been about an hour (and it is a different group of students each time I return), but the majority of the group are more engaged, and we cover more ground than in almost any other sessions I have led of similar length.

Although in a single short session they obviously cannot take away detailed and robust knowledge of copyright and related issues, these groups usually ask much broader-ranging questions than is typical in my experience. They have questions and observations about music listening and movie watching, Instagram and Snapchat, how brands communicate on social media, music performance and production, clothing design, books they are writing, small businesses their siblings are starting, and always, always how they can help artists get paid and whether media pricing is fair to consumers and artists. It is clear that they regularly think about issues of copying, sharing, permissions, and credit across many aspects of their lives.

Another training warm-up question I pose is, “How many copyrights have you infringed within the last twenty-four hours?” This question breaks the ice to address two important realities: first, that we all make use of third-party materials frequently in twenty-first-century life, and second, that it is well-nigh impossible to be certain that every single one of those uses is 100 percent legal, given the conflicting signals about legal use we all regularly experience. These groups of undergraduates often engage easily with these thorny realities, when getting to such discussion can be quite difficult with older session participants.

YouTube is my favorite embodiment of the prevalence of conflicting signals around legal use, not just because it contains many materials that appear to have been uploaded without the authorization of rightsholders. For users, it appears almost arbitrary whether apparently-unauthorized files are taken down or left alone, and users may conclude that rightsholders who do not take any action against apparently-unauthorized uses are tacitly permitting them. (This perception may, in fact, be right in some cases or it may arise from the misconception, leaking over from trademark law, that failing to police copyrights results in their expiration.) Users are also aware that potentially legitimate materials are sometimes removed, although in my experience, few (except perhaps active YouTube content producers) are fully cognizant of the frequent overreach in YouTube takedown notices and other rights claim practices.

In my experience, younger groups (both graduate and undergraduate students) rapidly grasp the complexity of the signals about legitimate and illegitimate use for YouTube users. They quickly understand the difference between “legal videos” and “videos tolerated by rightsholders”—or raise the distinction on their own. They also easily grasp the difference between “infringing videos” and “videos rightsholders try to take down.” However, more senior groups often find these distinctions difficult to understand. To some extent, that is likely due to the fact that they simply have less experience as users of YouTube. But lack of experience is not a complete explanation; while more senior groups do seem to easily grasp the concept of overreach, they tend to have more trouble grasping the distinction I try to make between “authorized” and “tolerated” content.

It may seem that older academics’ failure to recognize the difference between “authorized” and “tolerated” content on YouTube has few real implications for their work, but a parallel issue frequently arises in my one-on-one consultations with university instructors. An instructor finds a free online copy of a book they want to assign as student reading for a course and asks if they can use that copy. Since my role is not to approve or deny instructors’ course material choices, I can only offer general information about assessing the legitimacy of free online copies of books: something that appears to be authorized by the publisher or one of the authors may possibly be a legitimate copy, but copies with no connection to publisher or author are more questionable. Many instructors are confused by this response. How would they know whether a copy

is associated with the publisher or author? In some cases, this befuddlement is disingenuous: they recognize they have found a questionable copy of the materials but want someone else to tell them it is okay to use it anyway. Other times, it is truly a matter of the instructor lacking a basic skill, such as the ability to note the URL of a PDF link (i.e., they may not recognize that search results usually list the source of a file or that hovering over a link to the file usually displays similar information somewhere in a browser window.) In this case, my usual advice is to ask a minimally tech-competent fourteen-year-old: they may not make the same decisions a college instructor would about whether to *use* questionable copies, but already by that age they will often be able to assess whether a given copy is questionable.

While I think most tech-competent fourteen-year-olds are capable of recognizing copies of questionable provenance, they usually have not truly considered their own ethics around using third-party materials. But even though often only a few years older, many undergraduates have considered these issues in the same ways that quilters worry that prize money renders the use of third-party content illegitimate, or that academics focus on attribution and credit to the exclusion of other relevant legal considerations.

## Suggestions

I have expended a lot of words above trying to normalize the idea that assorted groups validly think differently about copying, permissions, sharing, and credit. But given the possible repercussions for creators if they misstep on related legal issues, it also remains quite important to provide real-world copyright education and training. Here are some practical suggestions:

Don't assume younger people are necessarily coming from an information deficit, even when they admit to practices that diverge from expectations about legal compliance.

Don't assume that behavior or practices that diverge from yours (or those of a dominant group), do so because of a moral failure. In many cases, the behavior or practices may be tied to mores or ethics with which you

are unfamiliar or may be a considered choice to depart from dominant expectations.

When working with creator/user communities with which you are unfamiliar or of which you are not a part, avoid assumptions about the current extent of their knowledge or about their information needs. You may not be able to answer all or even the majority of their questions; you may not even be able to understand all of their questions!

Be clear on your goals when engaging with a particular group. Are you trying to get session participants to buy into a set of norms of particular types of use? Or are you trying to ensure participants have enough knowledge to avoid legal pitfalls regardless of their acceptance of the norms and mores embedded in the laws? Both can be useful approaches, but many participants will appreciate when you make these motives more explicit.

Inculcating a specific set of norms is often the intent of copyright education sessions for undergraduates; the more so if the instructor is trying to relate information on both copyright and plagiarism in a single session. Try to avoid presenting about the two issues together, except to pick apart the unnecessary entanglement and conflation of the issues.

You may encounter resistance to information that does not fit with participants' own established expectations; this is particularly common for outreach to members of established communities of creation and use, such as senior faculty members—or quilters. With such established communities:

- Get to know the field or creative community. In a faculty setting, this might involve learning more about the communication structures of particular disciplines. For example, a discussion-starter about journal articles functioning as course readings will be ineffective with a group of instructors in a field that uses only textbooks.
- Demonstrate your competence with their established norms—or ask them to explain those norms to you. In a faculty setting, again, specific practices of a discipline may be relevant. For example, mathematicians and high-energy physicists often primarily share their research publications online, chemists tend to focus more on American Chemical Society publications, and many

humanities fields emphasize monographs. In a field where I am unfamiliar with common research dissemination practices, I may ask faculty members to explain their important research-distribution venues to me. Such an explanation can still help build to the next step.

- Once you have demonstrated that you are at least aware of their established norms and expectations, demonstrate how their established norms break down in alternative scenarios. This can help to drive home pieces of information that fit poorly with—or actively contradict—participants’ established norms and expectations. For example, academics can often be pushed to rethink the universality of their hyper-focus on citation by asking them if they have ever seen a visual collage artwork with footnotes and a bibliography.
- Acknowledge the conflict. My interactions with the quilters’ group helped me to understand why academics sometimes find my assertion of the lack of copyright in facts or ideas upsetting—attribution for ideas is a central part of academic values. I now emphasize that attribution is a separate issue from ownership and, more important, that the inability to copyright a work does not mean it is not valuable; instead, it means we think it is so valuable that everyone should get to use it.

Regardless of your goals, demonstrate respect for participants’ existing knowledge of and values around related topics. Ask them about their own creative work and how others’ creative work is important in their lives. Make connections from their existing experiences and knowledge to the information and/or norms you wish to share. Be explicit that new information and norms may conflict with participants’ existing understandings, and, above all, engage with them on the complexity of the issues.

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# Copyright Law's Role in Advocacy and Education for Open Access Policies on Campus

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## Introduction

Over the past decade, colleges and universities have been adopting institutional open access (OA) policies that encourage, direct, or give rights to authors to make their research publicly available in institutional repositories (IRs). These networked databases are often created to serve these OA policies, distributing an author's research to a global online audience. Without copyright law, these policies and the supporting IRs could not exist: copyright law is the engine of a successful OA policy and thereby a successful IR. In particular, US copyright law features a statute that allows creators to transfer rights for a work without actually giving up total control of it. These non-exclusive rights are the foundation of the OA movement in the US.

This chapter begins with a brief introduction to the benefits and management of OA policies, focusing on their basis in copyright law and

author rights. It continues with an examination of the ongoing disagreements among OA practitioners and publishers about what OA actually means and how the term “open access” can pose communication and workflow challenges for those working with institutional OA policies. Within this context, the authors describe common OA policy workflows and the activities librarians undertake to determine what version of an article can be deposited in an IR as well as how to communicate these nuances to campus stakeholders. It concludes with advice on how an IR can be used to advocate for author rights and comply with copyright law.

## Open Access Policies

### *Definition and Benefits*

The concept of OA is simple. In the words of OA advocate and scholar Peter Suber: “[O]pen access literature is digital, online, free of charge, and free from most copyright and licensing restrictions.”<sup>1</sup> OA literature increases “the visibility, retrievability, audience, impact, and usefulness of research,” says Suber.<sup>2</sup>

Members of an academic community can be protected by and encouraged to distribute versions of their research through university OA policies. These institutionally or author-driven initiatives come in a number of varieties, which have been described at length in the guide to “Good Practices for University Open-Access Policies,” written by Shieber and Suber in 2012. At one end of the range is a comprehensive policy: an opt-out, faculty-sponsored policy where an institution is granted non-exclusive rights to research and authors are expected to deposit a range of scholarship in an IR. At the other falls an opt-in policy where authors are simply encouraged to deposit peer-reviewed journal articles. Under the former, authors are granted a set of rights to distribute and reuse the deposited version under their copyright; under the latter, an author must follow a publisher’s self-archiving policy, which may vary in degree of permissiveness and exclusivity of rights taken.<sup>3</sup> All OA policies aim to make research as free and flexible as possible (in regards to cost and reuse) and are grounded in the protection of author rights within copyright law.

## *Copyright and Author Rights*

The constitutional purpose of copyright is to promote the progress of science and art.<sup>4</sup> This 225-year-old law has always sought a balance between the needs of the creator to reap rewards from the limited economic monopoly of their work and the needs of the public, once the limited economic monopoly rights have expired. Even as far back as 1783, a committee of the Continental Congress stated that “nothing is more properly a man’s own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius and to promote useful discoveries.”<sup>5</sup> These words are very much in line with modern thoughts surrounding academic labor, which view the creation of articles, books, and other scholarly research as “fruit[s] of...study.”<sup>6</sup>

The Copyright Act has been updated several times. Currently, copyright lasts for the entire lifetime of the creator, plus an additional seventy years after the creator has died. Typically, copyright law grants the creator a set of certain rights. These rights, codified in the US code at 17 U.S.C. 106, give creators the right to copy, modify, display, perform, and create other works modified from the original. These are typically referred to as the exclusive rights, or in common parlance, the “bundle” of rights. The creator automatically gains these bundled exclusive rights as long as the work is fixed and creative; no registration or other formality is required.<sup>7</sup>

As the copyright holder, the author is, until or unless copyright is transferred, the sole possessor and decisionmaker about the use of these exclusive rights. Each of these rights is unique and can be transferred in whole or in part. For example, an author could transfer her right to distribute to an individual or organization. That individual or organization could then distribute the work as if they were the original author.

However, such decisions to transfer outright some or all of the bundle of copyright could prevent authors from exercising their rights. For example, if an author transferred all of his exclusive rights in one agreement—as is often the case with traditional scholarly publishing contracts—he might not be able to legally place the work on his own course website, make copies for colleagues, or upload the work into an IR. The law would view the new rightsholder as the original author for legal purposes.

Luckily, transferring copyright does not have to be an all or nothing agreement. The law allows you to transfer copyright while holding back rights for yourself and others. This is known as non-exclusive licensing and is the fuel for OA.

## OA Policies and Copyright

Underlying most OA policies across the US is the statute addressing non-exclusive rights. In § 205(e) of the U.S. Copyright Act:

A non-exclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or such owner's duly authorized agent, and if—

- (1) the license was taken before execution of the transfer; or
- (2) the license was taken in good faith before recordation of the transfer and without notice of it.

As stated above, an author can transfer legal ownership to another party by granting an exclusive license. Thereafter, the author would no longer be considered the owner of that bundle of rights under the law. By contrast, the creator of the work does not transfer ownership of the copyright to the licensee when granting a non-exclusive license; the copyright owner simply permits the use of a copyrighted work in a particular manner. Granting non-exclusive rights to other parties still enables an author to grant, assign, or retain rights she had before. For example, an author might draft a piece of scholarship and send it to a pre-print repository,<sup>8</sup> giving the repository a non-exclusive license to post the work. However, since the author still owns the copyright, he could again transfer rights to a journal or publisher for a future publication; there is no conflict under copyright law in that second transfer. This is the advantage of the non-exclusive license: it keeps the author in the driver's seat, maintaining ownership and control of the exclusive rights.

Non-exclusive rights are sometimes viewed as “shared rights” since they drive and empower OA. Authors can share articles in repositories, they can publish openly licensed versions of their works on their own web

pages, and they can still contract with others. Non-exclusive licensing preserves the freedom of OA scholarship. Furthermore, this area of copyright law features two of the most advantageous presumptions offered by the Copyright Act—an affirmative defense to a claim of copyright infringement and the minimization of registration requirements.

First, the existence of a non-exclusive license is an affirmative defense to a claim of copyright infringement. Second, in contrast to an exclusive license, a “non-exclusive license may be granted orally or may even be implied from conduct.”<sup>9</sup> Since non-exclusive licenses do not convey a transfer of ownership, there is no requirement that they be recorded to be valid. A non-exclusive license is, therefore, an exception to the writing requirement under the Copyright Act Section 204. It is further clear, looking at the legislative history of the Copyright Act, that Congress absolutely intended that this exception create and empower an interoperable system for non-exclusive licensing: “the impracticalities and burdens that would accompany any requirement of recordation of non-exclusive licenses outweigh the limited advantages of a statutory recordation system for them.”<sup>10</sup> In retrospect, this Congressional mandate found in Section 204 made OA scholarship part of the core of protected copyrighted works, giving authors continued ownership of their copyright and offering publishers a viable alternative to continue their business of distribution without having to take any rights beyond the non-exclusive licenses.

### *Implementation and Management*

In early 2008, two events changed the deposit rate among scholars around the world. Previously, the rate of deposit of OA articles—such as the 2005 request by the US National Institute of Health (NIH) that grant recipients voluntarily self-archive their articles to PubMed Central—was lower than 5 percent. First, NIH made self-archiving mandatory,<sup>11</sup> and second, Harvard University’s Faculty of Arts and Sciences passed a faculty “self-mandate” utilizing their non-exclusive rights.<sup>12</sup> These two policies were massive developments in the history of the OA movement and began a long drive by other government institutions, funders, and universities to pass similar OA mandates. The question became: How could this be accom-

plished at different institutions, both public and private, with differences in structure and faculty status?

Early in the OA movement, any previous university mandate merely required faculty to deposit their own articles online. This was true of the twelve other institutional mandates and three departmental mandates that preceded the Harvard vote in nine other countries: Australia, Belgium, France, India, Portugal, Russia, Switzerland, Turkey, and the United Kingdom.<sup>13</sup> These efforts were sometimes referred to as deposit mandates, under which each faculty member had to expressly grant an institution non-exclusive license for each scholarly copyrighted article.

Conversely, the Harvard mandate automatically grants the institution a non-exclusive license to archive and distribute every scholarly article produced by its faculty.<sup>14</sup> This is, of course, subject to a waiver provision, where a faculty member may expressly opt out of the policy for an individual article. The policy was voted on by Harvard's entire Faculty of Arts and Sciences, and the decision was unanimous. As the OA policy spread at Harvard from school to school, the faculty were voting to let the university automatically acquire a prospective non-exclusive license to archive and distribute the scholarly works created by the faculty. Each vote noted the date of birth of the policy, as the license was not applicable to articles retroactively. Overall, the faculty body that voted at each school empowered that school to proactively archive articles under the broad, institutional, non-exclusive license to exercise the copyright rights. This has been called a permission mandate because it merely switches the default: instead of requiring every individual faculty member to expressly grant the school a non-exclusive license, the institution receives that license automatically via the vote and resulting policy. Many institutions now require this exact style of adoption at their institutions—a faculty vote.<sup>15</sup>

A faculty vote is often necessary to dispel any myth surrounding the controversy of top-down OA mandates. Certainly, if a president or provost at a university or other institution compels faculty to submit to an OA policy, this feels less like an organic process and could be interpreted, especially by OA skeptics, as a form of requisition of the copyrighted author's rights. OA is designed to keep the author and creator of these copyrighted works in the driver's seat and maintain control over their own copyrighted works. Therefore, a grassroots-style adoption by faculty vote—by the

very authors and creators of the copyrighted works subject to the policy—has a much greater legal foundation: the institutions will have an express license from the original copyright creators to archive and disseminate copies of these works. These faculty authors are choosing to share the bundle and adopt an OA policy.

Policies modeled after the Harvard-style OA Policy, for example, require two things of faculty: (1) that they give the university non-exclusive permission “to exercise any and all rights under copyright”<sup>16</sup> over their scholarly articles, which includes permission to disseminate OA copies through the IR, and (2) that they send digital copies of their articles to an office designated to handle the policy. This office is often the library.

## Disagreement among OA Practitioners and Publishers

### *Common OA Policy Workflows*

Libraries tasked with OA policy implementation often pursue a wide range of activities to promote the policy and to solicit and deposit publications. Although early OA policy adopters hoped that authors would actively engage with the policy and deposit publications without library assistance, the reality is that many libraries play an active role in the deposit process. Not only do libraries need to make authors and their proxies aware of policies, they need to facilitate deposit of publications in an IR.

In their analysis of data from the Coalition of Open Access Policy Institutions (COAPI), Duranceau and Kriegsman found that OA policy implementation activities related to soliciting IR content generally fall into one or more of four models: “systematic recruitment; targeted or opportunistic outreach; use of a faculty profile tool; and harvesting from other sites.”<sup>17</sup> Libraries typically adopt workflows and tools that best fit their resources and unique campus culture. Many libraries survey institutional publications and faculty CVs to identify relevant publications for deposit.<sup>18,19</sup> Others use bibliographic databases like Scopus and Web of Science to capture citations for applicable publications.<sup>20</sup> These databases can also

be integrated into faculty information systems such as Symplectic Elements, which permit institutions to automate the process of identifying publications and notifying authors that they need to deposit in the IR. Some libraries leverage institutional publisher memberships, like BioMed Central, to automatically harvest OA publications directly to an IR.<sup>21</sup> Others take a hands-on approach, working closely with individual departments and faculty to capture publications.<sup>22</sup>

Both Harvard University and Rice University use a combination of the aforementioned activities. Staff at the Harvard Library Office for Scholarly Communication (OSC), as well as participants in a distributed-deposit program that partners with OA liaisons, faculty assistants, and recruited depositors, work with authors to identify works and deposit them via a webform. Author self-deposit is also possible and common. OSC also offers CV Scraping, a mediated deposit service, in addition to other benefits, including direct outreach to authors, monthly download statistics emails, and reader feedback stories. Harvard's open access repository, Digital Access to Scholarship at Harvard (DASH), also harvests the various faculty activity reports and the OA-subset from PubMed Central. Similarly, Rice University's Fondren Library is actively engaged in article solicitation and deposit. Library staff monitor faculty publications via Web of Science, Scopus, and Google Scholar, depositing OA publications in Rice's IR, Rice Digital Scholarship Archive, and contacting authors for copies of other articles. Fondren also leverages its BioMed Central membership to automatically deposit of publications with Rice-affiliated authors.

### *Activities Librarians Undertake to Determine Versioning*

Copyright and author rights issues play a significant role in OA policy workflows. Because in many cases institutional OA policies leverage institutional copyright policies, successful policy outreach and implementation depend on an understanding of copyright and author rights issues by both library staff and authors. As discussed previously in this chapter, author rights are the rights controlled by an author unless copyright has been transferred to a publisher. Relevant to institutional OA policies, publication agreements often outline where authors can post copies of their articles and in what version. Much of the work related to depositing

focuses on identifying what version of an article can be deposited (known as versioning) and if embargoes are required.

Many institutional OA policies direct authors to make publications available in an IR immediately upon publication. Although publishers may instruct authors to embargo manuscripts for a set amount of time, some institutions, including Harvard, interpret the OA policy as taking precedence: assuming that the OA policy was passed before an author signed a copyright transfer agreement, and assuming that the publication did not require a policy waiver, the author is free to deposit the manuscript immediately. However, other institutions, such as Rice, accommodate embargo deadlines in response to author concerns about journal self-archiving policies. This necessitates that library staff check embargo guidelines (typically, via SHERPA/RoMEO and publisher web pages) in addition to versioning. Such work adds additional challenges to library workflows. In her 2017 article, Leila Sterman perfectly captures the process that goes into this work:

Green open access<sup>23</sup> policies are often buried on publisher's websites or only mentioned in contracts. This practice obfuscates important information, increasing both the time library staff spend searching for that information and author's obliviousness to the opportunities and restrictions of green open access. Searching for and complying with journal's unique green open access policies increases the effort required to post articles in repositories and decreases the perceived barriers to post on academic social media sites or personal pages as the restrictions are not obvious or visible. Embargo lengths are not always clear, even in resources like Sherpa/Romeo, which are devoted to maintenance of this information. Further, even if an embargo is clearly stated, does the embargo period start at the time of online publication, assignment of volume and issue, print publication, or some other date? This lack of clarity opens to unnecessary risk for even diligent librarians attempting to comply.<sup>24</sup>

Sterman explains that these challenges, along with publisher-required "set statements" (language required by a publisher to accompany a deposit) and confusing policies differentiating IRs and other websites, create further barriers to OA policy compliance.<sup>25</sup>

## *Communication with Campus Stakeholders*

Effectively communicating the nuanced nature of an institutional OA policy, publisher self-archiving policies, and article versioning is key to author participation. Additionally, library staff engaged with OA policy work must also navigate the wide-ranging and often differing understanding and opinions of OA by library colleagues, authors, and publishers.<sup>26</sup> Is it simply making content freely available online? Does OA imply freely available content with no restrictions on reuse? Because the OA community is so diverse, there is little consensus as to what OA is.<sup>27</sup> In addition, many faculty continue to be wary of OA publishing, surrounded by numerous off-putting reports and anecdotes of predatory journals and lack of peer review as well as a common business model where authors pay fees (author processing charges, or APCs). It is important for library staff engaged in OA policy implementation to understand these preconceptions about OA when preparing outreach material and be able to answer questions and challenges.

## *Using the IR for Copyright Advocacy and Education*

There are numerous advantages for authors who deposit research into an IR in addition to making works freely available. Research suggests that OA works are cited more frequently than works that follow a traditional publishing model; the latter often fall behind paywalls.<sup>28,29</sup> IRs typically provide substantial metrics and reader feedback, directly connecting authors to researchers and providing a sense of where their scholarship is being read. Finally, IRs typically contain robust metadata, enabling more thorough search engine indexing, and provide static permanent links to scholarship.

However, IRs also provide benefits to librarians and information professionals. An IR's workflows and requirements offer librarians opportunities to discuss complicated or abstract issues, including copyright, fair use, licensing, and author rights, in practical terms. These scenarios include questions surrounding the appropriate version of a work, waiving author rights under an OA policy, and IR licensing.

## *Versioning*

The primary point of contact between an author and the IR occurs when a work is submitted, either by author self-deposit or mediated deposit. The complexity around versioning presents a favorable opportunity to educate authors on copyright. During the author deposit process, repository managers face a common scenario: authors often submit a version under publisher copyright that cannot be included in the repository. IRs typically request or seek the accepted author manuscript (AAM) as this is the version that is covered by an OA policy or allowed by a publisher to be posted under self-archiving policies. The pinch point in determining the correct version to deposit gives librarians or repository managers an opportunity to explain the basics of copyright, the rights an author may have signed away to a publisher, and the rights an author retains if covered under an OA policy.

A conversation with an author about versioning can also include education on publishing contracts and negotiations of those contracts. Authors covered by an OA policy retain the right to distribute an AAM in an IR. Those who are not covered must turn to the author self-archiving policies set forth by a publisher. Self-archiving policies vary: while many publishers do allow for some reuse in an IR, others allow no provision at all. Education around the concepts of self-archiving and the sharing of tools to differentiate publisher policies can help an author make choices over which publishers to use in the future; it also empowers authors to negotiate for certain rights or provisions in future contracts.

## *Waivers*

A waiver request represents a speed bump for authors during the publisher negotiation process and provides another opportunity for librarians or repository managers to discuss copyright and author rights. Some OA policies contain a waiver option: a waiver is executed when a publisher requests an author waive their rights under an OA policy due to a conflict with the publisher's licensing or business model. The institution then agrees not to assert the rights it has been given under the OA policy and the author and/or repository manager must follow publisher self-archiving policies (which often include an embargo) to determine

how a work can be distributed in an IR. In other words, waivers limit or restrict an author's ability to reuse or redistribute their work even though the author is covered under an OA policy. While the waiver option gives authors the freedom to publish where they see fit, an author may choose to bypass a publisher that would require them to waive their rights. Waivers often provide the impetus for an author to pause and consider their rights, contract, and licensing.

### *IR Licensing Authorization*

Librarians and repository managers are often tasked with determining the licenses under which works are distributed in IRs. This process is facilitated when authors designate librarians or repository managers as proxies. These authorizations usually precede an author's deposits to the IR and do two things: re-assert an existing OA policy and give proxies the ability to make repository-specific licensing decisions on the author's behalf. However, the authorizations, which contain legal language, can confuse authors as to their purpose. As a result, these authorizations provide another opportunity for education around copyright, licensing, and author's rights. Librarians and repository managers reiterate the benefits of OA and an OA policy and explain the impact of different licensing within the IR as related to copyright.

## Conclusion

OA policies are rooted in US copyright law and prioritize authors' rights. The policies can be complex and require librarians and repository managers who are versed in copyright to help authors understand their rights. The tendency for institutions to develop their own unique policies and workflows for deposit further complicates the landscape and can be confusing for authors. However, the conversations that occur between authors and librarians or repository managers during the publisher negotiation phase and the deposit process result in the dissemination of copyright knowledge throughout the campus community. This enables and empowers scholars to advocate for their own rights facilitated by copyright law.

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# Fear and Fair Use: Addressing the Affective Domain

*Sara R. Benson*

## Introduction

Many laypersons have a certain amount of fear when confronted with the law. Fear of breaking the law, fear of being ignorant of the law, and perhaps the strongest motivator of them all (at least in the civil law context), fear of being sued. So, when discussing fair use with patrons of the library, whether they are faculty, students, or librarians, one must also address the elephant in the room: fear. A copyright librarian's job, quite often, is to teach others about fair use, but first, the copyright specialist must deal with the learner's visceral emotional response for the audience to have the confidence to use fair use in their daily work.

This chapter, then, is aimed at quelling the fear of those in the academy and empowering them to exercise their right to fair use. The chapter begins with a grounding of the discussion in the theory of the impact of fear on decision-making. Next, the chapter contextualizes fair use within the copyright legal landscape: is it a right, a limitation on the rights of others, an affirmative defense, or all of the above? And, is there always some risk in asserting fair use? Then, the chapter addresses instances where academics have been sued for exercising fair use and the outcomes of those cases. Finally, the chapter concludes by addressing legal safe harbors for academics exercising fair use.

## Fear, Risk, and Decision-Making

It is likely unsurprising to state that when risk measures are certain or calculable, generally individuals tend to be risk-averse.<sup>1</sup> When presented with a situation where one option is more certain than the other, individuals tend to favor the situation that is less ambiguous.<sup>2</sup> The Ellsberg paradox explains this using a classic test:

[I]f faced with a choice of drawing a ball from an urn containing 10 red and 10 black balls or an opaque urn containing 20 mixed red and black balls of unknown proportion, subjects tend to prefer the former, regardless of whether the selection of a red or a black ball would be rewarded.<sup>3</sup>

In other words, if an individual understands that one result is a clearer path to meeting a goal, the Ellsberg paradox demonstrates that the individual will choose the less ambiguous path, even if it is a less desirable ultimate result.<sup>4</sup> Similarly, “in order to mitigate risk, decision makers seek to reduce uncertainty.”<sup>5</sup>

There is no such thing as a no-risk situation in the fair use context because courts interpret fair use as an affirmative defense and, hence, a person claiming fair use could be asked to answer a lawsuit claiming infringement,<sup>6</sup> even if the fair use argument is quite strong. While many principles in copyright law are infrequently challenged in courts, there are thousands of cases interpreting fair use. Because it is a flexible test, two judges hearing a factually similar case could rationally come to a different conclusion. And judges are not limited to the four factors listed in the text of the statute,<sup>7</sup> leading to additional concerns regarding the accuracy of fair use predictions. Hence, fair use is, at its very heart, flexible and (some would argue) ambiguous. Many librarians and library patrons, therefore, when faced with the risk of potentially being sued (no matter how low that risk may be) might be tempted to always take the easier, clearer path: to pay licensing fees to use works that may be suitable for a fair use assertion.

Hopefully, however, if the librarian or library patron is provided with the resources and information contained in this chapter, their fear will subside, they will become less risk-averse, and they will be more confident in asserting their fair use rights.

## Fair Use: Is it a Right or An Affirmative Defense

While courts (and the legislature) define fair use as an affirmative defense due to its procedural posture in the court system<sup>8</sup>—if you are sued for copyright infringement, even if it is a fair use, you must defend the lawsuit in court to avoid a default judgment against you—many copyright educators tend to view it differently. Some view it as a limitation on the rights of authors in that users can assert fair use rights without first receiving permission from the author of the work. This interpretation seems to fit well with the terms of section 107, the fair use provision, itself as that section of the act is titled “Limitations on exclusive rights: Fair use.”<sup>9</sup> Others argue that fair use is a right and, as such, like any other legal right, unless you use it you will lose it. It is this position that is intriguing, as it finds support both in the Copyright Act as well as in some recent case law, and yet, courts continue to apply fair use as an affirmative defense.

Kyle Courtney constructed a cogent argument that fair use is a right.<sup>10</sup> Courtney traces the origins of the right to the 1976 Copyright Act itself in section 108(f)(4).<sup>11</sup> In that section, the act provides that “nothing in [section 108] in any way affects the right of fair use as provided by section 107....”<sup>12</sup> This so-called savings clause, which preserves the ability of librarians to assert both their section 108 and 107 rights together, specifically refers to fair use as a “right,” indicating that Congress believed it to be a right of those accessing and using copyrighted works at the time of the enactment of the Copyright Act.

Furthermore, Courtney argues, courts have recently noted that fair use is a right as well. For instance, in the 2015 *Lenz v. University Music Corp.* decision, the Court of Appeals for the Ninth Circuit, when interpreting fair use within the context of the Digital Millennium Copyright Act (“DMCA”), stated that “[f]air use is not just excused by the law, it is wholly authorized by the law.”<sup>13</sup> The court continued by citing Eleventh Circuit precedent stating that “[a]lthough the traditional approach is to view fair use as an affirmative defense...it is better viewed as a right granted by the Copyright Act of 1976.”<sup>14</sup> Therefore, argues Courtney, fair use is a right and has been recognized as such by courts such as the Ninth Circuit.

And yet in *Lenz*, the court was applying fair use within a specific legal context, a DMCA takedown notice. In that case, the court still acknowledged that, procedurally, depending on the nature of the case, fair use is an affirmative defense. In other words, the court made a distinction between DMCA takedown cases and other kinds of fair use cases, where fair use would remain (in the courts at least) as a procedural matter, an affirmative defense. Even in the Eleventh Circuit, where courts have been friendly to the argument that fair use is a right and not a defense stating that “fair use should be considered an affirmative *right* under the 1976 Act,” courts have reluctantly applied “Supreme Court precedent,” noting that “the fair use right must be procedurally asserted as an affirmative defense....”<sup>15</sup> It was this line of cases the Ninth Circuit relied upon to require a copyright holder to assess whether a particular use was a fair use prior to sending a DMCA takedown notice in *Lenz*. And the Supreme Court has consistently noted that fair use is an affirmative defense in 1985 in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>16</sup> in 1994 in *Campbell v. Acuff-Rose Music, Inc.*,<sup>17</sup> and again in 1998 in *Eldred v. Ashcroft*.<sup>18</sup>

While it is comforting to copyright librarians and patrons alike to view fair use as a right, and it would make a stronger argument to combat the fear of liability and it is important to assert fair use when it is available, fair use has not been considered a right by the courts except for in the limited circumstance of DMCA takedown notices in the Ninth Circuit. And while scholars argue that the burden of proof for fair use should be lessened to a regular defense<sup>19</sup> or even shifted to the plaintiff,<sup>20</sup> and that we all have a collective right to fair use,<sup>21</sup> it is a disservice to library patrons to ignore that courts will procedurally follow the clear precedent of the Supreme Court. Thus, as Kyle Courtney rightfully does in his fair use instruction sessions,<sup>22</sup> when instructing individuals about fair use, copyright librarians should educate their patrons about the need for a fair use risk assessment, including the possibility of litigation.

## Libraries, Education, and Fair Use Case-Law

Libraries are confidently ingesting more books into their digital collections and sending copies of the books to the HathiTrust Digital Library.

Libraries can feel confident providing the HathiTrust with books that are still under copyright protection so long as they will only be viewed online by researchers engaging with the text for non-consumptive purposes. Non-consumptive (or non-reading) uses include data mining, text mapping, text mining, and more. Librarians need have no fear digitizing works for ingestion by HathiTrust due to the *HathiTrust*<sup>23</sup> and *Google Books*<sup>24</sup> decisions from the Second Circuit Court of Appeals. In both of these decisions, the court stressed that using the works for the purpose of research without being able to read the entire book (in the case of *HathiTrust*, in the research term format, and in the case of *Google Books*, in the snippet view format) constitutes a fair use.<sup>25</sup>

As an extension of this right to fair use, some libraries are considering lending digital copies of books that are purchased by the library on a one-to-one basis with their physical holdings.<sup>26</sup> So long as the library has purchased the original book, the libraries assert that this is a fair use to make the entire text of the book available to one patron at a time. In other words, the library would either lend the physical book or lend the electronic version of the book at any given time, but not both. In that manner, the library considering lending copies of books that are still in-copyright would be lending out one copy of the book and would not make any excessive copies of the physical book. To the extent that a library is lending the electronic version of the book for research and educational purposes, the libraries assert that this is a fair use.<sup>27</sup>

Libraries may feel a bit less confident about their ability to place materials on e-reserve without first paying licensing fees and asserting fair use due to the ongoing litigation involving Georgia State University. Georgia State University has been involved in this litigation for over ten years and the case is still pending.<sup>28</sup> The case, which involves library physical reserves and e-reserves of copies of library books, was instituted by Cambridge University Press and Oxford University Press, with funding from the Copyright Clearance Center, in an attempt to curtail the widespread practice of fair use copying for course readings. It is important to note that this case began because Georgia State University had a problematic policy for creating course reserve materials whereby up to 20 percent of copyrighted works could be copied under fair use.<sup>29</sup> This is important because most universities do not create such a high risk of being sued by

(1) not having a problematic fair use policy, and (2) maintaining e-reserve materials for courses behind protective paywalls. In any event, the district court in that case has consistently held that the majority of the instances of alleged infringement are fair use.<sup>30</sup> However, the Eleventh Circuit Court of Appeals reversed and remanded the case to the district court, citing issues with the weighing of the fair use factors and noting that the district court gave short shrift to the impact on the marketplace for the copied books.<sup>31</sup> Nevertheless, on remand, the district court continued to favor the university and even ordered the publishers to pay for the attorney's fees incurred by the university in defending the litigation in excess of three million dollars.<sup>32</sup> This result, of course, was appealed to the Eleventh Circuit Court of Appeals once again with yet another remand to the lower court—this time ordering the court to reinstate its findings that factor four of the fair use test “for the 31 excerpts for which digital permissions were available”<sup>33</sup> favored infringement and insisting that the lower court eschew any “mathematical” approach to calculating fair use.<sup>34</sup> At the time of the printing of this book the decision at the lower court was still pending.

## Legal Safe Harbors

The biggest way to fight fear is in realizing that the likelihood of another case against a university library for e-reserves similar to the one launched against Georgia State University is rare and that the legal safeguards against such a case are high. In other words, it is not worth the publishers' time and money to file these kinds of lawsuits often. Regardless, there are legal protections granted to librarians, educators, and educational institutions that should quell much of the fear of being sued for good faith fair use determinations, including Section 504 of the Copyright Act and Sovereign Immunity (for the institution itself).

The first line of defense for individual librarians or educators who fear liability for fair use determinations is included in the remedies section of the Copyright Act itself. Section 504(c)(2) provides that

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:

- (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords....<sup>35</sup>

There are a few things to note about this provision. First, the provision protects librarians, archivists, employees, or agents working on behalf of the employee of a non-profit library, archive, or educational institution. Second, the protected librarian, archivist, employee, or agent made the fair use determinations as a part of his or her job. Third, the employee or agent of the employee had reasonable grounds to believe that his or her fair use determination was fair use. Fourth, this provision only applies to the reproduction or copying of works, not to a public display or public performance of the work. Fifth, if all of the above applies, the employee or agent of the employee is shielded from statutory damages, which can be significant. In that instance, the potential liability from infringement would be limited to “the actual damages suffered by him as a result of the infringement” as well as profits “that are attributable to the infringement and are not taken into account in computing the actual damages.”<sup>36</sup>

If the library is part of a public institution, the doctrine of sovereign immunity may provide a defense for the library as well. “The Eleventh Amendment stipulates that a state or state agency may not be sued in a federal court for dollar damages.”<sup>37</sup> However, even if sovereign immunity applies, the university still may face equitable relief such as an injunction when an appropriate state officer is named in the lawsuit and an ongoing violation of the law is alleged.<sup>38</sup> Interestingly, though, one district court has found that a professor at a public university can assert sovereign immunity (as opposed to a higher ranking administrator) and that “the fair use doctrine is unsettled enough” as to prevent a lawsuit. (One of the prerequisites to establishing sovereign immunity is that the statutory right allegedly violated as “clearly established” at the time of the alleged violation.)<sup>39</sup> So, there is some precedent for professors to assert the defense of sovereign immunity in copyright cases to completely avoid liability.

## Conclusion

Copyright literacy, and especially fair use literacy, is key to helping library patrons and educators to feel more comfortable making daily fair use determinations. It is natural to fear the unknown and to also become risk averse in the face of potential legal liability. And yet, there are some safeguards to liability as reviewed above. Namely, the fact that librarians and educators working in nonprofit educational institutions, libraries, or archives and acting within the scope of employment making a fair use determination are shielded from large damages. Additionally, sovereign immunity may also lead to either no damages or a limitation on the judgment to purely equitable relief, such as injunctions. Finally, the Supreme Court has made it clear that the recovery for attorney's fees shall go to the prevailing party, including the alleged infringer in a copyright case if the court rules that the defending party prevailed<sup>40</sup> in asserting fair use.

Thus, while there may be no such thing as no risk when asserting fair use, there are plenty of situations where the risk is quite low. Savvy librarians, educators, and library patrons can take comfort that their daily good-faith assertions of fair use will likely go unchallenged in court. And if they are challenged, there are some well-established safeguards to liability. Go forth and assert fair use in good faith without fear.

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# The Origins and Future of Fair Use/Fair Dealing Week: Why Should Libraries, Museums, and Other Cultural Institutions Participate?

*Kyle K. Courtney*

*Krista L. Cox*

Fair Use/Fair Dealing Week is a great example of successful grassroots organizing by cultural institutions, including libraries, archives, museums, and other institutions to celebrate one of the most critical of all copyright topics: fair use (and, later, fair dealing).

## The Law, Briefly

The Copyright Act of 1976 grants copyright holders a bundle of exclusive rights, including the rights to reproduce, perform publicly, display publicly, and prepare derivative works of (and distribute) copies of the copyrighted work. However, despite these exclusive rights, and the length of their protection (the life of the author plus seventy years), copyright

law recognizes the essential need for “breathing space.”<sup>1</sup> This space allows a user to harness some of the copyrighted work without permission “for purposes such as criticism, comment, news reporting, teaching...scholarship, or research...”<sup>2</sup>

This right allows uses that “promote the Progress of Science and useful Arts”<sup>3</sup> and preserves, without infringement, the values also enshrined in the First Amendment.

Fair use has been a part of copyright law for 170 years, initially coming to the United States as a common-law doctrine developed in the English courts.<sup>4</sup> Fair use is now part of the U.S. Code at 17 U.S.C. § 107. The statute helps users evaluate whether a particular use qualifies as a “fair use” using a fact-specific and context-based four-factor test:

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.<sup>5</sup>

As can be surmised in the preamble language to the statute, the right of fair use is a natural ally of library-related work. Libraries often provide all types of materials to patrons for uses such as “criticism, comment...teaching...scholarship, [and] research.”<sup>6</sup> In the library context, this four-factor test can be used as a form of risk mitigation, examined ahead of various library-related work. For example, libraries frequently use this test to determine whether or not they can perform a certain activity or function involving copying or scanning. By reviewing the four factors, as a court might, a librarian can determine whether or not the action she is taking might risk infringement or fall squarely within the realm of fair use. Increasingly, libraries and archives themselves engage in fair uses of their own materials, from digitalization to text mining, from online collections to digital exhibitions, and more.

Fair use has provided a critical “safety valve” in copyright law as a user’s right to accommodate the range of activities noted above and more.

Without fair use, copyright could be used as a monopoly to inhibit progress. Certainly, without fair use, the quick evolution of technology today would not be possible. Fair use, as a flexible doctrine, updates copyright law, accommodating new technologies and adapting copyright to the digital era.

In recent years, US courts have focused increasingly on whether an alleged fair use is *transformative*. A work is transformative if, in the words of the Supreme Court, it “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.”<sup>7</sup> Use of a quotation from an earlier work in a critical essay to illustrate the essayist’s argument is a classic example of transformative use. Conversely, a use that supplants or substitutes for the original work is far less likely to be deemed a fair use than one that makes a new contribution.

In the last decade, there were some enormously positive developments in the realm of copyright, transformative fair use, and libraries. The US Court of Appeals for the Second Circuit upheld the ruling in *Authors Guild v. HathiTrust*, deciding that providing a full-text search database of scanned books is analogous to providing access to these books for people with print disabilities, which constitutes a transformative fair use.<sup>8</sup> *HathiTrust* has paved the way for university libraries to embrace other activities, such as text and data mining, which are now at the forefront of interdisciplinary research.

A similar case, *Authors Guild, Inc. v. Google, Inc.*, found that Google did not infringe any copyright through its Google Book Search database, which shows “snippets” or significantly small portions of works from the millions of books that were scanned at many US university libraries.<sup>9</sup> US Circuit Judge Denny Chin dismissed the lawsuit and affirmed that the Google Books program meets all legal requirements for fair use.<sup>10</sup> Later, this decision was affirmed by the Second Circuit Court of Appeals.<sup>11</sup>

These laws and cases reveal the beneficial nature of having continual fair use programming at every institution. By investing in such efforts, patrons at each institution will be better informed and will be empowered to exercise the benefits that fair use grants, allowing for more creative use and reuse of work.

While the bulk of this chapter focuses on fair use, we also recognize that many more jurisdictions rely on fair dealing.<sup>12</sup> Like fair use, fair dealing is an important limitation or exception to copyright intended to benefit users. Fair dealing is often employed in many of the same contexts as fair use, and many statutes recognize research, private study, education, parody, satire, criticism, review, quotation, and news reporting as exceptions.<sup>13</sup> Both fair use and fair dealing are critical in providing limits to the monopolies provided by copyright.

There are some distinct differences between these two flavors of a similar exception, however. Fair dealing, a statutory limitation or exception, generally provides a closed-list set of activities that may be considered fair. In contrast, the fair use exception in the United States lists a number of activities that may be considered fair, but the preamble is not a closed list. Additionally, while fair use is weighed on statutory factors, fair dealing jurisdictions generally do not set forth legislative factors to determine whether a use is fair.<sup>14</sup>

## The Origins of Fair Use Week

The origins of Fair Use Week emerge directly from the development of the *Code of Best Practices in Fair Use for Academic and Research Libraries*.<sup>15</sup>

In 2010, the Association for Research Libraries (ARL) and Center for Media & Social Impact (CMSI) at American University's School of Communication launched a project to find the "best practices" of fair use emerging from libraries and archives.<sup>16</sup> Using various surveys, including long-form interviews, responses were gathered from a number of diverse academic and research institutions in the United States, from large universities to rural campuses. The surveys were about the libraries' understanding of the law and risk of utilizing fair use.

Later, after this information was processed from the surveys, librarians were invited to gather in small group discussions about fair use. Librarians gathered in five different cities between October 2010 and August 2011. In each conversation, participants were asked to discuss a series of brief hypothetical examples designed to raise questions about fair use and

its limitations and ask for the participating librarians' own understanding of fair use.

From these meetings, a series of draft best practices started to emerge. An outside panel of distinguished copyright experts, including Prof. William W. Fisher III at Harvard University, Prof. Michael J. Madison at the University of Pittsburgh School of Law, and Kevin L. Smith, then director of scholarly communications at Duke University Libraries, also reviewed the draft document. Ultimately, however, this new *Code of Best Practices in Fair Use for Academic and Research Libraries* was developed "by and for academic and research librarians."<sup>17</sup>

In March 2013, a "Library Code of Best Practices" Capstone Event was held in Washington, DC. This served as an official celebration of the new fair use best practices.

Building on that conference, Pia Hunter, then the head of reserve, media, and microforms at the University of Illinois at Chicago (UIC), proposed a week of celebrating fair use on the conference's *Fair Use Code Allies* listserv. At first, before the winter break, the community was unsure if it could work as a large-scale event. Successfully launching and running the new fairuseweek.org domain name that was purchased and reserved by Pia Hunter seemed a stretch. In fact, an email that went out to the listserv stating, "Please forgive my delayed notification, but at this point we've decided to postpone Fair Use Week for later in 2014, or if February remains optimal, 2015...."<sup>18</sup>

However, Hunter's idea for a full week of activities was taken up at Harvard Library, and several other institutions hosted single events in support of the celebration of fair use week. For example, UIC Library hosted a fair use clinic event in the lobby of the Daley Library, featuring both Sandy DeGroot and Pia Hunter. William Paterson University hosted Brandon Butler, then the practitioner-in-residence at the Glushko-Samuelson Intellectual Property Clinic at the Washington College of Law at American University, for a live fair use workshop.<sup>19</sup>

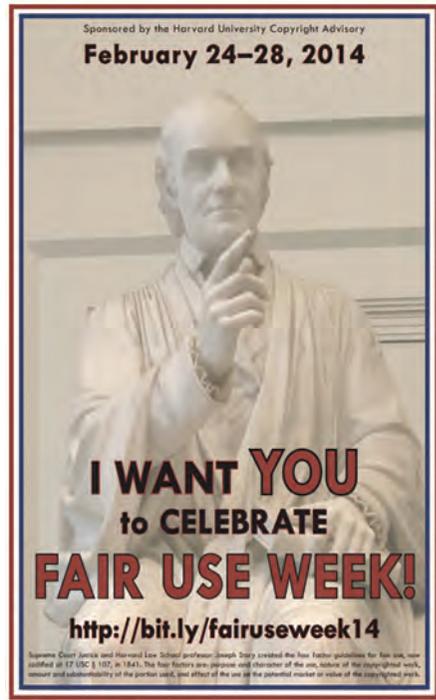
Harvard Library's Office for Scholarly Communication (OSC) under copyright advisor Kyle K. Courtney, set up a full week of activities, including daily blog posts by Krista Cox (ARL director of public policy

initiatives), Kevin Smith (then director of copyright and scholarly communication), and Kenneth Crews (then director of the copyright advisory office at Columbia), as well as hosting the first public showing of Harvard Law Professor Terry Fisher's new fair use lecture from his CopyrightX MOOC.<sup>20</sup> On the last day of Fair Use Week, Harvard convened the first Fair Use Week Panel, featuring Andy Sellers (then at Harvard's Berkman Center), Ann Whiteside (Harvard Graduate School of Design), Laura Quilter (UMass Amherst), and Ellen Duranceau (MIT).

Harvard OSC also established the "Fair Use Week Stories" Tumblr<sup>21</sup> and the @FairUseWeek Twitter account.<sup>22</sup> The Tumblr account showcases art, comics, writings, photos, and other works revealing the importance of fair use to communities beyond the academy. The "Fair Use Stories" Tumblr has featured posts by musicians, artists, scholars, archivists, and poets, all featuring a fair use theme. The @FairUseWeek Twitter account became the main source of social media activity on Fair Use Week events throughout the community and would play a critical role in later years' celebration and outreach.

## The Second Year of Fair Use Week and Beyond

Building on the success of Fair Use Week celebrated at Harvard and other institutions, in 2015, ARL worked to promote and expand the celebration



**Figure 4.1.** Harvard's first Fair Use Week poster, created by Kyle K. Courtney, featuring Joseph Story

in a coordinated manner. Hunter transferred the fairuseweek.org domain name to ARL in support of this effort. In addition to establishing the website, ARL created branding materials, including logos, for use by participants.



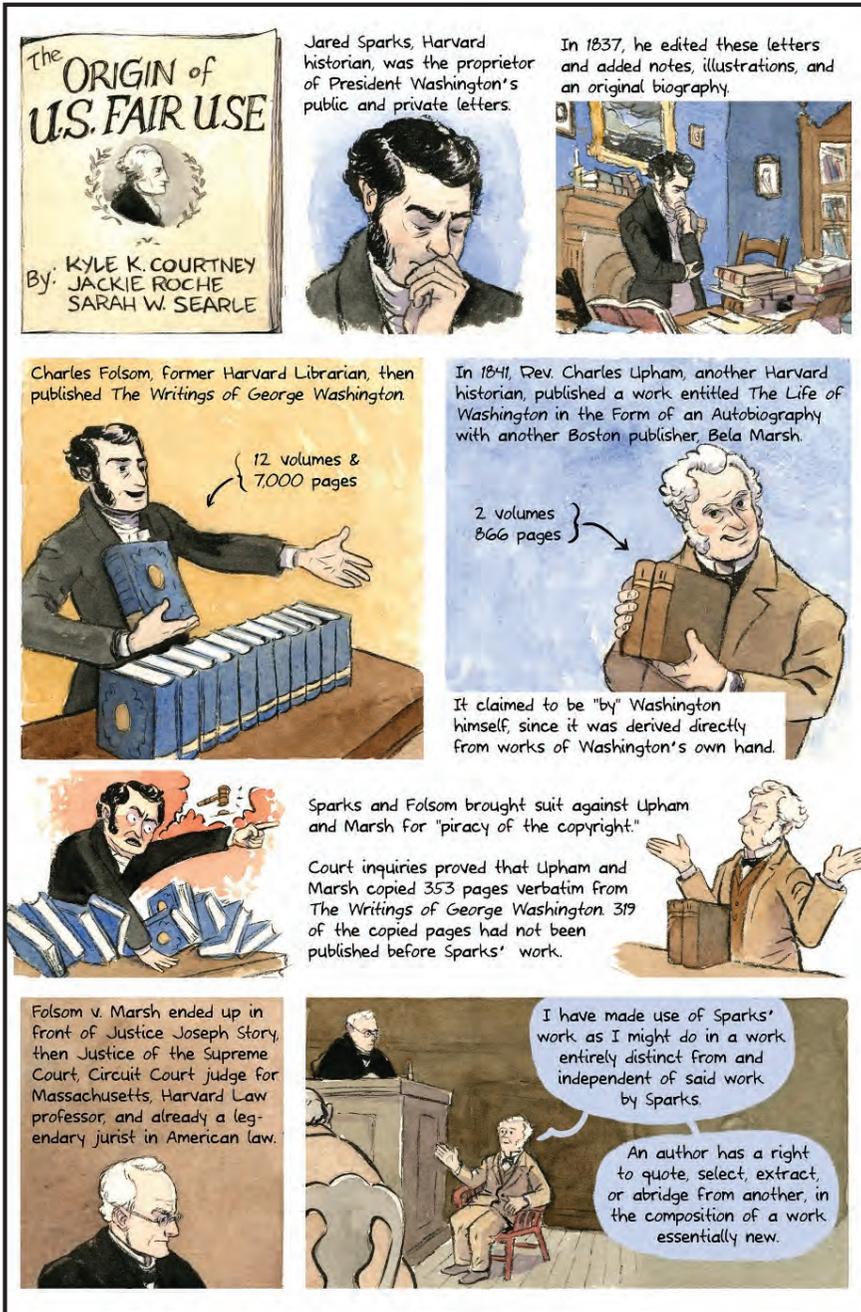
**Figure 4.2.** Fair Use Week Logo created by Krista Cox, ARL, in 2015

Beyond the branding, ARL also recruited participation, encouraging not only libraries and research institutions to celebrate but also non-profit organizations and trade blogs focused on users' rights to participate. In 2015, Fair Use Week expanded in terms of participating institutions and in scope, becoming Fair Use/Fair Dealing Week. By including the copyright doctrine of fair dealing in the celebration, institutions, and organizations from Canada as well as the multitude of fair dealing jurisdictions could also participate. Although there are important distinctions between fair use and fair dealing, these copyright doctrines share the characteristic of being an important and flexible right for users, safeguarding against excessive copyright protection. As explained on the Fair Use/Fair Dealing Week website,

Fair use and fair dealing are essential limitations and exceptions to copyright, allowing the use of copyrighted materials without permission from the copyright holder under certain circumstances. Fair use and fair dealing are flexible doctrines, allowing copyright to adapt to new technologies. These doctrines facilitate balance in copyright law, promoting further progress and accommodating freedom of speech and expression.

While fair use and fair dealing is employed on a daily basis by students, faculty, librarians, journalists, and all users of copyrighted material, Fair Use/Fair Dealing Week is a time to promote and discuss the opportunities presented, celebrate successful stories and explain the doctrine.<sup>23</sup>

Every year since its inception, participating organizations have used the week to celebrate, educate, inform, and promote the important doctrines of fair use and fair dealing. Each participant decides on the



**Figure 4.3.** "The Origin of Fair Use" comic by Kyle K. Courtney, Jackie Roche, and Sarah W. Searle

level of participation, from social media engagement (e.g., tweets and blog posts), to the creation of resources (e.g., infographics and comic books) and multimedia content (e.g., podcasts and webcasts), to live engagement (e.g., panel discussions or lectures). Thus, even after the celebration ends, librarians, educators, and advocates can continue to promote the doctrines of fair use and fair dealing, relying on the resources created during past celebrations. For example, an infographic on Fair Use Myths & Facts,<sup>24</sup> later adapted for the Canadian context in the creation of a Fair Dealing Myths and Facts,<sup>25</sup> explains these doctrines and addresses criticisms. Similarly, sharing an easily understandable and relatable explanation of the history of fair use can be accomplished through distribution of the comic book, *The Origin of U.S. Fair Use*.<sup>26</sup>

In 2015, the sixty-four participating institutions included universities, libraries, library associations, and a number of non-governmental organizations, such as the Electronic Frontier Foundation, Creative Commons, New Media Rights, Public Knowledge, and the R Street Institute. Since then, the celebration has grown each year, and in the 2018 celebration of Fair Use/Fair Dealing Week, the most recent year, participation grew to 153 organizations and included numerous individuals. Over the past five years, while the greatest concentration of participation has occurred in Canada and the United States, celebrations have also taken place globally, including Australia, Colombia, Greece, Israel, Kenya, Korea, the Netherlands, New Zealand, Pakistan, Tanzania, Uganda, and the United Kingdom.

Over the years, Fair Use/Fair Dealing Week has taken on an advocacy-based role for certain institutions. It is no surprise that fair use and fair dealing are often under threat from rights holders, lobbyists, and other organizations who have a fiscal interest in uses that can be licensed and commercialized for profit. This advocacy can take many forms, from promoting clauses used in library contracts that preserve rights, such as fair use, to supporting international adoption of fair use in other countries.<sup>27</sup> As Fair Use/Fair Dealing Week continues to grow and expand, governments should take note of the importance of these essential doctrines and ensure the robust application of fair use and fair dealing are not curtailed.

## Why All Institutions Should Celebrate Fair Use Week

Fair use and fair dealing play a critical role in ensuring balance in the copyright system, allowing for criticism and comment, research and learning, the creation of new knowledge and culture, and promoting innovation. Fair use, while often thought of in terms as a user's right, is depended upon by rights holders and users alike. Even though *everyone* who interacts with a copyrighted work relies on fair use on a daily basis, particularly in the digital world, there have been some attacks on this critical doctrine.<sup>28</sup> Celebrating fair use annually, therefore, provides an opportunity to educate and remind the community about the role that fair use, like other limitations and exceptions, plays in a functioning copyright system. By allowing not only use, but *reuse*, fair use serves as the basis for new knowledge and creation.

While fair use should be celebrated broadly, libraries have a particularly strong role to play in participating in Fair Use/Fair Dealing Week. As institutions that rely on fair use to fulfill their core missions and the role they play in providing access to knowledge, libraries are uniquely positioned to both advocate for the value of fair use and educate individuals on the doctrine.

In terms of advocating for fair use, libraries can use Fair Use Week as the perfect time to highlight particular collections made available through fair use. For example, in a blog post on the Fair Use Week website, Greg Cram showcased New York Public Library's (NYPL) 1939 New York World's Fair collection, which includes numerous records, documents, photographs, and other ephemera that were digitized and made available:

At the conclusion of the Fair, the corporation responsible for the Fair dissolved and donated a large amount of material to The New York Public Library. The corporation donated over 2,500 boxes of records and documents, as well as 12,000 promotional photographs. These records document not only the operations of the Fair, but also present a comprehensive view of all aspects of the planning, design, execution, maintenance, and dismantling of the Fair. The photographs in particular offer a unique view of life at the time, illustrating the Fair as only visual images can do.

[...]

We then turned to conducting a thorough, good-faith search for rights holders.... When the records of the Fair did not help, we searched for rights holders utilizing other methods, including searches on Google, the Copyright Office records, and other relevant sources. This search was time-consuming and, ultimately, fruitless.

Having found no copyright owner after our good-faith and reasonable search, we undertook a fair use analysis. Our analysis was informed by the development of voluntary community-driven efforts to create best practices for identifying rights holder(s), taking into account the nature of the particular material at issue, including the Society of American Archivists' 2009 statement of best practices, as well as general guidance such as the "Code of Best Practices in Fair Use for Academic and Research Libraries," developed by the Association of Research Libraries. We were also informed by various academic viewpoints, including Jennifer Urban's article on fair use and orphan works.

Guided by our fair use analysis, we determined to move forward with digitization of portions of the collection after balancing the educational benefit of the undertaking against the risk that a rights holder might subsequently surface. Although the potential for \$1.8 billion in statutory damages in the worst-case scenario was daunting, we not only digitized and posted the selections of the collection online, we also created a free iPad application to feature the digitized content.... The application was named one of Apple's "Top Education Apps" of 2011.<sup>29</sup>

Libraries might choose to highlight any number of projects, from the ways libraries support education using digital platforms to the creation of databases to facilitate search or other uses. Also, the preservation of particular collections of websites or other digital works subject to risk certainly is a major component of library-facing fair uses. And, as always, libraries excel at traditional fair use support, such as a student's reuse of existing works in the creation of new knowledge in the form of disserta-

tions, remixes, or mashups. These are just a few examples of the ways that libraries support the fair use activities of their host institutions and users at large.

An interesting narrative or storytelling using movies, film, music, and art is often a successful pedagogical strategy. Fair use story pedagogy is no different. Fair use success stories are an important element of learning, including the history of copyright, demonstrating the value the doctrine provides in expanding research, knowledge, and new creation.

An essential for any modern cultural institution is a full understanding of the law regarding the relationship between materials and copyright, particularly the fair use doctrine. Having a reliable point of contact for fair use is a critical component of any successful twenty-first-century cultural institution. To that end, the American Library Association, the Society of American Archivists, the College Art Association, American Association of Law Libraries, and other organizations list copyright and fair use as critical competencies in their respective fields.

Libraries, for example, not only depend on fair use to provide access to patrons but they can also help users employ fair use on their own, for example, when questions arise on the use of materials in a collection. The most common fair use question is whether using copyrighted materials in research, scholarship, and other creative endeavors is permissible.

There is an inherent tension in this environment, however: institutions want to provide whatever their community may desire but they also must balance the law against the user's needs. Fortunately, copyright and fair use do not always restrict certain uses. In many cases, a solid understanding of copyright can help ease fears, provide legal alternatives to a particular request, or help educate the community at large. Libraries have an opportunity—and responsibility—to empower their communities by providing truthful fair use resources for their users. In this way, libraries can serve a cooperative, risk-mitigating role within the institution.

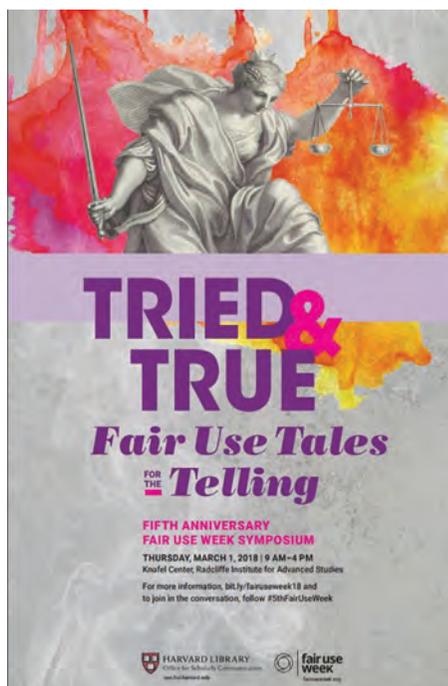
Again, in addition to promoting the robust, well-reasoned use of fair use, libraries and cultural institutions can also play a role in promoting the responsible reliance on fair use. Dispelling myths surrounding fair use (such as the myth that *all* educational uses are fair or that reliance on a

certain percentage (“thirty seconds is fair!”) of the work is always fair) can lead to greater risk mitigation for the library or institution.

Fair Use/Fair Dealing Week also presents an opportunity to highlight important but related laws that normally would not be emphasized in day-to-day instruction or reading. For example, in the second annual Fair Use Week, a number of libraries highlighted the “library innocent infringer”<sup>30</sup> section of the copyright law. If a library is found guilty of infringing a copyrighted work, there is a potential chance that there will be no statutory damages for such infringement. Congress offers libraries one last chance to avoid penalty in section 504(c)(2). This section states that if the infringer is a library or archive, or the employee of a library or archive, then the court can lower or eliminate damages altogether if the infringer “believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under § 107.”<sup>31</sup> To help support this in practice, a library should try to retain any documentation used to determine that the alleged use was a fair use. Spreading knowledge of this section, and others highlighted during Fair Use/Fair Dealing Week, can also aid the “total” analysis for risk mitigation of various fair use library activities.

## From the Fifth Anniversary to the Future

The Fifth Anniversary of Fair Use/Fair Dealing Week was celebrated in February 2018. Building off the best story-telling pedagogy fair use can offer, the Harvard Library Office for



**Figure 4.4.** Harvard Library Office for Scholarly Communication’s poster for the 5th Anniversary Fair Use Week Symposium, “Tried and True: Fair Use Tales for the Telling”

Scholarly Communication hosted the conference titled “Tried and True: Fair Use Tales for the Telling.” Thanks to the generous support of the Knight Foundation, this celebration was a one-day program featuring a vibrant community of artists, poets, filmmakers, archivists, lawyers, librarians, scholars, and other leading fair use experts. As with any Fair Use Week, there were stories, demonstrations, art exhibits, and lively discussions about the most powerful and flexible provision in copyright law.

That Fair Use/Fair Dealing Week launched from libraries is indicative of the special role these cultural institutions play as the guardians of that right. To quote the statute, “the fair use of a copyrighted work...for purposes such as criticism, comment, news reporting, teaching, scholarship, or research,”<sup>32</sup> is not an infringement of copyright. Many library actions fall within these types of uses. Libraries are often the only entities that provide access to copyrighted works before the copyright expires. This enables libraries, their patrons, and other users to exercise their rights under fair use limitations to creators’ right. Libraries also store, exhibit, and share copyrighted material as part of their fundamental mission.

And, finally, Fair Use/Fair Dealing Week is the representation of our most important mission: sharing knowledge across all disciplines with both patrons and peers. This is the true driving motivation behind the success of Fair Use/Fair Dealing Week. And, hopefully, with continued support from institutions and individuals around the world, Fair Use/Fair Dealing Week will continue to be celebrated for years to come.

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8. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 105 (2d Cir. 2014).
9. Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 291 (S.D.N.Y. 2013), *aff’d sub nom.* Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).

10. Authors Guild, Inc. v. Google Inc. at 293.
11. *Ibid.*, 804 F.3d 202 (2d Cir. 2015).
12. For the full texts of fair use and fair dealing limitations and exceptions in national copyright laws, Jonathan Band and Jonathan Gerafi, *The Fair Use/Fair Dealing Handbook* (Washington, DC: policybandwidth, 2015), <http://infojustice.org/wp-content/uploads/2015/03/fair-use-handbook-march-2015.pdf>.
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  30. 17 U.S.C. § 504(c)(2).
  31. "Copyright Law of the United States of America, Section 504: Remedies for infringement: Damages and profits," U.S. Copyright Office, <http://www.copyright.gov/title17/92chap5.html#504>.
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# An Exercise in Contradiction? The Role of Academic Copyright Librarians

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## Introduction

Copyright is a set of limited rights established by law. This law is built on the premise that a balance between the rights of creators and the uses of works for the public good is achievable and worthwhile. However, implementing mechanisms to achieve that balance is imagined differently by different stakeholders. On university and college campuses, academic librarians often find themselves at the pressure points between control and creativity. This can be especially acute for copyright librarians whose practice is informed by personal, professional, and institutional value systems—systems that do not always align with each other or evolving case law and legislation. Indeed, agreement between all three points of view is rare.

Copyright librarians are uniquely positioned to observe first-hand how copyright law is applied, ignored, or abused in practice. They also educate and provide services both to users and creators of copyrighted works and are actively involved in the acquisition of copyrighted content. Copyright librarians are well-positioned to raise awareness of copyright alterna-

tives and exceptions, including open educational resources (OER), open access, Creative Commons licenses, and applications of fair dealing/fair use. They have the professional education to think critically about multiple viewpoints on the copyright spectrum and are positioned to testify to the shortcomings and strengths of existing copyright laws and policies. As such, they have a role to play in advocating for copyright reform at institutional, professional, national, and international levels for both users and creators.

This chapter combines existing literature on copyright librarianship with the observations of librarians specializing in copyright at two Canadian universities. It begins by contrasting the evolution of copyright legislation with the values of librarianship, followed by a recent history of copyright librarianship in North America, including an examination of roles and associated risk tolerance and the librarian/officer division of labor observed in Canada. Finally, it explores points of tension and provides academic copyright librarians with suggestions for navigating their professional environments and finding a voice in the evolving ecosystem of information management and intellectual property rights.

## **An Uneasy Coexistence: Copyright Legislation and the Values of Librarianship**

Copyright legislation often responds to technological developments by either reinforcing rights perceived to be under threat or decriminalizing practices that are unenforceable. Attempts to reform the regime to reflect such changes will unavoidably place creators, users, and rights holders at odds. These conflicting interests are difficult to balance. Just like the printing press and commercial bookselling industry eventually prompted the adoption of the Statute of Anne in 1710 by the Parliament of Great Britain,<sup>1</sup> the pressures of the digital age, with its technologies making reproduction and transmission of works easier, have led to significant amendments to copyright laws in North America.

In his overview of copyright's evolution in Canada and the United States, Guindon observed that the notions of public good and balance that were at one point central to copyright law have eroded as rights holders have

continued to emphasize the “property” aspect of original creations by demanding extensions of copyright duration and scope, often to the detriment of availability, accessibility, and usability.<sup>2</sup> As much as the Copyright Act of 1976 codified the doctrine of fair use in the US and was thus a significant development in users’ rights, the extension of the copyright term to life plus seventy years in 1998 swung the pendulum back to rights holders, and not just in that country. US legislation is increasingly considered the standard in the global and digital environment and is pushed for in international trade agreements, even though the Berne Convention only requires a term of at least fifty years after the death of the author (the current term in Canada). As Guindon argues, such term extensions “no longer [serve] primarily as an incentive to creativity. Rather [they are] a trade instrument, a tool for content-owning corporations to insure [sic] maximum profits over a long period.”<sup>3</sup>

Indeed, as large multinational companies—many of them based in the United States—have increasingly become rights holders of copyrighted works, terms have been extended, often through lobbying efforts. Disney’s emphatic support for the Sonny Bono Copyright Term Extension Act of 1998 (nicknamed the “Mickey Mouse Protection Act”) is one such example.<sup>4</sup> Extending or reinstating copyright protections reduces access to resources that could otherwise be used freely to create new works and share knowledge. One instance of such a reduction in access is the digitization of analog public domain works by for-profit providers that then charge for access to the digital versions. This model creates a barrier between users and works that should be part of the public domain, even though the value added by the provider has nothing to do with the substantial transformation of the work itself.<sup>5</sup> By applying a software licensing model to digital information, content providers are curtailing long-term access to content in a way that copyright legislation does not. In return for this temporary access, libraries are expected to monitor use and enforce the terms of the license, a burden that is not required with print collections. This can test the limits of professional duty as it entails a redefinition of the legal relationship between an educational institution, its library, and its students.<sup>6</sup>

Meanwhile, the dominant discourse in modern librarianship is fueled by democratic values that privilege access and openness in connecting people with published works, which is closely associated with the “public good” purpose of copyright law.<sup>7</sup> These values contrast with the tradi-

tional gatekeeper role of librarians that was arguably more in line with publisher demands for a more enclosed copyright regime. Statutory limitations around usage and reproduction create a certain level of economic viability for the rights holder. Historically, in libraries this protectionism was visible in the stewardship of rare and expensive works, whereby some level of patron access was permitted but the artifact itself was protected. The enclosure mechanism was physical but the resulting protection of works similar in that use of the work was restricted to those privileged enough to have a means of access. This librarian as protector role remains relevant with rare books and archival materials today,<sup>8</sup> but under the electronic subscription model, most librarians have largely allowed digital rights holders to become the gatekeepers of digital content through license agreements and authentication. The evolution of this protectionist approach can be observed in conservative decision-making, policies, and practices regarding copyright in universities and colleges. While this is in line with the information society discourse and its commodification of knowledge, it is in sharp contrast with discourses in other academic circles, namely innovation and serving the greater good.<sup>9</sup>

Academic institutions can be non-judicial places of contestation for copyright issues and their attendant tensions. This is especially true when new technologies test the limits of copyright law while simultaneously advancing specific user provisions. Institutional fair use or fair dealing practices that do not take advantage of relatively liberal user rights affirmed by court decisions is one example. In her comparison of institutional fair dealing policies in Canadian universities with the Supreme Court of Canada's decisions and the application of fair use in the United States, Di Valentino demonstrates that the post-secondary education sector in Canada is more conservative than it needs to be in its application of fair dealing. By defining a "fair amount" as ten percent or less of an entire work, educational institutions that engage primarily in this type of arithmetical analysis tend to overlook the specific facts of a "dealing" and the holistic approach outlined by the Supreme Court of Canada. Such a "course of action essentially disregards fair dealing or gives the impression that it is a last resort rather than a user's right."<sup>10</sup> This overly cautious interpretation of copyright law means that other rights are also underused.<sup>11</sup> For example, hesitancy to rely on exceptions created for libraries, archives, and museums can unduly restrict access

to format-shifted media. While streaming technologies are available and can be limited to serving educational purposes, most libraries will opt to provide access to migrated digital media locally instead of taking advantage of new platforms and applications, disadvantaging users and undermining the role of the library.

Copyright librarians, whose work is informed by the values of librarianship, the needs of content users and creators, and case law, can find more risk-tolerant approaches to be at odds with a risk-averse institutional position that relies on restrictive agreements with content providers, blanket licenses with a copyright collective society, and/or conservative interpretations of fair dealing/fair use. These competing pressures can have a chilling effect on all librarians, most of whom already perceive copyright as overly complicated with legal jargon and contradictory, rapidly evolving case law. Many librarians and other library staff are worried about providing inaccurate or outdated information or being held liable for the actions of library users. Thus, they may refer queries to specialists without attempting to respond.<sup>12</sup> This perception of copyright as something so complex that it can only be mastered by a few specialists undermines the education and outreach efforts of copyright librarians.<sup>13</sup> It presents copyright as specialized knowledge of limited use outside the classroom when in reality copyright literacy is a valuable life skill for everyone.<sup>14</sup>

Librarianship and copyright practices are under pressure from commercial interests and have arguably evolved in opposite directions, the former tending toward openness and embracing technological change and the latter becoming increasingly protectionist in response to changing technologies. This tension is at the crux of the copyright librarian's contradictory roles in what is still considered a new area of librarianship.

## A Recent History of Academic Copyright Librarianship in North America

The overlap between library services and copyright is significant and longstanding and is demonstrated in the Canadian Copyright Act provisions dedicated to libraries (e.g., sections 30.1-30.3, added in 1997 as part of a second phase of copyright reform) and US provisions of the

Copyright Act of 1976 (e.g., most notably via Section 108's so-called "library provisions"). While the vast majority of library resources are now available electronically and reproduction and sharing no longer take place primarily inside library walls, librarians continue to fulfill the role of copyright advisor on university and college campuses. The digital age and its associated licensing models demonstrate the need for copyright-literate librarians who are aware of the implications of electronic content acquisition and access and are also able to educate the academic community rather than simply enforce copyright compliance.<sup>15</sup>

While in-house legal counsel or external lawyers are often still managing risk at the institutional level, day-to-day copyright management has increasingly been handled by librarians or other copyright specialists with a library background.<sup>16</sup> For faculty and staff, however, "librarians have always been the de facto copyright advisors"<sup>17</sup> because legal counsel has been largely unavailable for routine copyright queries. What has changed is the complexity of managing copyright compliance in the digital age, the effort to educate university communities about copyright, and the visibility of librarians in such roles.<sup>18</sup>

Copyright librarianship is still an emerging subspecialty of the profession with dedicated copyright librarians found mainly at larger institutions. Copyright officers appeared first, at least as early as the mid-1980s in the US,<sup>19</sup> but between 2006 and 2013, just over 6 percent of library-related postings on the ALA JobLIST (covering the United States and Canada) mentioning copyright as an area of expertise had "copyright" in the job title. Throughout this period, there was an increase in the number of positions requiring knowledge of copyright and licensing.<sup>20</sup> In May 2017, there were thirteen librarians in 215 Canadian universities and colleges who had both "copyright" and "librarian" in their job title.\*

More broadly, the number of copyright specialists is increasing: there were only four copyright positions identified in Canadian universities in 2008, but by 2015, that number had reached twenty-seven—a 575 percent increase over eight years.<sup>21</sup> More often, the copyright function is under

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\* Nine universities out of 94 (9.6 percent) and four colleges out of 121 (3.3 percent). As of May 29, 2017, based on the library staff directories of member institutions of Universities Canada (<https://www.univcan.ca/universities/member-universities/>) and Colleges and Institutes Canada (<https://www.collegesinstitutes.ca/our-members/member-directory/>).

the purview of the library and these types of questions are handled by a copyright officer/advisor/specialist or are added to the portfolio of a librarian specializing in scholarly communication or licensing, a subject librarian or a library technician.<sup>22</sup>

In the Canadian context, the catalyst for this increase in the number of academic copyright librarians (or at least in-house copyright specialists beyond a clearance officer administering a blanket license) is attributed in large part to a combination of Access Copyright's 1,300 percent tariff increase for its educational license for universities in 2010 (justified by the digital shift in the production and reproduction of copyrighted works),<sup>23</sup> multiple Supreme Court of Canada decisions related to fair dealing as a user right, Copyright Act amendments (both in 2012), and a general shift toward a reliance on library-licensed e-resources.<sup>24</sup> Reflecting those recent developments, almost half of respondents in Patterson's survey of copyright specialists in Canadian universities had less than five years of experience in the role, and three-quarters of respondents' institutions placed copyright management within the purview of the library.<sup>25</sup>

At the same time, the use of digital works and associated practices became more commonplace in libraries. Open access publishing, the use of Creative Commons licenses, and online course delivery increased the need for more specialized copyright expertise in academic institutions, creating demand beyond the support that could be offered by legal counsel. The increasing demand for copyright support in libraries seems to suggest "a sensitivity to academic freedom and the advancement of knowledge" on the part of academic authorities and an implicit recognition that librarians have something to contribute to a fair and balanced application of copyright.<sup>26</sup> Copyright librarians appreciate university culture in addition to the law and its practical applications.<sup>27</sup>

### *Expectations and Contradictions: From Compliance Officer to Activist*

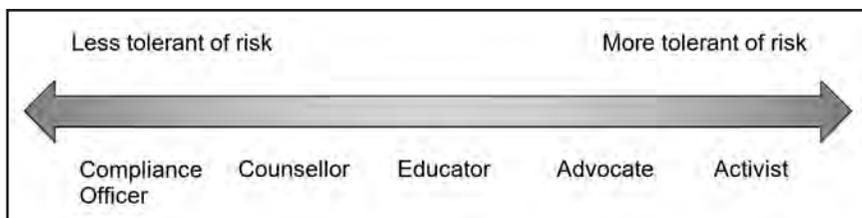
In her 2016 book, Frederiksen defined the copyright librarian as "someone who can serve as an intermediary between information producers and consumers; someone who is knowledgeable about the law and pro-

viding access to information; someone who is well positioned within an organization to answer questions about copyright and provide accurate, relevant, and timely answers, as well as assistance and guidance when needed.”<sup>28</sup> What distinguishes a copyright librarian from other copyright specialists is the emphasis on guidance and education. While they may be involved in copyright clearance activities, requiring a copyright librarian to play the role of “copyright police” is an underutilization of a librarian’s skills and an unduly restrictive interpretation of their role.<sup>29</sup>

Like librarians working in law, copyright librarians are expected to provide relevant information but not legal opinions. Thus, librarians need to stay on top of changes in legislation and policy and engage in some form of risk assessment.<sup>30</sup> While there is clearly a big difference between providing legal advice and sharing knowledge based on the assessment of a situation, the expectation of strict neutrality when sharing information is also challenged in the library and information studies literature.<sup>31</sup> That is, all information is produced and framed by a range of socio-political factors. Librarians are trained to understand and think critically about these factors in their role as information literacy specialists, including their own biases about copyright. As with all professionals, their own experiences will influence their work, and librarians who are also actively creating cultural works (e.g., writers, musicians, artists) may be more understanding of the protective role of copyright compared to colleagues who are less active in this type of output.<sup>32</sup>

In general, academic institutions provide copyright services to reduce the risk of legal action, usually through compliance or educational programs or a combination of both. How these services are structured is a reflection of institutional culture and strategy. In addition, personal attributes and formal job descriptions can determine where these positions land on a continuum between “compliance officer” and “activist.” Where a librarian, officer, or lawyer sees themselves on this risk-tolerance continuum can deeply influence their approach to the work.

As illustrated in figure 5.1, compliance officers are associated with the least risk tolerant, or most conservative, position on the continuum. The primary objective of this type of role is to comply with narrow interpretations of legislation, as reflected in auditing, oversight, or clearance responsibilities focused on preventing infringement instead of explaining



**Figure 5.1.** Risk tolerance continuum and associated roles for copyright specialists.

the reasons uses might be problematic for rights holders. It is an approach that generally lacks flexibility and is informed by a limited understanding of the complexities of copyright legislation and jurisprudence. A copyright office following this approach will likely adopt procedures for its user community that include specified allowable actions and consequences for deviation. At an individual level, some librarians may engage in the “copyright police” mindset, but these types of clearance or compliance responsibilities are more often completed by other staff members.

Institutions that are clearly uncomfortable with even a minimal level of risk may be more inclined to subscribe to a blanket license from a copyright collective society.\* This approach to copyright education and outreach is often limited to informing the community of what is allowed under the license and is sometimes based on the presumption that copyright is too complex to be understood and applied by the average person. A university adopting this approach may indeed minimize risk by limiting reproduction to a range of activities under specific conditions, but it can also discourage a more nuanced understanding and flexible interpretation of copyright law in its current state and in future iterations.

Officers and librarians with a deeper understanding of copyright law who can work with a slightly higher level of risk (e.g., where not all copyright-related activities are systematically audited) will tend to engage in

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\* It is important to note, however, that factors other than a low risk tolerance also come into play when an organization adopts a blanket license approach. For example, the size of the user population is often central to such a decision. When the price of a license issued by a copyright collective is based on the number of full-time equivalents (FTE) within an organization, it can make financial sense for an academic institution of more than 40,000 students, faculty, and staff to create two or three positions to manage copyright internally rather than pay more than \$1 million in fees every year. However, a much smaller institution with a community of fewer than 5,000 people may not be able to justify the creation of a complete copyright apparatus when purchasing an annual license would amount to \$150,000.

one-on-one consultations to counsel creators, users, rights holders, and administrators about specific scenarios. Their (non-legal) advice about an appropriate course of action can still be overly cautious, risk-averse, and informed by strict standards of compliance, steering clear of actions that could be interpreted as advocacy.<sup>33</sup> These individual counseling opportunities can be informed by education and outreach efforts on campus.

Getting closer to the center of the continuum are librarians for whom copyright literacy is their main responsibility, which includes a strong focus on education and outreach. Morrison and Secker observed that UK information professionals engaging in copyright education “find their knowledge about copyright...empowering and the user makes the ultimate decision about how to act, but from an informed perspective.”<sup>34</sup> Copyright librarians at the midpoint of the continuum already possess information literacy skills and engage in copyright literacy as a logical extension to educating their campus communities about how to ethically gather and use information.<sup>35</sup> They are also less likely to be called upon only when a situation needs to be “fixed” or when someone is seeking “approval” for a particular approach, although they may still emphasize compliance in their teaching.<sup>36</sup> Institutions where a copyright librarian’s focus is education and outreach may be more likely to adopt guidelines to offer their user community tools that encourage autonomy rather than strict policies. However, these librarians must have advanced knowledge and professional confidence. This kind of outreach also requires librarians to discuss the political, economic, and cultural ramifications of copyright law and “to articulate the intricate web of interests that exists between information creators, producers, aggregators, intermediaries, and consumers.”<sup>37</sup>

Educating faculty, students, and staff about copyright can also inform and inspire advocacy work. Librarians often describe themselves as service-oriented but also change-focused.<sup>38</sup> It is a self-identity that serves copyright librarians well as they discover imbalances in the application of copyright law at their institution or in the law itself. Librarians have the skills to connect people with the resources they need, a practice that provides ample evidence for public domain advocacy, as well as making arguments to protect the rights of both creators and users. Being an advocate can include promoting fair dealing/fair use as a right (not just a defense

or a privilege) or developing programming around the use of Creative Commons licenses and the development of OER. For some, advocacy work could include encouraging their user community to be less dependent on third-party copyrighted content by relying more on hyperlinking and open access content, for example.

Finally, at the more progressive end of the continuum are activists who agitate for change and take their efforts beyond their institution and the academic sector. Activists may, for example, challenge the need for an exclusive property right to incentivize the creation of new works. They might push for copyright reform and intervene in the legislative process through letter-writing campaigns, petitions, and participation in public consultations. They may also join forces with groups with similar concerns, or write on the topic for a wider audience.

The roles on this risk tolerance continuum are not mutually exclusive and, in some cases, may reflect the evolution of the responsibilities assigned to or taken on by copyright librarians in the course of their careers. They can also help librarians reflect on how their beliefs and practices change over time, especially as they learn more about copyright law and practice.

### *Copyright Librarians and Copyright Officers: How Are They Different?*

Copyright officers and librarians often work side by side in larger academic institutions and can share basic tasks. However, it is important to recognize and communicate the differences between the two positions, as the institutional understanding of these roles can frame the profile and effectiveness of the service. While official titles do not always accurately reflect individuals' copyright responsibilities, there are two subgroups of recognizable copyright specialists who appear to face different realities despite some overlap in their roles and potentially their training.<sup>39</sup> In her 2016 study, Patterson noted that in the Canadian context “copyright officer” was the most common title for non-librarian academic copyright staff but that there was a sense of dissatisfaction with the label because of the “policing and punitive connotations of the word ‘officer,’” which can add to the discomfort of individuals who already feel intimidated by copyright.<sup>40</sup> An “officer” is more likely to appear as the authority on the

matter, with the power to deny permission or initiate action on an infringement claim. In risk-averse institutions, this can give officers higher standing and respect than their librarian counterparts.

The role of librarians may be viewed in a more positive light in the academic community than that of copyright officers, even if the specifics of the librarian's role are not universal or agreed upon, including by those in the profession itself. While some librarians maintain a gatekeeper persona, most academic librarians today are associated with service, education, and access to information. Thus, copyright librarians can be perceived as more approachable than officers and are more likely to be known around campus from the educational programming they offer to faculty and students. In 2007, Vesely observed that librarians possess the “skills...to get to the question behind the question, locate a copyright owner, or find high-quality but less expensive alternatives to copyright-protected works,” and to interact with administrators, faculty, students, and staff while adhering to “a tradition of intellectual freedom combined with an ethical use of information, balancing respect for owner's rights and promotion of user's rights.”<sup>41</sup> A decade later, Frederiksen made a similar observation: What makes a good reference or research librarian is also what makes a good copyright specialist.<sup>42</sup> As Frankosky and Blair put it, “The legal aspect of copyright is paramount, but if no one approaches to ask for advice, you're working in a vacuum. It's the training, guidance, and awareness aspects of the role that make it come alive. These are the skills and knowledge that the librarian brings to the position, not the attorney.”<sup>43</sup>

Both officers and librarians can manage permissions services and related staff, answer questions about copyright, often provide training sessions, and help shape institutional policy and procedures. Librarians are usually also expected to make these contributions as members of the academy and in ways that are informed by their academic work in library and information studies. Similarly, librarians answer questions but are also trained to actively engage users through a reflective reference interaction. Their training sessions can become critical copyright literacy sessions, a responsibility and a privilege not normally available to copyright officers. Copyright librarians are expected to embody the values of their larger profession—librarianship—and they do so through their public service responsibilities, conference presentations, research papers, and advocacy work.

## Navigating the Tensions

Copyright librarians working in academic libraries provide services and expertise that fill a need: to educate the campus community about the rights and limits associated with copyright law. They wear many different hats and may, at different times, consider themselves to be counselors, educators, advocates, and sometimes even activists. In many institutions, copyright librarians can face tensions when working in an environment lacking in sufficient administrative and collegial support. This tension could result from the recent evolution of the role of the copyright librarian from a part-time or side position to a full-time specialist or the reluctance of others to view copyright literacy programming as an important complement to other services. For example, subject librarians that are willing to integrate academic integrity or research data discussions (or other facets of the scholarly communication ecosystem) into their information literacy sessions may hesitate to include even basic information about copyright, either because they do not feel knowledgeable enough in the subject or they fear that adding such content will confuse students and faculty. Similarly, administrators may be hesitant to accept any suggestions (from copyright librarians and support staff alike) without input from legal counsel. The typical role of legal counsel, however, is to minimize the institution's exposure to legal risk, not to ensure that the mandate of the university is realized. Their proclivity to avoid manageable levels of copyright risk can prevent libraries from realizing their mission. This situation, known as mission risk, can result in loss of collections (e.g., through degradation without reproduction) and reduced access to materials (e.g., not making preservation copies of at-risk materials).

Finding a space within an organization to recommend, teach, persuade, and create change will look different in different environments. The roles of counselor, educator, advocate, and activist are interdependent and dynamic. Despite the relative ease of mapping these on a continuum, in practice, they are far from linear. For this reason, this section organized by type of service offers ways to navigate these tensions.

### *Literacy Programs and Services*

Copyright literacy shares its precepts with information literacy, which

includes “an understanding of how to use and share information and the ethical implications of doing so.”<sup>44</sup> More specifically, ACRL’s *Framework for Information Literacy for Higher Education* refers to information “as a commodity, as a means of education, as a means to influence, and as a means of negotiating and understanding the world,” as something with value.<sup>45</sup> The production and dissemination of information cannot be divorced from the larger legal and socioeconomic context. At a minimum, information-literate individuals will recognize that even “free” information should be attributed to its authors. At a more advanced level, they will be aware of their rights and responsibilities as creators and users of information, while experts will understand that because information has value, it has the power to effect change but also to marginalize.<sup>46</sup>

Many copyright librarians offer copyright literacy sessions to help students, faculty, and colleagues understand copyright issues. This includes identifying these issues and related policies as well as critically evaluating current practices and policies. For example, instead of simply presenting an institutional copyright policy (e.g., fair dealing/fair use guidelines with a copying ceiling of 10 percent of a work), a librarian using a critical lens might compare the policy with those at other institutions or evaluate its interpretation of existing law (e.g., no hard percentages in fair dealing provisions, case law that allows for copying an entire work in some cases).

Copyright literacy programs can and should include curriculum integration where possible. This helps build librarian-faculty relationships that can evolve into making the classroom a space for both discovery and empowerment. Asking art students, for example, to consider how they constructed one of their own pieces and how they would like others to use that work can lead to useful discussions about ownership and licensing. Conversations about case law and legislation can inspire students and faculty to become more involved in legislative reviews and academic legal conferences. Sharing academic writing about copyright can also be useful. For example, asking graduate students to unpack Guindon’s quote, “The recent evolution of copyright is biased in favour of rights-holders at the expense of the public domain and the common good”<sup>47</sup> can help expand copyright awareness. One does not have to be a legal expert to have a useful conversation about copyright. After all, librarians are trained to help learners discover and develop knowledge on their own, not to tell faculty and students how they are supposed to feel about or interpret copyright law.

## *The Praxis of Scholarly Communication*

Copyright librarians are uniquely positioned to guide academics through copyright issues inherent in the practice of scholarly communication. Workshops for faculty and graduate students focused on author rights and publisher agreements can increase awareness about statutory rights and help academics make informed publishing decisions. For example, comparing corporate profit figures with author remuneration realities can inspire a conversation about alternate publishing strategies, including requests for rights retention clauses in publishing agreements.

Other areas in the scholarly communication ecosystem that are ripe for copyright conversations, especially for policy work at the institutional level, include open access publishing, the shift to open educational pedagogy, and the development of OER. It is difficult, if not impossible, for any of these platforms to function effectively with an “all rights reserved” approach to copyright. However, academics may not understand the breadth of their rights under their employment contract and, if they retain their copyright, the power of open licensing and how and when to use it to expand the access, visibility, and impact of their work.

The opportunities for working across campus and at the association level on open education and open access projects continue to unfold. Where and how copyright librarians contribute to these efforts will be a function of institutional culture and professional confidence. On many campuses, these initiatives are at early stages or low penetration levels, but it is clear that funder mandates and the ubiquity of digital access are trends that are likely to strengthen. This presents an opportunity for advocacy work that could inform policy and change practices.

## *Policy Interventions*

The inclusion of librarians in policy decision-making processes varies by institution and association. The more risk-averse these organizations are, the less likely they will be to listen to relatively progressive voices that bring evidence about changing practices. For example, based on the fairly

widespread acceptance of relatively conservative fair dealing guidelines, conservatism appears strong on many Canadian university campuses. Building an evidence-based platform for incremental change is one way to work within these scenarios.

Public service librarians with copyright training are uniquely positioned to gather evidence about how creative works are used and created. Stories gleaned from classroom and para-classroom conversations, focus groups, and consultations should be used to inform policy. For example, if librarians recognize that most students are accessing course readings via licensed library services and not their print collections, then related copyright policies should be amended to identify this established practice. In Canada, this shift in use was one of the factors that influenced the widespread abandonment of the Access Copyright (collective society) blanket license. If this evidence had been ignored and blanket licensing agreements maintained (despite steep increases in cost), the dismissal of evidence from the classroom would have been very costly.

Liaison librarians also have opportunities to observe changes in instructional practices. For example, the removal of VCRs and DVD drives from classrooms can lead professors to find online versions of dubious origin instead of asking the library to obtain versions of the films that are available for streaming. Developing supportive practices can help prevent unintentional infringement scenarios. Policies that are not based on current expectations and practices can become outdated and irrelevant, making adherence less likely. For these reasons, policy-making bodies should receive and respond to input from people who actually work with the subject of the policy. In the academic copyright context, this means people who can directly observe and report back on how end users (authors, students, and faculty) are using creative works.

### *Contributing to Legislation and Case Law*

Institutional and association copyright policies and positions are necessarily informed by legislation and case law. It is easy to forget that these systems were designed to be interactive and ultimately support democratic practices. Copyright librarians have opportunities to contribute to legislative reviews, ideally through institutional submissions, but also

by working with their professional associations and by making personal statements via public consultations. This work can take many forms, including in-person attendance at government-sponsored and advocacy groups' town halls and roundtables, writing opinion pieces for respected news providers, writing articles for academic and association periodicals, presenting at conferences, and encouraging colleagues to do the same. This type of professional work can encourage and support conversations and contributions beyond home institutions and affect change.

Amicus briefs and similar interventions into ongoing court cases present a higher threshold for involvement, to be sure, but are opportunities for input into the democratic process, especially at a group or association level. Recently, a group of US librarians and copyright experts submitted a letter to counter the proposal to move the Copyright Office to the legislative branch and remove the nomination of the next Register of Copyrights from the hands of the Librarian of Congress.<sup>48</sup> The US-based Library Copyright Alliance works with library associations to inform their amicus briefs, letters, and reviews of proposed legislative changes. While Canada does not have an equivalent umbrella organization for copyright advocacy, its library associations and allied organizations have provided submissions to Copyright Board and court proceedings on related issues.

All the activities noted in this section are informed by a librarian's employment status. Holding tenure and being able to rely on the protections offered by strong academic freedom provisions can make this work easier and, in some cases, possible. Librarians' professional responsibilities include preserving and strengthening their voices at work and in their broader communities.

## Conclusion

Copyright librarianship and its practices are shaped by legislative reforms and case law and also by the divergent and changing priorities of a wide range of stakeholders. Navigating the underlying tensions requires a commitment to fair observation and equitable solutions. Librarians have specialized knowledge in a challenging and dynamic area of study: copyright. They can support the development of new creative works and are invested in the dissemination of those works for the public good. Copyright law

provides the legal framework that informs librarians' roles in one area of this information ecosystem, but how librarians share and reuse creative works, both personally and professionally, is informed by their past experiences, value systems, and socio-political understanding of place. Workplace interpretations of copyright will vary, as they are informed by institutional risk tolerance, culture, and the broader and ever-changing milieu of copyright case law and legislation.

Legislative changes in the past few decades have often weighed in favor of rights holders' protections, while case law has at times provided users with balancing safe harbors. As the complexity of the copyright landscape has increased, so too has the number of academic librarians assigned to this nascent subspecialty. Indeed, this chapter is a result of reflections and readings made by two librarians finding their space in this new role.

A continuum of roles situated by risk tolerance can help librarians consider where and how they might contribute in their classrooms and broader communities. Should librarians act as counselors, educators, advocates, or activists or perhaps a combination of these roles, depending on issue and impact? The answer might change over the course of a career and as the broader discourse continues to evolve. However, the use of reflective and active practices in the classroom at the institutional level and in the larger library community will remain relevant. These practices will resonate with students, colleagues, and other policymakers only if they recognize and challenge the underlying tensions between content creators, users, and rights holders.

This is difficult and important work, necessitated by the broader attempt to balance innovation and the public good with an incentive to create. Hopefully, the evolution of this aspirational legal framework will include more librarians' voices as the balancing mechanisms of copyright should be informed by evidence from both user and creator communities.

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# Why Every Librarian Should Know About Copyright: Creating Copyright Training Opportunities for Librarians at Your Institution

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## Introduction

Librarians encounter copyright-related queries and scenarios every single day and, increasingly, copyright and legal scenarios present themselves to librarians and libraries in new and complex ways. From questions of fair use to complicated licensing contracts, librarians are being asked to interpret and navigate copyright-related scenarios that require knowledge and expertise. Because copyright legal interpretations often are not straightforward, many library and information professionals may feel

uncomfortable or unqualified to traverse nuanced layers of copyright scenarios. With this in mind, training and education opportunities should be key components to assisting librarians in confidently addressing complex legal issues at the intersection of copyright and information literacy at their respective institutions.

This chapter addresses the importance of copyright training and education and aims to provide case studies and scenarios that demonstrate effective opportunities for engaging librarians in various library departments in issues of copyright. In particular, it will explore the University of Central Florida's (UCF) unique intersection between subject librarians and scholarly communication, as well as the Office of Scholarly Communication's efforts to provide internal copyright training to librarians across the institution.

## Why is Copyright Training Important?

Copyright is an implicit part of the roles and responsibilities of both librarians and library staff, and they encounter such issues on a daily and frequent basis. Whether it is ascertaining copyright permission for materials borrowed or loaned through interlibrary loan or purchasing public performance rights when a film is acquired, copyright presents itself in various ways throughout the library's distinct units, departments, and offices. In the digital landscape in which libraries operate, it is realistic to expect that all librarians encounter and negotiate copyright in some way on a regular basis.

Because this is an area so intrinsically tied to various aspects of librarianship, having a basic knowledge and understanding of copyright is particularly important. This is certainly not to say that all librarians must be experts on the topic of copyright, but rather to suggest that librarians should feel they have a general understanding of the concepts and challenges associated with copyright law. In general, presenting librarians with training opportunities allows them to broaden their knowledge, depth, understanding, and comfort level on such topics.

Understanding the lack of comfort that many librarians express with copyright law has been the subject of multiple broad studies in which sur-

veys have been administered to librarians and library staff internationally. Studies have been both qualitative and quantitative in nature. Most recently, Morrison and Secker conducted a study using phenomenography, a qualitative research method that looks for variations of experiences, to explore the professional experiences of academic librarians and library staff in the UK with copyright.<sup>1</sup> Of particular interest in the context of this chapter is the study conducted by Charbonneau and Priehs which surveyed academic librarians about the need for copyright training and awareness locally within institutions.<sup>2</sup> In addition, a study conducted by Cross and Edwards explored the curriculum and faculty of ALA granting degree programs to determine if there were deficiencies at this core level.<sup>3</sup> Each of these particular studies, as well as others on the subject, has indicated that there are several core factors that affect and preempt the need for robust copyright and intellectual property training.

Perhaps the most notable factors that precipitate the need for copyright training for librarians include the following: (1) lack of copyright curriculum in degree-granting programs, (2) lack of formal and informal training opportunities locally at library institutions, and (3) changes in copyright law and legal interpretations. As noted by the Cross and Edwards study, a large percentage of ALA degree-granting institutions neither require copyright or legal training as a part of a student's degree requirements nor offer extensive training with regard to copyright and intellectual property.<sup>4</sup>

Because most library and information science degree-granting programs do not incorporate copyright training in a significant way, it is a likely assumption that many librarians enter into the profession without a solid foundation of copyright knowledge. With this in mind, libraries should aim to provide some formal or informal copyright training for the librarians.

However, as the studies we have discussed illustrate, copyright training is often lacking at many institutions. Compacted with ever-changing copyright law and legal interpretations, it is little wonder that many librarians feel uncomfortable and unqualified to address copyright-related scenarios. Additionally, it is important to note that law is constantly evolving and even librarians with training can use updates as case-law is further developed.

## Defining Copyright Training

A library can and should provide the following sorts of training to librarians: general education, assistance in addressing specific copyright-related situations, and practice using common copyright scenarios. However, like copyright itself, addressing training and education opportunities may not be as straightforward as it may seem at first glance. Questions may arise surrounding training best practices, areas of responsibility, job descriptions, and legal implications and responsibilities. Training for librarians may come in many forms, and some training opportunities may be best served by using external opportunities, like Copyright X through Harvard Law School,<sup>5</sup> the Copyright for Educators & Librarians MOOC through Coursera,<sup>6</sup> the Copyright Certificate Program through Copyrightlaws.com,<sup>7</sup> or workshops offered through a local consortium. In many cases, libraries choose to create internal training opportunities that rely not only on internal resources but also on externally developed materials to best serve their librarians. Programs, such as Copyright First Responders created by Harvard Library's Office for Scholarly Communication,<sup>8</sup> can be useful models when creating internal training opportunities locally at your institution. It is important to note that no one particular type of model is the most effective, but rather, each library should focus on providing opportunities tailored to its institution and librarian responsibilities.

In the context of this chapter, it is important to define and identify key aspects and attributes that make up copyright training—both external and internal to the library. All of these allow the library, librarians, and/or library units conducting such training the ability to identify and communicate with librarians the goals, which will be explored more fully in the next section, and expectations surrounding training opportunities. Goals and expectations for training sessions are critical to define both for successful implementation and completion of training.

The most important factor to consider when crafting a copyright training module is the focus of the training or its scope. Copyright is both broad and complex; interpreting it can produce lengthy and nuanced responses and explanations. Defining training sessions or workshops by a particular aspect of copyright or focusing on a specific and narrow topic allows both those conducting the training and those attending a chance to fully

explore and address the topic at hand. For instance, creating a “What is Copyright?: Learning the Basics,” session might explore the core fundamentals of copyright, while another session might focus on specific exceptions to copyright protection, such as the section 108 exceptions for preservation, archives, and interlibrary loan.<sup>9</sup> Providing session participants with an expectation regarding the scope of a particular copyright learning session is an important method of reinforcing concepts. Additionally, using instructional scaffolding as a pedagogical tool to provide copyright training in this manner provides support and reinforcement in a meaningful way. Scaffolding, in particular, provides an environment where new skills can be taught and learned in contextualized, real-world environments.<sup>10</sup> For instance, one cannot fully understand the limitations on copyright or copyright exceptions without first understanding the core rights that copyright provides to authors and exploring these concepts through scenarios faced daily by librarians is an effective way to provide training using scaffolding.

Another aspect of copyright training is resource support. Providing librarians with resources they can use both during and after their training helps ensure that staff feel comfortable and confident that they have the tools needed to provide copyright support and/or make copyright interpretations in their areas of responsibility. This can be as simple as a website or research guide with copyright resource links, policies, and other important information; or it could be something more complex, like a wiki or internal training manual with frequently asked questions and sample scenarios. The goal of any copyright training for librarians should be to provide as much support as possible throughout the training process while providing resources post-training to facilitate copyright queries and scenarios faced by librarians on a daily basis in their respective areas.

## Goals of Copyright Training

As copyright training is both developed and defined locally at an institution, libraries should be aware of the importance and need to set goals for such training opportunities. Goals are important not only for the attendees but also the organizers who may have benchmarks defined for measuring the success of the training, as well as providing deliverables

for attendees. For instance, the following goals should be considered when implementing copyright training and apply to training conducted internally at one's library or externally through another library or organization.

1. **Gaining an understanding of the basics of copyright law (and the spirit of the law):** This may be the most critical goal for any copyright training. Not only should the attendees gain an understanding of the basics of copyright law, or a particular aspect of copyright, they should also understand what the spirit of the law may imply. Copyright law and its interpretation are complex. Helping librarians understand this particular nuance is deeply important in addition to understanding the fundamentals.
2. **Understanding exceptions:** Copyright law provides exceptions. For instance, the face-to-face teaching exemption aids in serving the educational needs of faculty and students. Understanding these exceptions helps librarians assist faculty navigating copyright in both face-to-face and online teaching environments and understanding the ways faculty can use copyrighted materials in these different environments and learning platforms.
3. **Understanding the right to fair use:** Assisting librarians with understanding what fair use is, how it can be applied, how to navigate the four fair use factors, and best practices for evaluating copyright risk is particularly critical in academic libraries. This is also important in helping librarians and faculty better understand how to use copyrighted material in limited fashions without fear of litigation. In particular, the limitation on liability for librarians employing good faith fair use determinations provided in Section 504(c)(2) of the Copyright Act is an important aspect of the law to acquaint librarians with.<sup>11</sup>
4. **Learning to identify “bad” copyright information:** Copyright information and interpretations are widely available both online and in the literature on the topic, and this often leads to “bad” copyright information—or, rather, misinformation. This misinformation may confuse matters for those already uncomfortable with the topic. Providing copyright resource support, as previously mentioned, can help mitigate using such information, as well as assist librarians with the skills needed to identify appropriate

resources with excellent information as opposed to those that provide misinformation.

5. **Instilling confidence:** Another important goal is to instill confidence in librarians attending training sessions. Copyright can be overwhelming to even the most skilled legal experts. Helping assuage fears and perceptions leads to confident librarians who feel comfortable navigating copyright and referring to experts when they feel less confident addressing a query or scenario.
6. **Creating copyright advocates:** Often, we might feel that copyright is a burden or prompts legally precarious situations; however, helping librarians understand that copyright is a right and that exceptions and aspects of copyright law, such as fair use, exist to use copyrighted content in limited fashions under certain conditions can and should be utilized.

By providing specific goals and expectations during copyright training, librarians can engage in this type of training with the knowledge that they will have both support during and after the training process, as well as benchmarks to help throughout the process.

## General Copyright Training Opportunities

With an understanding of what copyright training is, why it is important, and the types of goals or benchmarks that can be achieved during and after training, those conducting such training can begin to frame specific training opportunities. Perhaps the first decision, as noted previously, is to determine if the library will provide internal, external, or a combination of both training opportunities with respect to copyright and intellectual property. This decision should be based on institutional needs and consider financial needs as well. For libraries just beginning to explore copyright training, it may be best to approach this using either external opportunities or rely on a combination of both internal and external training. Those institutions with experts in copyright and copyright law may want to consider creating their own internal training opportunities, such as presentations, or as will be discussed in the case study, discussions or brown bag lunch opportunities.

## Case Study: The University of Central Florida

As we explore the importance of copyright training, as well as potential training opportunities that libraries can implement at their respective institutions, it is helpful to examine a successful example of copyright training development and execution. The University of Central Florida (UCF) has created a unique model incorporating scholarly communication responsibilities into a subject librarians' annual assignment and position description. This emphasis on scholarly communication has led to various opportunities and strategies for successful training in copyright topics and issues. One such area has included a brown bag lunch series developed from the Office of Scholarly Communication to answer common questions received from library staff and faculty and to provide additional training on specific topics, such as fair use.

### UCF Subject Librarians and Scholarly Communication Outreach

In 2013, the UCF Libraries' Research and Information Services (RIS) Department initiated a new subject librarian program to increase positive impacts on faculty research, teaching, and student learning. The new program strongly encouraged each subject librarian to engage in scholarly communication outreach to the faculty and students in his/her assigned academic departments and programs.

Subject librarians use both face-to-face opportunities (new faculty orientations, visits with individual researchers, library instruction sessions, workshops, and presentations at academic department and university meetings), as well as online interactions (web-based research guides, tutorials, videos, and electronic newsletters) to engage in an evolving conversation with faculty and students about scholarly communication topics such as copyright, authors' rights, and open access.

UCF subject librarians have 35 to 45 percent of their formal annual assignment and position description designated for "outreach," which includes a heavy emphasis on subject librarians communicating schol-

arly communication information to their assigned faculty and students. The subject librarians routinely report on their scholarly communication outreach progress in both their monthly and annual self-evaluations, and each year the head of research and information services, after reviewing their progress, writes annual evaluations that serve as a basis for promotion, merit salary increases, and awards.

## Subject Librarian Scholarly Communication Training

To ensure that the subject librarians are well-versed in scholarly communication issues, the RIS Department works closely with UCF Libraries' Office of Scholarly Communication and IT/Digital Initiatives (IT/DI) units to provide highly focused scholarly communication training throughout the year. Scholarly communication training is a high priority in both RIS and library faculty monthly meetings, RIS retreats, graduate student workshops, and frequent workshops provided by the scholarly communication librarian. These trainings usually take place either in the main library or in the nearby Graduate Student Center, which makes it very convenient for the subject librarians to participate.

The scholarly communication librarian further supports UCF's subject librarians by leading professional development opportunities and being "on call" when questions arise. The position also works directly with faculty and instructional designers from the Center for Distributed Learning by assisting them with copyright questions related to course materials, publishing, author agreements, and compliance with research funding mandates. Frequently, a subject librarian will invite the scholarly communication librarian to accompany him/her on a visit to an academic department office to discuss a faculty member's copyright questions together. Other times, the subject librarian serves as a liaison and arranges an appointment for the faculty member to meet with the scholarly communication librarian at the library.

In addition to copyright training provided at meetings and workshops, subject librarians frequently utilize copyright information provided via the libraries' scholarly communication web page.<sup>12</sup> The web page provides

detailed sections on author rights, sharing your copyrighted work, using other's work, creative commons, and fair use, with a prominent link to UCF's Office of General Counsel.

## Examples of Copyright Questions that Subject Librarians Are Asked

Subject librarians have been asked to promote UCF Libraries' institutional repository by encouraging their assigned academic faculty to consider placing their scholarship there. As a result, academic faculty sometimes reach out to subject librarians with challenging copyright and author rights questions regarding particular materials that they are considering adding to the institutional repository. When these specific questions arise, the subject librarians frequently arrange meetings to bring together the faculty member, the scholarly communication librarian, and the digital initiatives librarian for detailed discussions about the particular scenario.

For example, when faculty members who have a long history of publication and would like to deposit their works into UCF Libraries' institutional repository, their query typically leads to meetings involving the scholarly communication librarian, the digital initiatives librarian, the subject librarian, and the faculty member. Meetings include discussions about the various venues in which the faculty members have published throughout their teaching tenure and whether or not they have retained the copyright of the published works. In most cases, faculty have not retained the copyright of their scholarship due to a contractual agreement signed with a publisher in order to have their research published. In this case, the scholarly communication librarian, subject librarian, and digital initiatives librarian work with faculty members to determine if a version of their research (i.e., pre-print, post-print, and/or publisher's PDF) may be added to the institutional repository using resources such as author agreements, publisher websites, and SHERPA/RoMEO.

In addition, UCF faculty are often interested in uploading various types of media and formats to the institutional repository. In this case, as well, multi-person meetings take place to discuss author rights, copyright, formatting, and technical issues involving particular situations.

Institutional repository-related questions are not the only areas in which copyright is a concern. Faculty members often contact their subject librarians with copyright questions related to fair use. In particular, educational multimedia is one of the most common areas copyright questions arise for faculty. Some of these questions have to do with the following topics:

- showing videos in the classroom
- providing access to library-licensed streaming videos via online courseware
- providing access to certain journal articles through their online syllabus or courseware
- including certain images taken from the internet in their online courseware
- asking if the library will digitize unofficial copies of videos that they have downloaded from YouTube or Vimeo so they can use these videos in their online courseware
- asking if the library will digitize older VHS formats

Subject librarians are comfortable pointing faculty to general information about fair use contained in US statutes (such as 17 U.S.C. § 107-1-Limitations on exclusive rights: fair use), as well as a FAQ created by the UCF Office of General Counsel to assist faculty in regard to common questions related to copyright and fair use for educational media in the classroom. However, most subject librarians believe that it is best to direct specific legal questions to the scholarly communication librarian or the Office of General Counsel. Frequently, a subject librarian will invite the scholarly communication librarian to accompany him/her on a visit to an academic department office to discuss a faculty member's particular copyright or fair use questions together or to arrange an appointment for the faculty member to meet with the scholarly communication librarian at the library.

## Copyright, Fair Use, and Digital Scanning at UCF Libraries

Perhaps one of the most challenging copyright scenarios that subject librarians face on a daily basis is the self-serve library scanners, which provide users with digital scans that they can email or save on a USB flash

drive. Students, faculty, staff, and community patrons use these scanners on a frequent basis, and the most often used self-serve library scanners are located only ten feet away from the very busy research services desk.

Under the best of circumstances, subject librarians serving at the desk are asked on-the-fly questions from patrons about what constitutes fair use and how much they may copy or scan from a particular resource to stay within the law. Situations like this give subject librarians an opportunity to educate users on fair use; however, in most cases, users are under the assumption that they can scan anything, in any amount, and do not consider the implications of copyright.

Given this, under the worst of circumstances, subject librarians observe patrons scanning or photocopying whole works without seeming to pay attention to posted copyright warnings, even though UCF machines have relevant text indicating that users must adhere to copyright laws. The text from Title 17, USC-Copyright, Chapter 1: Subject matter and scope of copyright<sup>13</sup> and Section 107: Limitations on Exclusive Rights: Fair Use<sup>14</sup> is not only posted on the scanners, but the users must click through the digital script of these postings and accept the provisions before proceeding with their scanning.

These types of scenarios, about the rights and responsibilities associated with copyright and the implications of observing potential copyright violations, have prompted several discussions between subject librarians and the scholarly communication librarian at reference meetings and at workshops about this issue. Section 108, Limitations on Exclusive Rights: Reproduction by Libraries and Archives,<sup>15</sup> in particular, notes that libraries and archives or their employees are not liable for any unsupervised use of scanning, photocopying, or other uses on reproducing equipment in the facility provided that the appropriate notices mentioned above are present on the equipment.

## Scholarly Communication Brown Bag Presentations

All subject librarians at the University of Central Florida have a component of scholarly communication within their assigned duties. Other

librarians and staff in other departments or units who do not normally have these duties will encounter copyright scenarios as well. These individuals may not know how to deal with copyright situations without notice or time to prepare. The scholarly communication librarian may not be available at the time of need, or a nearby subject librarian may not be comfortable with the specific needs of the situation. What is the role, then, of the scholarly communication librarian to prepare the faculty and staff of the library to know how to handle these situations? General advice to pass along every situation to the scholarly communication librarian may not be appropriate. It may be difficult to tell, in fact, if some situations are suitable for the Office of Scholarly Communication. Although dealing with situations on a case-by-case basis may be the most thorough and effective answer to helping coworkers, the Office of Scholarly Communication opted to engage in discussions to help support interest in the topic as well. Fear of copyright is a common issue, so the scholarly communication librarian and scholarly communication adjunct librarian devised a plan to increase interest in, awareness of, and motivation to learn about and engage with copyright.

The plan started simply by crafting “Scholarly Communication Brown Bag Presentations” to give to the faculty and staff of the library. Subjects included

- using SHERPA/RoMEO to understand journal copyright policies;
- personal responsibilities with uploading copyrighted material to professional profiles;
- what is scholarly communication?;
- author rights; and
- copyright in general.

All PowerPoint files are available online through UCF’s institutional repository, STARS.<sup>16</sup>

The topics were presented to cultivate discussion among coworkers and showcase tools or skills they could use themselves. This presentation format, however, did not produce discussion, except perhaps from one or two individuals already comfortable with the subject. The Office of Scholarly Communication changed the plan to include both faculty and staff in the discussion and to encourage an environment where questions of any experience level could be asked without qualms or hesitation.

## Stay Savvy with Scholarly Communication Sessions

To make the change from formal presentation format to an informal discussion group, a “rebranding” was strategized. Instead of titling the sessions “Brown Bag Presentations,” the title was transitioned to “Stay Savvy with Scholarly Communication” and advertised as sessions. The email used more welcoming tones to invite any faculty or staff members to attend and bring their lunches. More changes were introduced beyond a new name and invitation style. Conversation took the place of projected slides. Alternative tools to help guide the discussion included distributing articles to read one week prior to attending the session and then supplying handouts with small bulleted lists of article highlights.

Four sessions were tested in this way. Short (half-page) handouts were created for two topics per session, with each topic based on an article released within the past several months found by the scholarly communication adjunct librarian. The articles usually did not originate from peer-reviewed academic journals but rather from well-known blogs, higher education magazines, and other related sources. Opting for “lighter” reading helped ensure attendees had time to read the material before attending the session or at least that a quick recap would be sufficient to bring everyone up to speed. Topics included:

- Can cake count as intellectual property?
- How to improve technology transfer in regard to patent and copyright understandings.
- Does piracy of scholarly articles fill a growing need?
- How does copyright law impact the sharing nature of open educational resources?

After several “Stay Savvy with Scholarly Communication” sessions led by the scholarly communication librarian and the scholarly communication adjunct librarian, guest discussion leaders from various campus units were invited. The first guest discussion leader was from the Office of Technology Transfer, and the second was the Center for Distributed Learning, both utilizing handouts. This new aspect with guest leadership offered different learning dynamics and insights from experts in the topics they led.

After positive feedback, the scholarly communication adjunct librarian sent more invitations to guests to lead discussions. Now the topics expanded into more content-heavy subjects. Instead of strictly following the discussion-only layout of the session, the guest discussion leaders were invited to give short presentations for half of the session and then foster discussion, with help from the scholarly communication librarian and adjunct.

This last recipe for copyright outreach seemed to suit the taste of the UCF Libraries faculty and staff. With outreach, especially sessions including aspects of professional development, there will always be a balancing act of what is too boring?, too in-depth?, not interesting enough?, not comprehensive enough?, and so on. After trying (1) presentations from the scholarly communication librarian and adjunct, (2) discussions led by the scholarly communication librarian and adjunct, (3) discussions led by other experts, and (4) invited speakers plus discussion portions, the fourth and final “recipe” seemed to work best.

Was it the new dynamic for the fourth type of session or was it the comfort of regular attendees that inspired discussion, interest, and—we hope—easier applicability to copyright situations encountered in the library?

The scholarly communication adjunct conducted a small survey from some regular attendees to help see preferences and areas to improve the sessions. Attendees included full-time faculty librarians, adjunct librarians, and library staff. Survey results indicated a range of reasons for joining the sessions. Attendees were encouraged to visit to learn more about the Office of Scholarly Communication and its services, which in turn helped the attendees connect library users to those services. Colleagues more familiar with the department enjoyed how the sessions helped them stay current on topics relevant to their work projects, learn about tools, and hear from presenters they knew to be proficient in various areas of expertise. For practicality, the attendees also valued receiving reminder email and calendar invitations. Multiple attendees lauded the informal setting which allowed for open discussion, learning about colleagues’ current projects, and having fun in a relaxed environment.

Attendees also helped target aspects of the sessions to improve. The main issue, however, was scheduling. Individuals often voiced their apologies

for missing certain sessions due to conflicting commitments. Ways to ameliorate scheduling issues could include recording the sessions or offering the sessions at multiple times. Other requests were related to having more topics, such as how various issues discussed impact faculty from other disciplines.

With a strong group of interested colleagues and seemingly endless possibilities for topics, this format for copyright and related training has proved successful at the University of Central Florida.

## Conclusion

Copyright is an implicit part of a library and the roles librarians play at their respective institutions. Yet, copyright training opportunities have not always played a large role in providing support and infrastructure to help librarians navigate the ever-changing landscape of intellectual property. As we explore in this chapter, copyright should not be an area in which only a select few librarian experts should be engaged, but rather should be an inherent part of every librarian's role in a meaningful way. Creating copyright training opportunities at your institution provides not only an infrastructure but also a resource for librarians to feel supported and engaged in understanding and navigating intellectual property topics and issues.

The University of Central Florida's unique cross-section of scholarly communication and research and information services illustrates how incorporating scholarly communication at the core level of librarian responsibility can impact engagement and interest in topics, such as copyright. In addition, the Office of Scholarly Communication's workshop and training series has proved successful in providing education and training opportunities for copyright and other related concepts.

Though copyright law and its interpretations will likely never be an uncomplicated topic, providing copyright training opportunities for librarians plays an important and critical role in creating confident, knowledgeable copyright advocates at your institution.

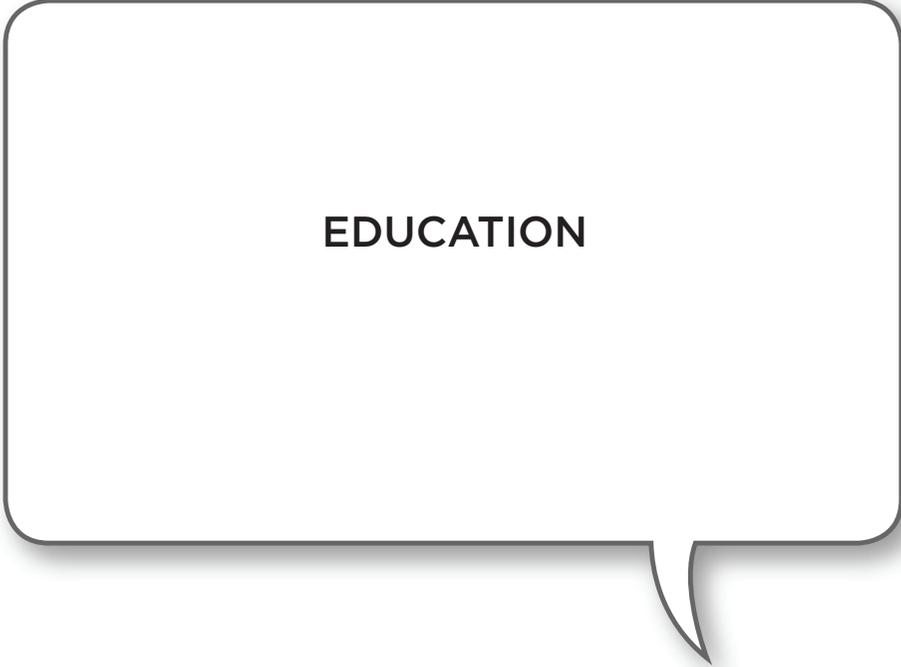
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A white speech bubble with a black outline and rounded corners. The word "EDUCATION" is written in the center in a bold, black, sans-serif font. The bubble has a small tail pointing downwards and to the right.

**EDUCATION**





# Copyright Self-Study: How to Know What You Know, What You Don't Know, and How to Discover What You Need to Know Next

*Allison Nowicki Estell*

The long and tortuous title of this chapter might be seen as a metaphor for the psychological experience of undertaking a study of copyright. Copyright is an extensive, detailed, and ever-changing area of law, touching upon many and varied aspects of information creation and usage in higher education and beyond. It is difficult to know everything about it in a given moment, and just as difficult for people new to a formal study of the topic to assess their knowledge and know where to set out on the path of discovery. This chapter employs the framework of self-directed learning theory to argue the necessity of a process-based (rather than content-based) approach to copyright study. In addition to orienting readers to this different perspective, I also identify some of the more pervasive copyright law concepts and copyright literacy questions that may arise during a process-based study of copyright and point readers toward resources and materials for assessing their own copyright information needs as an ongoing endeavor.

It is my hope that a wide range of readers in the higher education field will find the concepts and approaches presented here to be thought-provoking and helpful; however, this chapter is addressed primarily to librarians, who will often find themselves—as stewards of access to information and experts in finding findable information—the appointed or *de facto* copyright officers of their institutions.<sup>1</sup> In such a role, librarians are called upon routinely to make decisions based in copyright law and to provide copyright information to and identify copyright resources for other members of their institution. A review of relevant literature reveals that librarians report moderate familiarity with copyright issues, although it varies with time in the profession, type of workplace environment, and substantive content issue.<sup>2</sup> But the literature does not necessarily define the term “familiarity.” An awareness of the existence of copyright topics and terms does not necessarily translate to solid knowledge of those concepts. Most recent studies have not assessed librarians’ actual copyright knowledge,<sup>3</sup> although assessment tools of varying quality and detail do exist, often in the form of quizzes or checklists. Indeed, there are plenty of copyright resources available (print and online materials, synchronous and asynchronous webinars, and courses of study presented by legal experts, professional organizations, and copyright organizations), but almost too many to sort through. Thus, many questions face the student of copyright:

- If you want to learn about copyright, how should you begin?
- Which basics should everyone know in order to establish a baseline of competency?
- Where and how does copyright law impact work in the academic environment?
- How do you locate and evaluate copyright information and resources?
- How do you maintain a reasonable level of currency going forward?

It is understandable to be cautious about taking on responsibility for advising others on copyright questions because the answers to those questions fall within the legal sphere and most librarians have not had a legal education. So, it may be comforting to learn that, as a librarian dealing with copyright, you should not be giving legal advice; rather you are in the librarian’s usual position of simply providing your patrons with information, the subject of which happens to be law. Nevertheless, it may

be helpful to understand a bit about the pedagogy of a legal education and the critical-thinking perspectives and methods it develops in future lawyers.

The American legal system is a “common law” system, which means that the law is expressed not only in statutes created by legislators but also in the written opinions (cases) of judges interpreting those statutes. American legal education is based in a case study method, wherein students read the work of judges outlining how they employed legal reasoning to apply relevant statutes to specific facts in order to determine what the judgment or outcome should be.<sup>4</sup> Often, legal concepts and frameworks will coalesce from this reasoning, but the application of those legal concepts remains extremely fact-specific: the minutest shift in facts may create a “distinguishable” case which could have a wholly different outcome when set before a judge. Law students gain mastery over basic concepts and principles of law, derived from both statute and judicial decision, but they cannot be said to have mastered some particular body of raw data that can be accessed mechanically to report outcomes in all cases without some further analysis. Indeed, arguably the most important thing law students learn during law school is how to engage in legal reasoning, something that is taught through the probing questioning of the Socratic method.<sup>5</sup> This style of teaching is process-based and experiential, and develops a perspective of habitual inquiry and iterative learning.

When you enter this legal sphere, you should not be striving simply to memorize copyright directives that will be objectively applied to the situation you are presented with; you need to think analytically about how the statutes and cases on copyright might indicate a favored course of action in that situation. You will not always be able to know the “right” answer. You can strive to be accurate, but you may not always be able to be as precise as you would like; you should just try to give the best answer based on the information you have available at the time. Thus, making a mind-shift from content-based learning (trying to master all of the law as though it were answers you could know in advance) to process-based learning (organizing legal concepts into a framework to be applied to whatever facts are presented to you in the moment) will help librarians feel comfortable and successful in this work.

## If You Want to Learn about Copyright, How Should You Begin?

I have a law degree, but I never took a course in copyright law during law school, so when I was charged with a copyright project in my first library job, I considered myself a copyright novice. I decided to take one of the few LIS copyright courses that were available at the time, and I found it to be a helpful introduction to primary sources, useful secondary sources, and some reliable commentators on the subject. I noticed that the analytical skills and perspective of inquiry I had developed during my legal education were the pillars I relied upon to support this new copyright knowledge.

After that course, I wanted to stay current with developments in the law and its application in higher education, but because copyright was only a small part of my overall duties, it was hard to find the time to do so. I observed that every time I was faced with a project or received a query, it was almost as though I needed to start fresh. Further, when I would get questions from people outside of my organization (to whom I could devote very little time), I would often find myself coaching them through the conceptual process of what they would need to do to find the copyright information they needed and how they would apply that information to the facts in their situation. Over time, I came to realize that each instance of copyright inquiry could be viewed as a learning episode positioned somewhere along my ongoing trajectory of copyright study. I started by learning from external teachers and moved to an internally-driven learning approach. As I tried to describe the psychological transition I had made toward ownership and responsibility for my learning needs, I discovered that there was an entire community of scholars studying self-directed learning, stemming from Malcolm Knowles's work in the 1970s.<sup>6</sup>

We may sense that people learn more efficiently and effectively when the impetus for the learning need is self-driven. Indeed, C. Roland Christensen writes, "To me, teaching carries an awesome responsibility to encourage students to want to know, to show them how to know, and to insist that they ask and answer the question 'For what purpose do I need to know?'"<sup>7</sup> Teachers strive to engage their students with material

by demonstrating the potential applications of the material into spheres in which the student can relate. With self-directed learning, the teacher and the student are one and the same; both teacher and student share the same goals during the learning episode.

Lucy M. Guglielmino discusses self-directed learning in three different contexts: formal learning settings, the workplace, and personal life. She also identifies two basic reasons for engaging in self-directed learning: nature (self-directed learning as a natural response to a learning need) and environment (self-directed learning as a way to survive in a changing environment).<sup>8</sup> Self-directed learning concepts have been applied in multiple professions, including pharmacy, medicine, human resources, as well as to a multitude of subjects and learning levels, including the teaching of math, science, elementary education, and educational technology.<sup>9</sup> Because both higher education and copyright law are dynamic environments and systems which trigger a steady stream of issues requiring ongoing analysis, both nature and environment are hospitable to the librarian's choosing to direct his or her own learning on copyright issues.

When directing your own learning, you may feel a tension between independence and empowerment on the one hand, and self-doubt and dismissal of your achievements on the other. The literature on self-directed learning recognizes that adults may not value their learning efforts if the outcomes are not validated externally.<sup>10</sup> Some of this may boil down to situational concerns: "People's propensity to control their own learning is not necessarily determined by increasing their reflective abilities, but by meta-cognitive processes which depend upon personality type, learning style preference, cognitive style, past experiences, situation pertaining, subject studied, acquired competencies, or all or none of these."<sup>11</sup>

In *Self-Direction for Lifelong Learning*, Philip C. Candy compiles a list of "attributes, characteristics, qualities, and competencies" of the self-directed learner, as identified through decades of scholarship on the topic. A self-directed learner is likely to:

1. be methodical/disciplined;
2. be logical/analytical;

3. be reflective/self-aware;
4. demonstrate curiosity/openness/motivation;
5. be flexible;
6. be persistent/responsible;
7. be venturesome/creative;
8. show confidence/have a positive self-concept;
9. be independent/self-sufficient;
10. have developed information-seeking and retrieval skills;
11. have knowledge about, and skill at, “learning processes”; and
12. develop and use criteria for evaluating.<sup>12</sup>

Stephen F. Jennings’s 2007 article references studies that may or may not problematize the validity of these criteria,<sup>13</sup> but most of these do appear throughout the literature. Do any of these qualities resonate with you? They may be places to begin by using your internal resources to aid in your quest for copyright understanding.

There is a spectrum of learning preferences that vary from individual to individual and even situationally for a given individual. The spectrum ranges from wishing to be taught by others to preferring to engage in fully self-directed learning. Something to consider is not just preference but also readiness: a person might have skills and characteristics that lend themselves to self-directed learning in one field but not another, depending on the baseline knowledge possessed or other cognitive or psychological barriers in a given situation.<sup>14</sup>

When preparing yourself for copyright study, think of the classic distinction between activities that occur just-in-case or just-in-time. There’s only so much just-in-case copyright knowledge you can gather in advance. So much of an appropriate outcome will arise from the just-in-time information—the facts of the particular scenario or challenge you are faced with in the moment. You may want to start with some conventional content-based learning (i.e., taking a course in which an instructor presents some basic information), but the nature of the copyright field and its grounding in law will demand that eventually everyone must make the

transition into self-directed learning. As a dynamic field in which laws are always susceptible to iterative change and reinterpretation based on new fact patterns arising from developments in the way copyrighted material is created and shared and used, the field of copyright will not always offer an external teacher at the point of one's need.

Knowles offers an instrument for assessing your abilities in nine competencies that support the success of self-directed learning, one of which is having a concept of yourself as “non-dependent and self-directed.”<sup>15</sup> He also provides readings describing self-directed learners to aid learners in developing a view of themselves as self-directed.<sup>16</sup> Patricia Cranton's work is another resource for helping you think about how you learn.<sup>17</sup>

## Which Basics Should Everyone Know to Establish a Baseline of Competency?

As you explore the copyright resources that are out there, you will start to notice patterns of frequently-discussed concepts, but I will recommend some fundamentals here. First, you will want to familiarize yourself with the passages in the US Constitution from which the authority and purpose of copyright law can be derived: Article I, Section 8, Clause 8, and the First Amendment.<sup>18</sup> Another primary source is the Copyright Act, which is located in Title 17 of the US Code and sets forth the details of these rights.<sup>19</sup> From these statutes, you will uncover what types of information can be copyrighted, and how, by whom, and for how long. Then you will need to understand what can and cannot be done with copyrighted material, by whom, and for what purpose. This will trigger concepts of the public domain,<sup>20</sup> fair use,<sup>21</sup> library exceptions,<sup>22</sup> the doctrine of first sale,<sup>23</sup> and, in the higher education arena, the TEACH Act,<sup>24</sup> which are all specific statutory provisions of the Copyright Act mentioned above. Along the way, you will also encounter the significant cases in which judges have helped to clarify how the statutes should apply to particular factual situations. You may also wish to familiarize yourself with the contractual provisions of licensing, including Creative Commons licensing.<sup>25</sup>

## Where and How Does Copyright Law Impact Work in the Academic Environment?

There are many different ways that copyright questions might present themselves in higher education. All users should be concerned whenever they are making any copy of any amount of copyrighted material, although many situations may be entirely legal without first seeking permission from the copyright owner because a given item is part of the public domain, governed by a Creative Commons license, covered by an exception to copyright, or a fair use. “Making a copy” includes, but may not be limited to: photocopying; scanning (to print, to file, or to email); printing out; copying, downloading, or uploading a digital file; and converting analog format to digital format. It is important to note that attribution and citation of copied material, while necessary to avoid plagiarism, do not necessarily negate the possibility of copyright infringement. When using any text, images, sound recordings, or video recordings, you must determine whether the material is in the public domain, whether a fair use exists, or whether permission has been granted from the copyright holder.

Activities common in higher education that should trigger a consideration of copyright law include reproduction of materials for: distance education and its administration through a learning management system; preservation projects; the development of universally accessible formats; and interlibrary loan. Materials held in archives, student work (such as theses and dissertations), and other intellectual property (such as scholarly writing and technology transfer) created at the higher education institution are also protected by copyright laws. E-resource acquisition and management are usually governed by licenses, which are contracts that outline the terms by which libraries gain access to copyrighted materials. If a license does not expressly state the terms for a given usage of material, copyright law will govern.

As technology advances, new forms of reproduction will become possible. And as time passes, new issues in copyright will emerge. Other chapters in this volume explore issues in open access<sup>26</sup> and text mining,<sup>27</sup> as well as the commonalities and differences between US copyright law and the copyright laws of other countries.<sup>28</sup>

## How Do You Locate and Evaluate Copyright Information and Resources?

What may come naturally to all librarians who study copyright, whether in a traditional learning environment or by a self-directed methodology, is the gathering and organizing of the copyright concepts and resources we plan to use to as guidance. You may consult a wide variety of resources, including people, organizations, blogs, websites, LIS curricula, professional development programs, books, and all manner of publicly-available tools (copyright decision tools, fair use tools, quizzes, and assessment tools). Some resources will endear themselves particularly to you and you will go back to them again and again. I think of this as a sort of toolkit. The first tools I added to my own toolkit were the copyright laws themselves,<sup>29</sup> a few choice books that presented concepts clearly,<sup>30</sup> and a few “advisors” (in the form of blogs and web resources I could consult).<sup>31</sup> I cite only a few examples in the notes, but there are many other excellent resources I have consulted over the years; I invite you to find your own favorites.

But how? The sheer volume of information available may be daunting. Again, we can return to the field of self-directed learning. In “Self-Directed Learning and the Paradox of Choice,” Ralph G. Brockett discusses the negative impacts of choice on the success of self-directed learning: choice can be overwhelming, even debilitating. You need to set parameters for “viable choices,” to help limit choices to a manageable amount,<sup>32</sup> and also determine which questions you deem important, as opposed to trivial, so you can place the appropriate amount of energy into selecting appropriate guidance for decision-making essential to the question at hand.<sup>33</sup> Brockett references the work of Barry Schwartz, especially the idea that people can be “maximizers” or “satisficers,” who either seek “the best” or the “good enough.” In the world of copyright, trying to find the perfect answer might lead you down a variety of tangential paths that would not serve your interests; thus, you may orient yourself toward either maximizing or satisficing based on the question type or the amount of time you have for a given issue, depending on the situation. Managing your attitude toward choice is essential to successful self-directed learning,<sup>34</sup> and Brockett’s article discusses two main strategies for the self-directed learner: making good decisions and choosing when not to learn.<sup>35</sup> In other words, you

will need to draw upon information literacy and ethical principles and, at some point, know when you have researched a topic sufficiently for the purpose at hand.

In terms of the latter, engaging in the copyright sphere means being able to move back and forth between facts and concepts, applying copyright concepts to the particular facts in a situation to come to a conclusion about the best answer you have at the moment (which rarely results in a clear-cut decision about what to do but rather provides you with a range of possible decisions and associated risks). Trying to determine a definitive answer to a particular copyright query may be a fruitless quest; since the law is an ever-changing field that seeks to attenuate itself precisely to the facts at hand (in a way, itself “learning” as it goes along), you may find that your specific scenario has never been addressed before.

In making good decisions, the fourth frame of the Association of College & Research Libraries’ *Framework for Information Literacy for Higher Education* (“Research as Inquiry”) is particularly relevant: “Research is iterative and depends upon asking increasingly complex or new questions whose answers in turn develop additional questions or lines of inquiry in any field.”<sup>36</sup> Knowledge practices in this frame include:

- being able to “formulate questions...based on information gaps or on reexamination of existing, possibly conflicting, information”;
- being able to “monitor gathered information and assess for gaps or weaknesses”;
- being able to “synthesize ideas gathered from multiple sources”; and
- “draw[ing] reasonable conclusions based on the analysis and interpretation of information.”<sup>37</sup>

The dispositions (collections of “preferences, attitudes, and intentions, as well as a set of capabilities that allow the preferences to become realized in a particular way”) associated with this frame seem particularly suited to self-directed copyright learning, especially:

- the idea of research as open-ended exploration;
- ambiguity as beneficial to the research process;
- the importance of seeking appropriate help when needed; and, of course,

- following ethical and legal guidelines in gathering and using—here, sharing/disseminating—information.<sup>38</sup>

Even as you explore legal concepts and seek legal information, remember to call upon these information literacy frameworks that support all activities in our field of library and information science, as well as the ethical standards that guide our profession.

The American Library Association's Code of Ethics includes a section on copyright, which states: "We respect intellectual property rights and advocate balance between the interests of information users and rights holders."<sup>39</sup> The accompanying interpretation of this section explores this tension between users' and creators' rights, as well as First Amendment free speech rights.<sup>40</sup> As you locate and evaluate copyright resources to apply to the copyright scenarios that face you and your patrons, you should also keep at the forefront of your mind this ethical context. You may be more sympathetic to the creator's right to determine the fate of her or his copyrighted material to the exclusion of any user's right to employ that material, or you may find yourself advocating for a broader conception of the user's right to use existing materials to advance scholarship and innovation. No matter where you position yourself on a spectrum between absolute rights for either the creator or the user of copyrighted material, it is important that you realize there is such a spectrum and that such a balancing act is sought by the very nature of copyright (stemming even from its origins in the Constitution giving authors exclusive rights but only for a limited amount of time).<sup>41</sup> Not every situation gives rise to a copyright claim in which a judge will engage in that analysis and balancing for you; still, in each situation, you must operate in good faith along that spectrum.

Underlying this balancing act are considerations of legal ethics as well. If you do not have a law degree, you need to be careful about how you communicate copyright information. You can share legal information, but you should be clear (to yourself and to anyone with whom you communicate) that you are not providing legal advice because you are not employed as a legal professional.

There are ethical and practical reasons to be careful in copyright conversations even if you actually have a law degree. The Model Rules of

Professional Conduct (or MRPC, the framework upon which many jurisdictions of the United States base their ethical standards for lawyers) address the unauthorized practice of law and require that lawyers be licensed within the jurisdictions in which they practice.<sup>42</sup> From a practical standpoint, unless you are organizationally inhabiting a legal role (such as University Counsel or the like), you are probably not authorized to be engaged in the practice of law and likely have no safety net of malpractice insurance. Things can be further complicated if the person you are assisting knows that you have a law degree. The MRPC cautions against the risk that “the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship.”<sup>43</sup>

Leaving insurance and legal-ethical issues aside, still, you may wish to be careful to discuss copyright only in the context of “legal information” (and not risk the appearance of providing legal advice) for the sake of the larger community at your institution. You might otherwise risk setting misleading expectations for other librarian-colleagues and patrons of whatever role you fill. If you were to provide legal advice, patrons might expect advice from other librarians who are not qualified to do so; patrons cannot “see” your law degree—or your colleagues’ lack of one—and they could get confused or disappointed by different levels of service being offered by people filling similar functional roles.

## How Do You Maintain a Reasonable Level of Currency Going Forward?

Shurr et al. offer a seven-step framework for self-directed learning:

1. Conduct a self-assessment
2. Evaluate self-assessment
3. Determine objectives
4. Recruit support
5. Collect data
6. Monitor progress
7. Celebrate success<sup>44</sup>

This framework can be employed iteratively over time—as you begin a study of copyright, as you confront your first question from a patron, and as you strive to keep up with developments in copyright law and its application to emerging scenarios in higher education. Of these seven steps, I would advise you to focus on two activities in particular for a successful self-directed study of copyright: keep your copyright materials and resources organized so you can access them easily when you need them, and make sure to recruit support for your efforts. Find peers, partners, and mentors along the way. By building your own copyright knowledge base and creating your own copyright community, you will be well-positioned to handle any copyright question that comes your way, whether you are immediately familiar with the relevant information, or end up determining that it requires more study or nuanced analysis than you can provide on your own, or anywhere else in between.

In short, the features of self-directed learning require students to determine their own content, evaluate their own learning, and facilitate their own learning process. If you perceive these features as advantages rather than drawbacks, then I encourage you to engage in your own self-directed study of copyright.

## Endnotes

1. Rebecca A. Albitz, “Copyright Information Management and the University Library: Staffing, Organizational Placement and Authority,” *The Journal of Academic Librarianship* 39 (2013): 429–35.
2. Allison Estell and Laura Saunders, “Librarian Copyright Literacy: Self-Reported Copyright Knowledge Among Information Professionals in the United States,” *Public Services Quarterly* 12, no. 3 (2016): 214–27, <http://dx.doi.org/10.1080/15228959.2016.1184997>.
3. Deborah H. Charbonneau and Michael Priehs, “Copyright Awareness, Partnerships, and Training Issues in Academic Libraries,” *The Journal of Academic Librarianship* 40 (2014): 228–33 (examining “comfort level,” “awareness,” and “training desires”); Allison Estell and Laura Saunders, “Librarian Copyright Literacy: Self-Reported Copyright Knowledge Among Information Professionals in the United States,” *Public Services Quarterly* 12, no. 3 (2016): 214–27 (examining “familiarity”); Tania Yordanova Todorova et al., “Information Professionals and Copyright Literacy: A Multinational Study,” *Library Management* 38, no. 6/7 (2017): 323–44 (examining “familiarity,” “awareness,” and self-reported, as opposed to objectively-assessed, “knowledge”). However, a study of Brazilian academic librarians did objectively assess knowledge of copyright issues, with questions that tested actual copyright knowledge: Juan-Carlos Fernández-Molina, João Batista E. Moraes, and José Augusto C. Guimarães, “Ac-

- ademic Libraries and Copyright: Do Librarians Really Have the Required Knowledge?," *College & Research Libraries* 78, no. 2 (2017): 241–59.
4. Gleaning critical information from a legal case is a skill that law students hone over the course of their legal education; Orin S. Kerr's article, "How to Read a Legal Opinion: A Guide for New Law Students," however, is written in a tone accessible to the interested layperson and may give you the confidence to tackle your first legal opinion. In *The Green Bag: An Entertaining Journal of Law* 11, no. 1 (2007): 51–63, accessed April 24, 2018, <http://www.volokh.com/files/howtoreadv2.pdf>.
  5. "The Socratic Method," University of Chicago Law School, accessed November 13, 2017, <https://www.law.uchicago.edu/socratic-method>.
  6. Malcolm Knowles, *Self-Directed Learning: A Guide for Learners and Teachers* (New York: Cambridge Adult Education, 1975).
  7. C. Roland Christensen, "Every Student Teaches and Every Teacher Learns: The Reciprocal Gift of Discussion Teaching," in *Education for Judgment: The Artistry of Discussion Leadership*, eds. C. Roland Christensen, David A. Garvin, and Ann Sweet (Boston: Harvard Business School Press, 1991), 117.
  8. Lucy M. Guglielmino, "Why Self-Directed Learning?," *International Journal of Self-Directed Learning* 5, no. 1 (2008): 1–14.
  9. Jordan Shurr et al., "Another Tool in the Belt: Self-Directed Professional Learning for Teachers of Students with Moderate and Severe Disabilities," *Physical Disabilities: Education and Related Services* 33, no. 1 (2014): 17–38, 20.
  10. Allen Tough, *The Adult's Learning Projects: A Fresh Approach to Theory and Practice in Adult Learning* (Toronto: Ontario Institute for Studies in Education, 1979), cited in Stephen F. Jennings, "Personal Development Plans and Self-Directed Learning for Healthcare Professionals: Are They Evidence Based?," *Postgraduate Medical Journal*, no. 83 (2007): 518–24, 518.
  11. Jennings, "Personal Development Plans," 521.
  12. Philip C. Candy, *Self-Direction for Lifelong Learning: A Comprehensive Guide to Theory and Practice* (San Francisco: Jossey-Bass, 1991), 459–66.
  13. Jennings, "Personal Development Plans," 518.
  14. Murray Fisher, Jennifer King, and Grace Tague, "Development of a Self-Directed Learning Readiness Scale for Nursing Education," *Nurse Education Today* 21 (2001): 516–25.
  15. Knowles, *Self-Directed Learning*, 61.
  16. *Ibid.*, 64–70.
  17. Particular sections that may be of interest are: Chapter 3, "Strategies for Self-Directed Development," Chapter 4, "Critical Reflection," and Chapter 5, "Becoming a Transformative Learner"; Patricia Cranton, *Professional Development as Transformative Learning: New Perspectives for Teachers of Adults* (San Francisco: Jossey-Bass, 1996).
  18. These are conveniently displayed on the same webpage at Stanford University Libraries' Copyright & Fair Use site, accessed November 11, 2017, <https://fairuse.stanford.edu/law/us-constitution/>.
  19. 17 U.S.C. §101ff. (2012).
  20. The public domain encompasses materials that are not restricted by copyright ownership. If an item is in the public domain, anyone may use it for their purposes. Some materials did not meet the eligibility for copyright protection upon creation, while others will enter the public domain when the relevant copyright term expires. Peter B. Hirtle has created a comprehensive resource for determining whether an item is

- in the public domain. Peter B. Hirtle, “Copyright Term and the Public Domain in the United States,” accessed November 11, 2017, <https://copyright.cornell.edu/publicdomain>.
21. 17 U.S.C. §107 (2012).
  22. 17 U.S.C. §108 (2012).
  23. 17 U.S.C. §109 (2012).
  24. The TEACH (Technology, Education and Copyright Harmonization) Act is codified in Section 110(2) of Title 17 of the U.S. Code, and creates users’ rights for copyrighted material within the higher education context; it also creates responsibilities for those institutions availing themselves of its provisions; 17 U.S.C. §110(2) (2012). Kenneth D. Crews provides a solid introduction to this material: *Copyright Law for Librarians and Educators: Creative Strategies & Practical Solutions* (Chicago: American Library Association, 2012), 83–91.
  25. Creative Commons is “a global nonprofit organization that enables sharing and reuse of creativity and knowledge through the provision of free legal tools,” accessed April 24, 2018, <https://creativecommons.org/faq/#what-is-creative-commons-and-what-do-you-do>.
  26. Colin Lukens, Shannon Kipphut-Smith, and Kyle Courtney, “Copyright Law’s Role in Advocacy and Education for Open Access Policies on Campus,” in *Copyright Conversations: Rights Literacy in a Digital World*, ed. Sara R. Benson (Chicago: ACRL, 2019).
  27. Rachael G. Samberg and Cody Hennesy, “Law and Literacy for Non-Consumptive Text Mining: Guiding Researchers through the Landscape of Computational Text Analysis,” in *Copyright Conversations: Rights Literacy in a Digital World*, ed. Sara R. Benson (Chicago: ACRL, 2019).
  28. See Bing Wang, “The International Copyright Regime—Just Enough to Make You Cringe,” in *Copyright Conversations: Rights Literacy in a Digital World*, ed. Sara R. Benson (Chicago: ACRL, 2019); Anna Vaglio, “Interlibrary Loan and Copyright in Italy: A Case Study of the Bocconi University Library,” in *Copyright Conversations: Rights Literacy in a Digital World*, ed. Sara R. Benson (Chicago: ACRL, 2019); Ann Ludbrook, Stephen Spong, Mark Swartz, and Graeme Slaght, “Canadian Copyright Law: Rarely Pure and Never Simple,” in *Copyright Conversations: Rights Literacy in a Digital World*, ed. Sara R. Benson (Chicago: ACRL, 2019).
  29. U.S. copyright law (Title 17 of the U.S. Code) can be found on the U.S. government’s copyright website: <https://www.copyright.gov/title17/> (accessed November 11, 2017). Additionally, Cornell Law School’s Legal Information Institute offers a useful web-based presentation of the law, annotated with hyperlinks between concepts: <https://www.law.cornell.edu/uscode/text/17/101> (accessed November 11, 2017).
  30. My own toolkit includes: Kenneth D. Crews, *Copyright Law for Librarians and Educators: Creative Strategies & Practical Solutions* (Chicago: American Library Association, 2012); and Peter B. Hirtle, Emily Hudson, and Andrew T. Kenyon, *Copyright & Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, & Museums* (Ithaca, NY: Cornell University Library, 2009).
  31. Kevin Smith (now Dean of Libraries at the University of Kansas) wrote a blog in his capacity as Director of the Office of Copyright and Scholarly Communications at Duke University, which I began reading after encountering Kevin Smith in a copyright webinar several years back; this torch has been taken up by his successor, Dave Hansen), accessed November 11, 2017, <https://blogs.library.duke.edu/scholcomm/>. Among the many excellent web-based resources I could mention, I’d like to highlight

- one I added early on to my toolkit, and still refer to regularly, sometimes known as the “Hirtle chart”: Peter B. Hirtle, “Copyright Term and the Public Domain in the United States,” accessed November 11, 2017, <https://copyright.cornell.edu/publicdomain>. Indeed, the Cornell University Copyright Information Center is an ever-evolving treasure-trove of resources for the librarian handling copyright questions.
32. Ralph G. Brockett, “Self-Directed Learning and the Paradox of Choice,” *International Journal of Self-Directed Learning* 3, no. 2 (2006): 27–33, 28.
  33. Brockett, “Self-Directed Learning,” 29.
  34. *Ibid.*, 30.
  35. *Ibid.*, 31.
  36. Association of College and Research Libraries, *Framework for Information Literacy for Higher Education*, February 9, 2015, accessed November 12, 2017, <http://www.ala.org/acrl/standards/ilframework#inquiry>.
  37. Association of College and Research Libraries, *Framework for Information Literacy*.
  38. *Ibid.*
  39. American Library Association, “Code of Ethics,” accessed November 11, 2017: <http://www.ala.org/tools/ethics>.
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# “Information Has Value” and Beyond: Copyright Education within and around the *Framework*

*Gesina A. Phillips*

## Introduction

The Association of College and Research Libraries’ *Framework for Information Literacy for Higher Education* offers a broad outlook regarding the core concepts necessary for responsible, informed, and generative information use. Just as the *Framework* is adaptable for many disciplines and teaching strategies, it implicitly supports opportunities for librarians and other instructors to discuss the legal and social structures underlying information creation, use, and reuse. The idea of intellectual property shapes the information landscape to which learners are formally introduced within the *Framework*; therefore, the *Framework* presents a singular opportunity to discuss topics—no matter how basic—related to copyright and fair use. Just as advocates of critical library pedagogy and social justice praxis have identified opportunities and gaps in the *Framework*, copyright educators may need to teach both within and beyond the frames in order to connect learning to practice.

This chapter seeks to examine opportunities within the *Framework* itself to discuss copyright with learners in an accessible and understandable way. This may be accomplished by integrating copyright into existing

information literacy sessions, library-taught courses, and online materials, or the *Framework* may be used to better connect existing copyright instruction and resources to undergraduate learners. This chapter begins by discussing the *Framework* and information literacy as related to copyright, locating opportunities to discuss copyright within several frames. As information literacy is often a project located within undergraduate curriculum development, particularly for first-year students, the discussion then focuses on methods for connecting copyright to undergraduate learning. Upper-level learners may also experience gaps in information literacy instruction as they begin to encounter copyright in concrete ways within their academic lives, so this chapter closes by offering some suggestions regarding outreach to that student population as well.

## The *Framework* as a Starting Point

Library pedagogy, especially the instruction of undergraduate students, focuses on the idea of information literacy. *The Framework for Information Literacy for Higher Education* (hereafter the *Framework*), administered by the Association of College and Research Libraries, was made available in 2015 and accepted in 2016 to replace the *Information Literacy Competency Standards for Higher Education*, published in 2000. The purpose of the *Framework* is to offer a set of interrelated major themes which can be integrated into discipline-based, library, or core curricula in order to promote the development of information literacy skills.

The *Framework* offers the following as a definition of information literacy: “The set of integrated abilities encompassing the reflective discovery of information, the understanding of how information is produced and valued, and the use of information in creating new knowledge and participating ethically in communities of learning.”<sup>1</sup> Even within this definition, the clear role of intellectual property education is evident through references to “how information...is valued” and using information “ethically.”

The *Framework* seeks overall to promote metaliteracy, a concept which repositions information literacy as “an overarching set of abilities in which students are consumers and creators of information who can participate successfully in collaborative spaces.”<sup>2</sup> Metaliteracy locates learners within digital sites of information exchange, such as online communities or social media, and focuses on the development of the

skills necessary to navigate, learn from, and contribute to these spaces. This idea incorporates the affordances of the digital world, which requires learners to connect multiple literacies (e.g., digital literacy, visual literacy, and media literacy) and to view information as a “dynamic entity that is produced and shared collaboratively.”<sup>3</sup> Information production and sharing, of course, will connote to a copyright librarian the necessity of promoting an awareness of the complex web of legal and ethical issues accompanying such practices.

Copyright underpins information creation and use, and its attendant lessons about fair use, licensing, and copyleft mechanisms such as Creative Commons are important for understanding one’s own information creation and reuse. The *Framework* explicitly mentions copyright in relation to information ethics, taking up the topics of citation and plagiarism in order to promote responsible research practices. This is in line with the *Standards* that the *Framework* replaces, although the previous guidelines focused much more narrowly on a prescriptive vision of competencies necessary to enable ethical content use. For a more nuanced view of the interplay between intellectual property rights (and responsibilities) and information literacy, however, an instructor will need to consider the learning objectives of the *Framework* through the lens of a copyright specialist rather than seeking guidance from the document itself.

The *Framework* also opens the door for a discussion of students as creators of copyrighted works. This constitutes another stark divergence from the previous *Standards*, which promoted a more strictly consumerist view of information. Despite the use of terminology envisioning information creation as necessarily transactional, the *Framework* recognizes the generative power of learners. Indeed, learners are already information creators, whether they (to use the language of the *Framework*) “see themselves” that way or not. Most learners will have been regularly creating copyrighted content and potentially posting it to online systems that demand certain uses of that content as a term of service. Recognizing the specific currents of copyright at play in their own lives—“how this applies to them”<sup>4</sup>—promotes a broader understanding of this topic. Opportunities to connect copyright education to the *Framework* and to students’ lived experience will be discussed later in this chapter.

A focus on the student as a learner with their own unique experiences and potential contributions will reify one of the deeper concepts which can be teased out of the *Framework*: learner agency. A criticism of the *Framework* is that it does not promote learner praxis, or the enactment of the theories learned, but instead “stops short of advocating curriculum and pedagogy that develops active responses” to an understanding of concepts such as information privilege.<sup>5</sup> Learner praxis must therefore be promoted as an extension of the *Framework* rather than an inherent value within it. Learners already interact with and create copyrighted material constantly; therefore, learner agency with regard to copyright is an outcome that is likely both attainable and beneficial in a way that is obvious to the learners themselves.

The *Framework* offers a vision of metaliteracy and opportunities to promote student agency, but certain applications of these pedagogical practices must be created based on the gaps or inherent opportunities in the frames. It is in this liminal space that copyright education can take root within information literacy instruction.

## Copyright, Information Access, and Social Justice

The opportunities afforded by the *Framework* to explicate information creation and access as well as social justice issues have been explored by other authors but bear consideration in this conversation for their particular application to copyright education. The ACRL Information Literacy Competency Standards for Higher Education Task Force considered but ultimately decided against including a standalone frame focused on social justice, instead incorporating social justice-related topics into the other frames.<sup>6</sup> Authors discussing the *Framework* from a social justice standpoint have noted that although the frames incorporate openings for a discussion of social justice, the language is often “passive”; for example, learners are “inclined” to examine their information privilege rather than simply examining it.<sup>7</sup> The economy of information is also privileged in the neoliberal language of the “information marketplace” that learners are meant to contribute to, seeming to “raise the value of information as a commodity over other dimensions of value.”<sup>8</sup>

Despite these criticisms of the document's incorporation of social justice, a discussion of information access and use is incomplete without a discussion of the structures at play with regard to information ownership. Copyright underpins information access and use in ways which are often hidden from information users, especially those new to research. The *Framework* offers a unique opportunity to not only educate learners about copyright in general but also to address more specific legal inequities—that is, how copyright affects them in particular as information users and creators. Often, this includes a discussion about how market forces and the power of publishers as rightsholders “inhibits their access to needed materials and limits their ability to control the dissemination of their own work.”<sup>9</sup>

This discussion can and must center information privilege, or “who can access what, from where, for how long, to what end.”<sup>10</sup> What role does copyright have to play in the commercial scholarly infrastructure? How do the power structures inherent in the ecosystem of scholarly communication influence what is considered “publishable” or “scholarly”? How does the system of for-profit publishing and rights-holding enforce a system of information haves and have-nots? What access to information do learners have while enrolled at a college or university that they will not have after they leave? What access do such learners have on campus that they do not have (at least in the same way) off-campus? What are the discrepancies in information access between different institutions?

These questions are not meant to be asked and answered all at once; in all likelihood, copyright educators do not have an opportunity to focus exclusively on the topic of information access and social justice. Just as the *Framework* is meant to be iterative and integrated throughout the learning process, so too must this discussion of information justice be woven into the fabric of discussions about information creation and use.

## The Frames

The six individual areas of focus in the *Framework* are called the frames; they are Authority Is Constructed and Contextual, Information Creation as a Process, Information Has Value, Research as Inquiry, Scholarship as Conversation, and Searching as Strategic Exploration. These broad topics, taken together, are meant to “organize many other concepts and ideas

about information, research, and scholarship into a coherent whole.”<sup>11</sup> Each frame contains knowledge practices (methods for increasing understanding) and dispositions (descriptions of the “affective, attitudinal, or valuing dimension” of the frame content).<sup>12</sup> Taken together, each frame seeks to describe an aspect of information literacy in a way which, at least semantically, privileges understanding rather than a prescriptive set of competencies.

The locus of copyright instruction within the *Framework* is the frame Information Has Value. This frame investigates the way in which information is commodified and presents a unique opportunity to discuss scholarly communication with students. By using this frame as the introduction to copyright (rather than its only entry point into the curriculum), an instructor may find many opportunities to investigate the intersections between copyright and information literacy in the remaining frames.

### ***Copyright in the Framework: Information Has Value***

The frame Information Has Value is perhaps a natural starting point for a discussion about copyright due to its explicit mention of “intellectual property laws.” The frame is worth including in its entirety due to its sustained focus on the legal and commercial implications of information value:

Information possesses several dimensions of value, including as a commodity, as a means of education, as a means to influence, and as a means of negotiating and understanding the world. Legal and socioeconomic interests influence information production and dissemination.

The value of information is manifested in various contexts, including publishing practices, access to information, the commodification of personal information, and intellectual property laws. The novice learner may struggle to understand the diverse values of information in an environment where “free” information and related services are plentiful and the concept of intellectual property is first encountered through rules of citation or warnings about plagiarism and copyright law. As creators and users of information,

experts understand their rights and responsibilities when participating in a community of scholarship. Experts understand that value may be wielded by powerful interests in ways that marginalize certain voices. However, value may also be leveraged by individuals and organizations to effect change and for civic, economic, social, or personal gains. Experts also understand that the individual is responsible for making deliberate and informed choices about when to comply with and when to contest current legal and socioeconomic practices concerning the value of information.<sup>13</sup>

The concept of copyright is inextricably intertwined within this frame. The academic publishing system relies on copyright to maintain control over information objects, and information access is affected in turn. The frame also identifies some ways in which students may already have encountered the idea of ethical and legal information use: citation and plagiarism. The final section of the frame gestures toward the power structures active in the creation and commodification of information, gesturing ultimately to fair use, advocacy, and copyleft mechanisms to "contest" how information is typically used.

The knowledge practices of this frame indicate how learners might demonstrate an understanding of certain facets of this topic. Included among those practices are mentions of citation, cultural relativity as applied to intellectual property, information access (and lack thereof), and a directive to "articulate the purpose and distinguishing characteristics of copyright, fair use, open access, and the public domain."<sup>14</sup> Several large topics are grouped together in this latter practice, but their inclusion provides a good justification for the instructor seeking to integrate an awareness of copyright into the curriculum. The dispositions for this frame encourage learners to recognize the value of information creation and conceptualize their own role as information creators but only gingerly suggest that the learners become "inclined" to perceive and examine the information privilege that they may possess.<sup>15</sup> In order to more fully realize these concepts, a more robust integration of copyright into the remainder of the information literacy curriculum is called for. Rather than simply articulating the purpose of these concepts, as the knowledge practices suggest, learners must be encouraged to understand their own participation in the realm of information seeking, reuse, and creation.

This frame can be used to aid in understanding the underlying infrastructure of scholarly communication: why information access looks a certain way, why learners might not be able to access the information they need instantly, and why their professors are concerned about them quoting and citing information appropriately. It can also empower learners to confidently enter into the scholarly conversation and begin to participate in practices of attribution and reuse. In short, understanding the value of information to various stakeholders—creators, publishers, and information users—will help learners to contextualize their own current and future scholarship.<sup>16</sup>

However, an understanding of copyright based on the *Framework* need not only apply to a learner's scholarly life. The broader scope of an individual's interaction with information can be considered when teaching using the *Framework*. The skills required to evaluate information for scholarly purposes can and should be applied to other forms of information, such as posts on social media or news reporting. A learner's consciousness of intellectual property should also transcend a simply scholarly treatment. Learners may have more copyright and intellectual property questions related to their personal or creative pursuits than about their scholarly work, especially at the undergraduate level. Learners may also not realize the ways in which copyright intersects with their lives on a moment-to-moment basis, particularly as related to content online. A more holistic treatment of copyright, therefore, will more fully promote the threshold concept of Information Has Value.

### *Finding Copyright in Other Frames*

Although the Information Has Value frame contains the clearest references to copyright education, other frames present opportunities to renew the discussion. Scholarship as Conversation returns to the concept of citation as a mechanism for giving proper credit. Although citation has clear ethical dimensions which are distinct from its legal implications,\* participation in the scholarly conversation by making use of existing works can be related to an earlier discussion of copyright. The dispositions of

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\* It is important to note, however, that the ethical and the legal are not entirely unrelated. Creative Commons licenses, for example, codify an expectation that material be attributed, and the presence of a citation can contribute favorably to an argument for fair use.

this frame also include the idea that learners are information creators in addition to information users, requiring some concept of what rights they have as creators as well as their options in terms of encouraging reuse of their work.

The frames Scholarship as Conversation and Information Creation as a Process address the topics of information formats and the architecture of scholarly publication. A broad overview of the scholarly publishing system will incorporate many of the main topics within the *Framework*, including discussions of the authority, format, and value of information. The idea that copyright changes hands within scholarly publishing may provide an example of the commercial value of information as a commodity, while discussing the occasions on which authors retain their copyright may offer a jumping-off point for discussing open access and different article formats such as pre-prints and post-prints.

The Searching as Strategic Exploration frame may offer an unexpected, and often unavoidable, lesson about information availability. Instructors who have performed live search demonstrations have inevitably encountered results which are not available at their institution. This presents a good opportunity to explicate the issues around information access and ownership. A discussion of why a particular result is unavailable (at least immediately) offers several lessons; a dead-end within a database is a chance to discuss the economics of information and information availability, to attempt to disambiguate publishers from individual journals from database platforms, and to identify the suite of rights granted by copyright that underlie many of these systems. It may also present an opportunity to discuss emergent and alternative methods of providing and obtaining information, such as open access. For students who may well have already encountered paywalls when searching the web, this discussion can bring together disparate experiences of information access.

## Learner-Focused Copyright Education

Although no single information literacy-focused course can hope to cover all of the frames in their entirety, the *Framework* offers an opportunity to incorporate a consciousness of copyright into other lessons about the information landscape. But what might that look like in practice? The fol-

lowing sections offer some suggestions about the ways in which learners may be introduced to copyright basics and the ways in which these concepts may be connected to their own experiences, practices, and needs.

### *Citation and Plagiarism*

Librarians are often expected to teach citation and to provide education about avoiding plagiarism. Consider that learners will be very familiar with these terms and perhaps even their application in an academic context. However, they may not have any exposure to the legal and ethical concerns underlying these issues, and repeated warnings about the consequences of non-compliance may deaden their impact.<sup>17</sup> Learners may need to begin by seeking to understand the difference between plagiarism (reusing the work of another without giving them credit) and copyright infringement (exercising one or more of the exclusive rights granted by copyright without permission from the creator).

Explaining the overlaps and disconnects between plagiarism and copyright infringement will also benefit learners, particularly when discussing topics such as the public domain (wherein copyright is not a factor but plagiarism still may be) and citation (proper citation should prevent accusations of plagiarism but is not an airtight defense against copyright infringement). Introducing learners to real-world examples of plagiarism, non-attribution, and copyright infringement may help to clarify expectations.

### *Digital Literacy*

Many learners make use of social media platforms and other web services with terms of service which make far-reaching claims of rights to user-created content. It may not be clear to all users that agreeing to the terms of service can create a contractual relationship wherein the rights granted by copyright to creators are altered (for more about click-through and browse-wrap licenses, see chapter seventeen in this volume by Rachael Samberg and Cody Hennesy).<sup>18</sup> A close-reading exercise of those terms of service might reveal particularly interesting links to a discussion of copyright in addition to other dimensions of information value such

as the commodification of personal data and online behaviors. Questions for learners include: What rights to your content do you give up or share by signing up for this service?<sup>19</sup> Does the platform tell you what it plans to do with your content?

### *Recognizing Learners as Creators*

Your learners may be creating works as artists or hobbyists. What are their rights as copyright holders? What rights can they license to others using mechanisms such as Creative Commons? How must they comply with copyright law, and how might they evaluate fair use if they seek to use the copyrighted works of others? Loftis and Wormser offer the example of art students, for whom image appropriation becomes a unique issue that needs to be addressed in the information literacy curriculum.<sup>20</sup> Even for learners without these artistic applications, a discussion of familiar topics such as content takedowns on YouTube may spark interest.

### *Supporting Undergraduate Research*

Learners who move off-campus or who graduate will find themselves with a different corpus of information readily available to them. Engage with learners based on their experience. Ask them: Why is it that their access differs based on their location? How might lack of access impact the work of others, such as health advocates, policy researchers, and citizen scientists? How might their own access to information change over time?

Questions such as "Why does Google Scholar sometimes ask for money?" should also resonate with learners who have some experience conducting research.<sup>21</sup> Although the discussion of the economics of information verges into a larger discussion of scholarly communication topics, the mechanism in copyright for exclusive rights to disseminate information objects will underpin this discussion.<sup>22</sup> Providing some context for paywalls will help learners to understand their research process better and may help to prevent some of the frustration caused by not understanding why these barriers exist (although it may not—and likely should not—assuage the frustration resulting from systems which cause their inability to access needed information).

Interaction with undergraduate research at the library may extend to include the research products that they produce. At institutions that make undergraduate work available through their institutional repositories, it is integral to reach those learners early to ensure that they understand attribution and permissions (or the rights of third-party copyright holders) as well as their own rights.<sup>23</sup> This applies also to graduate learners, as discussed in the following section.

## Not Just for First-Year Instruction

Of course, the *Framework* outlines knowledge practices that are useful for a greater number of learners than just first-year students. In terms of copyright, there may be a major knowledge gap for learners just beginning to produce scholarship for public display and publication. This may offer an opportunity to reframe information literacy concepts for learners who are just entering the realm of scholarly publishing. Authors' rights, information access, and the economics of information in general take on a different meaning for an individual who is creating an electronic thesis or dissertation, seeking to publish a journal article or other scholarly information object, or acting as a peer reviewer.

Upper-level learners creating scholarship and graduate students writing theses and dissertations are often unaware of their own copyright and the legal structures that may impact their reuse of others' copyrighted material. These learners may require targeted instruction related to copyright and scholarly communication topics. Ideally, this will be supported by previous information literacy instruction which incorporated a consciousness of copyright. However, unless copyright is formally integrated into the information literacy curriculum, instructors may find that these learners have little to no formal education regarding these topics. This is not to say that learners will be complete novices in terms of intellectual property; some learners may have experience as creators in other contexts, while others may have faculty advisors who have provided guidance regarding the use of copyrighted material. Graduate students will not have uniform needs and goals, but there are some common areas where a copyright specialist is uniquely prepared to engage.

## *Electronic Theses and Dissertations*

Institutions which require graduate students to submit Electronic Theses and Dissertations (ETDs) as a graduation requirement are poised to offer copyright education to graduate students. Learners graduating with a knowledge gap in terms of reuse of copyrighted material and the rights afforded to a creator by copyright represents a missed opportunity. Moreover, requiring graduate students to sign a license granting their university (or a third party such as ProQuest) permission to reproduce, display, and distribute their ETD would seem to require education about those rights. Just as preparing an ETD models the scholarly publishing process, so too may it be used to educate authors about their own rights as well as the rights of other copyright holders.

## *Graduate Students as Authors and Researchers*

Graduate students engage in research and publishing, so integrating this population into faculty-focused publishing workshops and resource distribution can be beneficial. Advisors may invite their graduate students to these sessions ad hoc, but often graduate students will need some of the same training as faculty with regard to topics such as their rights as authors and open access publishing.

Reaching authors at the beginning of their careers will provide an opportunity to discuss their rights and to prepare them for the questions that arise when negotiating (or, in many cases, simply signing) a contract to publish their work. This will also ensure that authors who are predisposed to make their work available will have the opportunity to learn about different roads to open access. For graduate students preparing ETDs, this will prove particularly important if they plan to include previously published articles in their manuscript.<sup>24</sup>

In addition to reusing their own materials, new authors will often make use of third-party copyrighted materials such as survey instruments, which carry a dual responsibility to request permission, first for their initial use and then to reproduce in a publication. Authors should be educated regarding how to acquire permissions or licenses and how to articulate a fair use argument when appropriate. Authors may also create

their own instruments, providing an opportunity to discuss their rights as the copyright holder as well as mechanisms for clear and open licensing.

Although graduate and upper-level undergraduate learners may have mastered many of the core concepts of the *Framework*, it is important to remember the iterative nature of information literacy and to identify opportunities to work with these learners, likely outside of an institution's formal information literacy curriculum.

## Conclusion

Although intellectual property may not constitute its own frame (and in many respects does not need to), copyright-related topics wind their way through most of the major areas of focus included in the ACRL *Framework*. A truly robust understanding of information objects necessitates an understanding of how those objects are created and how they change hands. Copyright forms the basis for this system of information creation and exchange. Exposing learners to the basic concepts of copyright law and the ways in which it impacts their own information use and creation serves to empower them to not only use information responsibly but to reuse information with intention and to create new works with a fuller knowledge of their own rights.

## Endnotes

1. Association of College and Research Libraries, *Framework for Information Literacy for Higher Education*, adopted January 11, 2016, <http://www.ala.org/acrl/standards/ilframework>.
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# An Active Learning Approach to Teaching Copyright Essentials

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## Introduction

Twenty-first-century undergraduate students are often “under-prepared” for academic work.<sup>1</sup> “And then,” as Nancy Noe writes, “there is the Internet.”<sup>2</sup> Students come in with extensive experience online but also with “broad generalizations and misunderstandings regarding issues such as copyright.”<sup>3</sup> Areas of intersection between scholarly communication and information literacy, including the economics of the distribution of scholarship, the increasing need for digital literacies, and the changing roles of libraries and librarians, all touch on the importance of copyright knowledge and copyright instruction.<sup>4</sup>

Graduate and undergraduate students, as well as faculty, “are more likely...to experience content of all kinds as digital, easily available, reusable, and shareable” and to share research and educational works online in ways that are like publishing though they are “far removed from traditional publishing.”<sup>5</sup> Additionally, students’ experience with social media and other everyday technological interactions are increasingly moving into the classroom in assignments in the form of “collaborative videos, wikis, or blogs” rather than (or alongside) term papers and midterms.<sup>6</sup>

Even with an understanding of fair use/fair dealing, it can be difficult to navigate these increasingly blurred boundaries between the classroom and the public sphere.<sup>7</sup>

It is vital that students develop digital literacies (including media literacy, visual literacy, and data literacy), and a key component of each of these proficiencies is a functional knowledge of copyright law and its application.<sup>8</sup> Librarians, with their extensive experience teaching all areas of information literacy and scholarly communication, can effectively convey copyright knowledge to students.

Copyright stands slightly apart from information literacy more generally. It is an area of law in which librarians have often become the primary experts and educators within academic institutions. Librarians providing this information may not have legal degrees and even with a legal pedigree cannot provide legal advice in their roles as librarians—yet librarians are uniquely positioned<sup>9</sup> to provide to their patrons holistic copyright instruction encouraging the legal use of and access to information.

Indeed, it is “*critical* that librarians aid [their] students’ understanding of intellectual property, and their associated rights and responsibilities.”<sup>10</sup> Guidelines and best practices for information literacy instruction,<sup>11</sup> addressing such topics as goal-setting, planning, and evaluation, can be applied to copyright education. However, additional considerations are needed to address the complexities and nuances of copyright law and its application.

An active learning approach, as opposed to passive instruction such as a lecture, can make copyright education more effective by “engag[ing] students to be fully involved and to participate in the learning process.”<sup>12</sup> Active learning pedagogies use approaches such as discussion, debate, role-playing, and hands-on use of tools and methods,<sup>13</sup> which “require the use of higher order thinking skills such as analysis, synthesis and evaluation.”<sup>14</sup>

A 2012 study found that active information literacy instruction yielded

the psychological outcomes of decreased anxiety/increased self-efficacy using online library resources, improved perceptions of online library resources, and improved perceptions of librarians in terms of helpfulness and value; [and] the behavioural outcome of improved use of librarians.<sup>15</sup>

These outcomes are equally beneficial in relation to copyright education as a specific segment of information literacy instruction. The ACRL recommends pedagogy that uses “collaborative and experiential-learning activities,”<sup>16</sup> and elsewhere specifically notes that scholarly communication and information literacy education “is more effective when active learning, and other ways to fully engage the learner, are applied.”<sup>17</sup> Activities such as discussion of the rights held by copyright owners and a fair use analysis, as utilized in this chapter’s lesson plan, get students interacting with and implementing the copyright concepts they are learning, enabling a deeper understanding of these concepts.

This chapter first establishes principles to guide the design and development of content, structure, and delivery for copyright education programs. These principles aim to create copyright education that interests, inspires, and empowers students to understand the many ways in which their actions online (both as academics and as citizens of the modern world) involve copyright and to make informed and confident decisions in potentially risky situations. These principles are intended to act in concert with existing best practices.

The chapter then illustrates the application of these principles using active learning pedagogy in a detailed lesson plan for undergraduate students. This approach to copyright education builds on traditional information literacy by adding elements of transliteracy, which is defined as “an [individual’s] ability to use diverse analogue and digital technologies, techniques, modes and protocols.”<sup>18</sup> Incorporating transliteracy into this copyright curriculum further provides students with tools to understand how to create, work with, and use not only textual sources but also images, video, audio, and other multimedia works. Active learning is the ideal pedagogical approach to enable students to connect their uses of interactive technology with an understanding of the rights of both creators and users of media.

## Principles

Copyright “rules” can include legislation, case law, institutional policies, and guidelines or best practices; these are complex and overwhelming, especially to those unfamiliar with copyright or legal documents more

generally. The formal nature of these, and the jargon used, can make copyright dry and difficult to learn. Copyright decisions often require interpretation or assessment of each situation and involve some level of legal risk. Critical-thinking skills and an understanding of all of the applicable “rules” are necessary to make these interpretations and decisions.<sup>19</sup>

Copyright education needs to go above and beyond both information and digital literacies and provide students with the confidence to address copyright questions and make decisions in their coursework, their social interactions, and their future careers. The authors propose the following four principles, which establish keys to ensuring that copyright education addresses the nuances of copyright law and the risk inherent in making many copyright-related decisions.

### *Targeted and Relatable*

Due to the complex and overwhelming nature of copyright legislation, policies, and guidelines, copyright education must be targeted to its audience. This will enable the instructor to synthesize sources and focus the content on what a particular audience needs to know. College and university copyright education audiences may be grouped by course or discipline, rank (e.g., faculty, undergraduate students), or responsibility (e.g., teaching, learning, research), and in each case the content and delivery can be planned with the needs of that audience in mind. For example, a session on theses and dissertations will discuss fair use/fair dealing differently than a session on coursework, while a session on coursework will include more detail about the institution’s policies than a session on publishing. Content that is of little use to an audience can be eliminated, or at least glossed over; for example, a session for students need not cover teaching or might more specifically discuss in-class presentations instead.

A secondary principle here is that copyright education should be relatable: “By using examples of which students are aware, the librarian can help ensure that the information they are conveying is both applicable and easy to remember.”<sup>20</sup> Copyright rules and guidelines can vary in different contexts, and students are used to constant sharing and re-sharing online. Thibeault describes the shortcomings of a “compliance approach” in which “a stark contrast is made between content creators, typically depicted as corpora-

tions...and individuals who are depicted solely as consumers”<sup>21</sup> and contrasts these shortcomings with the benefits of a “creative rights approach,” which “invite[s] a conversation...where all people may create and...their creations deserve and receive protection under copyright.”<sup>22</sup> The lesson plan described in the latter part of this chapter emphasizes this creative rights approach immediately in class with a discussion about whether students believe they hold any copyrights, actively engaging students from the beginning and establishing the active learning approach. Many students arrive at college or university knowing little about copyright but also often believing that this knowledge is unimportant; focusing on their own rights demonstrates the importance of this knowledge in a tangible way. Such targeted approaches are taken “with the intent that the student does not passively assume the knowledge but rather the content applies meaningfully to the student’s everyday actions.”<sup>23</sup>

### *Simplified*

Due to copyright’s complexity and the need for interpretation, copyright education needs to be simplified, both in terms of limiting the amount of information covered in a workshop or class and in terms of breaking down concepts and defining terminology.<sup>24</sup> Presenting information in a clear and concise manner, as well as using examples and activities, will make it easier for students to understand and relate to course material. Using active learning techniques and letting students come to conclusions instead of feeding them information may take additional time both in course preparation and in course length, but content delivered using this approach will likely be better internalized and retained by students.

While it is not possible to eliminate all copyright-specific jargon, instructors should eliminate legalese where possible and make sure to clearly define and provide examples for terms that are likely to be new to students. This is another area in which relatable examples and activities can enhance student learning. Librarians do need to be wary of over-simplifying content, however, in case important distinctions are lost; it should be clear to students what types of situations they may be able to address themselves and what circumstances might warrant seeking help. Letting students know where and how to find such help should be part of any copyright education.

## *Empowering*

Whereas being able to apply copyright law to the most common ways of working with content in higher education was once a matter of applying a set of rules, it is now necessary to help our communities apply critical thinking skills in order to integrate a more fundamental understanding of our copyright regime.<sup>25</sup>

Copyright education needs to be empowering as opposed to prescriptive. Librarians should provide copyright information and tools in a way that gives students the confidence to make decisions that may involve risk. Role-playing, such as the fair use analysis in this chapter's lesson plan, provides guided experience with assessing copyright questions. Librarians should also emphasize positives, such as users' rights in copyright law or the availability of openly licensed sources, rather than negatives or limitations.

When students learn about copyright in an empowering framework, they have the chance to practice making decisions in a relatively low-risk environment (i.e., in their coursework). This information can also begin to be applied to social media and other online situations. With multiple opportunities to make these decisions during their education, by the time the students graduate and begin to publish or work in a professional setting, they will be much more confident in identifying and addressing copyright concerns.

The copyright considerations and level of risk for students reproducing works or excerpts in a course assignment will be different from those relating to reproducing content in a thesis or dissertation, which will be different yet from risks relating to formal publishing. The extent to which librarians encourage students to make decisions themselves, instead of coming to the library or copyright office, will depend on an institution's policies or culture as well as the specific situation and the type of work being produced. The questions students bring directly to the copyright librarian can also be answered in an empowering frame—indeed, many questions do not have one correct answer; instead, information can be provided to guide the student through making their own decision.

## *Illustrative and Interactive*

Copyright can be a dense and difficult subject to learn (and teach), so copyright education should be illustrative and interactive, utilizing demonstrations, examples, and activities targeted to the specific audience. This is where active learning can be most useful for copyright education. Current news items relating to aspects of copyright or cases relating to education, for instance, provide relatable examples for students. Folk-Farber describes using “wonderfully controversial and messy” cases and news stories to pique students’ interest;<sup>26</sup> on the other hand, Keener cautions that the “element of chance” in introducing real-life scenarios can be “challenging,” due to the differing backgrounds, experiences, and perspectives of the students in the class.<sup>27</sup> Individual librarians will have different comfort levels for using such examples, but there are many different scenarios that can be used as illustrations. Investigating “real-life” cases intrinsically connects copyright issues to students’ experiences by putting students in the shoes of users as well as creators of copyright-protected works.<sup>28</sup>

In addition to demonstrations, students should be given opportunities to interact with the content through exercises, quizzes, or other activities. This interaction enhances the connections students make with the content by having them assess, synthesize, and apply the concepts they’re learning. Active approaches like these increase the confidence of students in applying the concepts they have learned and practiced.<sup>29</sup>

## **Classroom Application**

These principles can be flexibly applied to the development and delivery of copyright education for a variety of audiences and in a range of formats. Providing copyright education tailored to the four principles outlined above, along with active learning approaches that encourage students to work through copyright decisions, leaves students better equipped to think critically about the wide variety of situations in both their professional and personal lives that involve copyright.

These principles provide a useful framework for delivering an effective copyright lesson, but the content of the lesson could focus on many different aspects of this area of law depending on the needs of the stu-

dents. Several dedicated undergraduate courses on copyright, such as the "Theft of the Mind" seminar at Texas A&M<sup>30</sup> and the "Copyright and You" course at Oakland University,<sup>31</sup> have been developed in recent years; however, as much as some librarians may want to offer a full-length course in copyright, they may lack the resources or institutional buy-in to be able to get such a course off the ground. The lesson that follows is designed for librarians who care about copyright education but may have limited resources or classroom time.

## A Sample Lesson

As part of a required one-credit information literacy course for undergraduates, one of the authors of this chapter has incorporated a full, seventy-five-minute lesson on copyright and fair use into her curriculum that exemplifies the principles laid out in the first part of this chapter. The lesson will be described here, and all materials related to the lesson are available at <https://goo.gl/rbv25> (materials are CC licensed). It could easily be adapted for use in a one-shot session or as part of a stand-alone copyright student workshop. Several active learning strategies are employed throughout the lesson. Meyers and Jones categorize active learning strategies by the "four key elements...[of] talking and listening, reading, writing, and reflecting,"<sup>32</sup> and most of these elements are represented in the lesson. Some of the content and layout of the in-class portion is similar to Folk-Farber's copyright lesson,<sup>33</sup> but this lesson includes an additional pre-class assignment and a more robust assessment.

The lesson is comprised of three components: pre-class work, in-class lecture and practice, and homework. The lesson is aimed at facilitating the following learning outcomes:

- Students will understand the basic tenets of copyright law and apply those tenets to evaluate the likelihood of copyright infringement in real-world scenarios.
- Students will analyze the differences between copyrighted work, public domain, and Creative Commons-licensed work in order to locate creative works that have fewer restrictions on usage.

- Students will use the four factors of fair use to evaluate whether creative works that reuse elements of other copyrighted material require permissions.

Over the course of the lesson, students should become familiar with the following concepts: copyright protected works, public domain, derivative work, Creative Commons, and fair use. Students will be introduced to and should be able to apply some basic copyright principles, and they should come away with a broad sense of the role that copyright plays in the information economy and public access to information.

### *Pre-Class*

Before the class session about copyright, students are asked to complete several readings that introduce them to some of the concepts in the lesson. One reading is Dewey's report of a photography firm suing a small blog over the use of a portion of a copyrighted image in a meme posted on the blog.<sup>34</sup> The topic of the article helps to make the unfamiliar concept of copyright more relatable by showing how memes, which students encounter and maybe even create in their leisure time, can be the subject of copyright disputes. It also illustrates the complex task of balancing free speech and creativity with intellectual property rights and how, in some cases, money can tip the balance, giving the students a big picture view of how copyright can affect the flow of information and culture. Other reports about copyright and popular culture could be substituted for this particular reading.

The other assigned pre-class readings include Faden's video, *A Fair(y) Use Tale (NOT a Disney Movie)*,<sup>35</sup> a cheeky rendering of the fair use exception of copyright law and an infographic, video, or reading about the basic tenets of copyright law. These materials help to introduce the content of the class and provide a base level of information about the topic that the students expand on or clarify during the in-class activities.

Students are asked to write two paragraphs reflecting on at least one of the readings and to post their responses in the class forum. They are also asked to reply to two other students' posts, and sometimes interesting discussions ensue. A handful of students have dealt with copyright issues

through involvement in a student club or a personal hobby, so they have some awareness of the issues. Some students think that lawsuits like the one described by Dewey<sup>36</sup> are an abuse of copyright protection and that the current term of copyright is too long, but others are in favor of strict enforcement of copyright law and a lengthy term. Students' misconceptions about copyright also tend to come to the surface in these discussions, such as the notions that ideas are copyrighted, that content available for free online is not protected by copyright, or that using a copyrighted work is legal as long as credit is given. These discussions reveal important information about student knowledge on the topic and the gaps therein which can help to guide the direction and emphasis of the in-class instruction. Reflecting on a reading is also an active learning strategy that requires students to be actively engaged with the course materials and content.<sup>37</sup>

### *In-Class*

This lesson includes a lecture and discussion portion to reinforce information from the readings and correct student misconceptions followed by an interactive component that allows students to apply the concepts to real situations. Students are asked to actively participate in the discussion by evaluating a series of statements about copyright using facts they learned from their pre-class assignments. Some of the statements also build upon previous ones, and the instructor encourages students to recall previous statements to help them reason out whether later statements are true. Such a structure for the lecture encourages active listening and problem-solving on the students' parts as they move through the content of the lesson. This approach emphasizes the learning process over grades and correct answers, which research has shown to be effective at fostering critical-thinking skills and higher-order thinking.<sup>38</sup> The first statement that students evaluate is whether anyone in the room owns a copyright. Students are told that if they do own a copyright, they should raise their hands. Generally, very few students raise their hands. Students are then asked if they have ever done any creative or research writing, painted or drawn something, made a video or audio recording, or taken a photograph. Generally, every hand in the classroom is up by the end of the list, and students get the big reveal that they are, indeed, all rights holders

for things that they create all the time. At this point, students often have questions about specific types of work and whether they can be copyrighted, so the instructor can discuss the criteria that a work has to meet: it must be original, it must be creative, and it must be a tangible work (not just an idea). Students are then asked whether the © symbol is required for a work to have copyright protection. The instructor gives them a hint by reminding them that they are rights holders. The instructor then informs the students that no formalities are required to hold a copyright on a work, but they can be beneficial in certain circumstances. Sometimes at this point in the lesson, a student mentions an example of something that would be covered under trademark or patent law, providing the instructor with the opportunity to discuss how such works indeed fall under the umbrella of intellectual property but are governed by different rules that will not be detailed in the lesson.

After discussing which types of work can be protected by copyright, the instructor proceeds to explain the bundle of exclusive rights held by copyright owners and the term of copyright. To introduce the exclusive rights, students are asked whether the translation of a copyrighted work is permitted without permission, which leads to a discussion of the other exclusive rights that copyright holders have (the rights to copy, distribute, broadcast, perform, and create derivative works). *The Phantom of the Opera* is used to illustrate the concept of derivative works, as it has many derivatives including translations, film rights, and a musical rendition of the work. The discussion of *The Phantom of the Opera* also provides the instructor with a transition to the concept of the public domain because the novel and the original film version are both in the public domain. Students are informed that current copyright laws provide that works are protected by copyright for the duration of the life of the author plus seventy years or ninety-five years for works by a corporate author. The “quiz” concludes by asking the students if the statement “If something is posted on the internet, anyone can use it however they want because it becomes free information” is true or false. The instructor reminds students of the facts of the lesson to this point to try to elicit a response of “false” to this common misconception. At this point in the lesson, many students are able to recognize that posting a work online does not negate the copyright protections that are automatically bestowed when the work is created.

Students often conflate the concepts of copyright infringement and plagiarism, so the next part of the lesson includes a discussion of the distinctions between the two concepts while introducing some resources to help students avoid infringement. In this portion of the lesson, students learn about the public domain and Creative Commons (CC) licensing, including how to search for CC-licensed images and videos on Google and YouTube. Finally, the instructor provides a brief overview of the four factors of fair use with special attention paid to the concept of transformative works.

### *In-Class Activity*

The concept of fair use can often leave students scratching their heads, unsure of what to make of it, so the last part of the class is dedicated to analyzing a video that reuses portions of previously copyrighted work. Before watching the video, students are given a handout that has a table with the facts about copyright that were covered in class on one side and a summary of the four factors of fair use on the reverse. The class then watches the video, *MORE NFL—A Bad Lip Reading of the NFL*.<sup>39</sup> It is a mashup of footage from NFL games with the people on screen saying funny, nonsensical gibberish. A comedy video is a good transition from the heavy and sometimes difficult-to-grasp facts of copyright and helps students to understand how the factors of fair use apply to real-world situations. The mood of the class noticeably lightens during the video.

After watching the video, students complete a fair use analysis of it, looking at each of the four factors to determine if the use of previously copyrighted footage in the video is fair or not. The students become very engaged during this portion of the lesson, working in small groups and discussing how to apply the four factors to the video. If students are reluctant to work together, the instructor encourages them to talk through their ideas with a partner or two because speaking out loud requires more clarity and organization than silent thought, thus more actively engaging students with the content. The instructor also wanders the room answering questions and asking students to rethink answers where they've made mistakes. Interaction between students and between students and their instructor is crucial to the "talking and listening" element of active learning.<sup>40</sup> When the conversation starts to die down, the entire class

compares their answers. For factor one (the purpose of the use), students easily identify the entertainment purpose of the use, which is considered unfavored, generally, by courts interpreting the fair use factors. Other purposes that students sometimes identify are transformative and/or parody (favored) and possibly commercial from YouTube ad revenue (generally an unfavored purpose or use). For the second factor, students are usually quick to determine that the nature of the copyrighted source material (footage from NFL broadcasts) is in the genre of a documentary or nonfiction work (which is more protected under fair use). Students have some difficulty with the third factor. The video is about three minutes long, but each clip used is only a few seconds long and the clips appear to come from many different games, so the amount of copyrighted material borrowed from each work is minuscule. The clips are also unsubstantial, showing inconsequential moments as opposed to the heart of the work. Lastly, students easily conclude that the video is unlikely to have any impact at all on the market value of NFL broadcasts.

In making a final determination as to whether this video is an example of fair use or not, students are asked to consider whether the video would serve as an acceptable substitute for the original work (a broadcast of an NFL game). Most understand that it would not, and based on the entirety of the fair use analysis, they generally agree that the video is likely an example of fair use.

At the conclusion of the in-class activity, students are asked to search for a Creative Commons-licensed image using Google Image search. After locating one CC-licensed photo, they look up the terms of the license on the CC website and explain how one would reuse the image while abiding by the terms the author has set out.

## *Assessment*

The intent of the lesson is to make the students aware of copyright while they interact with content in their academic, personal, and professional capacities and to give them tools and resources to help them recognize and solve copyright problems that they encounter. To reinforce the lecture and in-class exercise content, this lesson includes a homework assignment comprised of three realistic scenarios to which students should

apply the concepts covered in class. The first scenario is an example of a Shakespeare play being adapted for a community theater. The second scenario is about a student sharing an idea with a friend who then steals it and creates a work based on the idea. The third scenario is a situation that requires a fair use analysis of a piece of student work that parodies a popular sitcom. The final exam for the course also includes an open note essay question with a scenario in which a friend steals a photo from someone else's social media and begins selling prints of it after making some small edits, justifying the theft by claiming that publicly posted works are not protected by copyright. Students are asked to respond using their knowledge of copyright and fair use.

## *Results*

Over three semesters, 156 students were enrolled in courses in which this lesson was taught with 132 completing and submitting the homework assignment and 148 sitting for the final exam. The authors believe that fewer students submitted the homework because it is a less substantial portion of the final grade than the exam.

The Shakespeare play mentioned in homework question number one was correctly identified as being in the public domain by 71 percent of the class participants. For question two, 87 percent of the participants recalled that an idea is not copyrightable, so using someone's idea does not constitute copyright infringement. For the third question, 73 percent of the students correctly identified that a student work that parodies a sitcom for a class assignment would likely be considered a fair use. The final exam question was graded on a points scale based on the thoroughness and correctness of the answer. Students scored an average of 75 percent on this question.

## **Conclusion**

A working knowledge of copyright is essential to twenty-first-century college graduates as they prepare for their professional and personal lives lived in the digital age where sharing and remixing content is an essential mode of interaction. Librarians have the background and the position on

campus to meet the need for training on this important but sometimes overlooked aspect of information literacy.

Copyright is a complex area of law, but by putting together a lesson that is targeted and relatable, simplified, empowering, and illustrative and interactive, librarians can help students to gain the skills and knowledge they need to navigate copyright issues. The sample lesson provided follows these principles and has been effective in raising copyright awareness among students. Its focus on student as author makes the content relatable. The discussion of Creative Commons and fair use empowers students to know how to legally use information. Finally, the use of active learning approaches to walk through real-world activities and examples makes it illustrative and interactive. These principles and the accompanying sample lesson can enable any librarian with a role in instruction to effectively teach undergraduate students about copyright.

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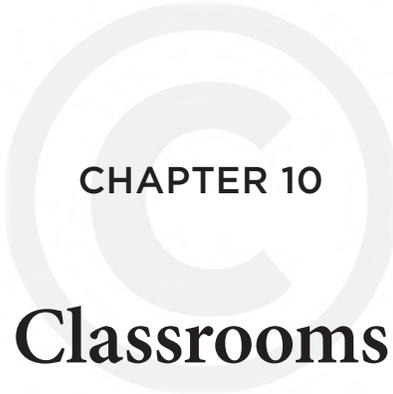
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## CHAPTER 10



# Online Classrooms: Is the TEACH Act Enough?

*Carla S. Myers*

## Introduction

The Technology, Education, and Copyright Harmonization Act (TEACH Act) was passed by Congress and signed into law by President George W. Bush on November 2, 2002, in response to changes in distance education brought about by advances in technology in the preceding years. Fifteen years later, copyright considerations in distance education are as relevant as ever as the number of online courses being offered by colleges and universities grows each year. Digital Learning Compass' *Distance Education Enrollment Report 2017* shows that “in higher education, 29.7% of all students are taking at least one distance course... [with] 14.3% of students taking exclusively distance courses and 15.4%... taking a combination of distance and non-distance courses.”<sup>1</sup> This is an increase of “3.9% over the previous year,”<sup>2</sup> and “this growth rate was higher than seen in either of the two previous years.”<sup>3</sup> Additionally, “blended” courses are being offered more frequently by higher education institutions. These courses, “also known as hybrid or mixed-mode courses, are classes where a portion of the traditional face-to-face instruction is replaced by web-based online learning.”<sup>4</sup> Even courses taught primarily through face-to-face instruction usually require students to engage with an online “course page” within the institution's Learning Management System (LMS),<sup>5</sup> usually to access supplemental learning resources, take quizzes and tests, or, in the case of “flipped classrooms,” watch recorded lectures posted to the course page before coming to class so that the content found in them can be discussed during class time.

A primary teaching practice in both face-to-face and online education settings involves students engaging with copyrighted works. Often this takes place via the class textbook, but it also includes the course instructor performing,<sup>6</sup> displaying,<sup>7</sup> copying, and distributing different types of copyrightable works including but not limited to images, graphical works, sound recordings, musical works, dramatic works, motion pictures, audiovisual works, and literary works.<sup>8</sup> At the time of its passage, it was hoped that the TEACH Act would provide greater clarity and flexibility regarding how course instructors could share copyrighted works with students in an online learning environment and “establish a critical balance between the needs of educators and students on the one side and the rights of copyright holders on the other.”<sup>9</sup> While it can be argued that the TEACH Act was an improvement over the distance education expectation previously found in Section 110(2),<sup>10</sup> the language of the statute left many librarians and educators feeling confused regarding what types of works could be shared online with students and in what amounts. In the following sections, this chapter seeks to provide some clarity regarding how copyrighted works can be used in distance education under the TEACH Act and answer the question of “Is the TEACH Act enough?” to support online education and distance learning. Topics that will be covered include an overview of the law, reasons for utilizing (or not utilizing) the TEACH Act, best practices for campus compliance with the TEACH Act, tools and resources for learning more about the law, and non-TEACH Act options for using copyrighted works in online education.

## An Overview of The TEACH Act

The TEACH Act is codified, primarily, in Section 110(2) of US copyright law (Title 17, United States Code). To take advantage of the TEACH Act, the institution must be a “governmental body or an accredited nonprofit educational institution.”<sup>11</sup> Information about accreditation requirements can be found in Subsection 11 of Section 110(2) of US copyright law.

The TEACH Act requires many members of the organization, including university administrators, attorneys, and information technology (IT) personnel, to come together to fulfill its requirements. The institution must have “policies regarding copyright”<sup>12</sup> in place and “[provide] infor-

mational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright.”<sup>13</sup> When transmitting digital works online for distance education, the TEACH Act requires that “to the extent technologically feasible,”<sup>14</sup> the transmission of works “is made solely for”<sup>15</sup> and “the reception of such transmission is limited to”<sup>16</sup> “students officially enrolled in the course for which the transmission is made”<sup>17</sup> or to “officers or employees of governmental bodies”<sup>18</sup> who may need access to them “as a part of their official duties or employment.”<sup>19</sup> The institution utilizing the TEACH Act is also required to “[apply] technological measures that reasonably prevent”<sup>20</sup> those accessing the works from retaining them “for longer than the class session.”<sup>21</sup> The institution may “not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention”<sup>22</sup> by the users. It must also take reasonable measures to prevent “unauthorized further dissemination of...work[s]”<sup>23</sup> by the recipients to others.

Once these requirements are met, there is additional work to be done, however, as the TEACH Act also sets forth requirements that instructors teaching a course must adhere to, including:

- The work being shared online with students cannot be one “produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks.”<sup>24</sup>
- The copy used for the transmission must be “lawfully made and acquired under this title”<sup>25</sup> (Title 17 United States Code) and cannot be a copy that “the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired.”<sup>26</sup>
- The performance or display of copyrighted works must be “made by, at the direction of, or under the actual supervision of [the course] instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of...[the] institution.”<sup>27</sup>
- “The performance or display [of copyrighted works must be] directly related and of material assistance to the teaching content of the transmission.”<sup>28</sup>

Additionally, the course instructor must also consider the “amount” of the copyrighted work that can be shared under the TEACH Act, which varies by the type of work. The TEACH Act allows displays of works such as “general static images, whether of artworks, text, photographs, or other works”<sup>29</sup> “in an amount comparable to that which is typically displayed in the course of a live classroom session.”<sup>30</sup> The TEACH Act allows course instructors to make full performances of nondramatic literary works, such as “readings from a novel, textbook, or poetry,”<sup>31</sup> and full performances of nondramatic musical works, examples of which include “playing a recording or actually performing a new a pop song or symphony.”<sup>32</sup> However, the performance of “any other work,”<sup>33</sup> including performances of audiovisual recordings such as films, the performance of dramatic literary works such as plays, and the performance of dramatic musical works such as operas and Broadway musicals, is restricted by the TEACH Act to “reasonable and limited portions.”<sup>34</sup>

## Why Use the TEACH Act?

The TEACH Act provides users with both advantages and disadvantages. Perhaps the greatest advantage of utilizing the TEACH Act is the opportunity to mitigate legal risk for the institution. A “statutory exception” is “a provision in a statute exempting certain persons or conduct from the statute’s operation.”<sup>35</sup> The TEACH Act is an exception to the rightsholders statutory right to make a public performance or display of a work, and while it contains many detailed requirements, it does allow “a wide variety of uses of copyrighted works, without risk of copyright infringement...if the instructor and the educational institution take careful steps to implement the law.”<sup>36</sup>

The greatest disadvantage of utilizing the TEACH Act is the number of requirements that must consistently be met to ensure compliance with the law. A decision to utilize the TEACH Act cannot be made lightly nor can compliance be ensured through the actions of a single individual. Compliance requires many members of a campus community coming together over the course of many months to ensure policies, educational practices, and technological measures are in place, and then,

after meeting these requirements initially, working together continue to ensure they remain in place.

Another distinct disadvantage of the TEACH Act is the restrictions placed on the number of copyrighted works that can be reused for educational purposes. While the display provision and the amounts of nondramatic literary and musical works that can be reused are clear, there is much debate surrounding exactly how much of “any other work”<sup>37</sup> can be used. The law does not provide an explanation of what is meant by the “reasonable and limited”<sup>38</sup> language it uses. A report put forward by the Senate<sup>39</sup> in 2001 states that “[w]hat constitutes a ‘reasonable and limited’ portion should take into account both the nature of the market for that type of work and the pedagogical purposes of the performance.” A Congressional Research Service report released in 2006 states, “The exhibition of an entire film may possibly constitute a ‘reasonable and limited’ demonstration if the film’s entire viewing is exceedingly relevant toward achieving an educational goal; however, the likelihood of an entire film portrayal being ‘reasonable and limited’ may be rare.”<sup>40</sup> These statements can provide some guidance on how to interpret the law and should be discussed with campus attorneys in order to determine the institution will define “reasonable and limited” based off the amount of legal risk they are comfortable undertaking. Another risk management consideration in utilizing the TEACH Act is tied to the Digital Millennium Copyright Act, or DMCA, that is found in Section 1201 of US copyright law. Section 1201(1)(A) states that “no person shall circumvent a technological measure that effectively controls access to a work protected under this title.” Much debate surrounds the application of the DMCA in conjunction with the exceptions found in US copyright law.<sup>41</sup> As such, how the DMCA may impact an institution’s utilization of the TEACH Act will be a risk-management issue that must be carefully considered.

## TEACH Act Best Practices

If an institution decides it will utilize the TEACH Act to provide students and faculty with access to copyrighted works in an online learning environment, there are some best practices they can consider to help ensure compliance.

## *Copyright Education*

Librarians and administrators should work with legal counsel to establish a campus copyright policy based on US copyright law and then ensure that this policy is readily discoverable on the institution's website along with other quality educational materials about US copyright law. They should also identify campus partners who may be able to assist in educating members of the campus community about copyright compliance. More frequently, academic libraries are employing copyright librarians or have a member of the staff who, as part of their job responsibilities, is responsible for learning about and educating patrons about US copyright law. If the educational institution's library employs such a person, they may be a useful ally in developing a copyright education program and teaching it. Staff from the Office of General Counsel may be able to assist with these initiatives as well.

## *Restricting Access to Works*

Most LMSs have a "course page" for each course taught at the institution each semester that is accessible to only the system administrators, course instructor, teaching assistants, and those students enrolled in the course. Users must log-in to the LMS using a username and password provided by the instructor to access their course pages. Unless a student takes an "incomplete" in a course, students' access to the LMS's course pages and learning materials posted there is usually terminated at the end of each semester. This type of limited access is ideally suited to meet the requirements of the TEACH Act, and institutions utilizing the TEACH Act should require course instructors to use the LMS when sharing copyrighted works with students online to help ensure compliance with the law.

## *Stream Sound Recordings and Audiovisual Works*

Providing students with access to streaming versions of sound recordings and audiovisual works, rather than downloadable files, can help ensure they are unable "retain the work for longer than the class session"<sup>42</sup> and can make it harder for students to disseminate copies of the works to others.

## *Using Lawfully Acquired Works*

It will be important to help faculty understand how a lawfully acquired copy of works they wish to share can be acquired. Here, again, the institution's academic library can be a partner in this process by either acquiring copies of works for their collection or obtaining copies through legitimate library lending services such as interlibrary loan.

## TEACH Act Tools and Resources

There are tools and resources available that can assist members of the campus community in learning more about the law and working through the requirements of the law, including

- the American Library Association's *Distance Education and the TEACH Act* webpage: <http://www.ala.org/advocacy/copyright/teachact>;
- *The TEACH Act—Online Performances*, a video lecture that is part of the *Copyright for Educators & Librarians* Massive Online Open Course (MOOC) created by Duke University, Emory University, The University of North Carolina at Chapel Hill: <https://www.coursera.org/learn/copyright-for-education/lecture/4qR-MU/the-teach-act-online-performances>; and
- *Copyright Checklist: Compliance with the TEACH Act*, developed for the Columbia University Libraries Copyright Advisory Office by Kenneth D. Crews: <http://etom.org/wp-content/uploads/2017/02/checklist-for-teach-act-and-distance-education.pdf>.

## Non-TEACH Act Options for Using Copyrighted Works in Online Teaching

If the intended instructional use of a copyrighted work as part of online instruction does not fall within the scope of the TEACH Act, there are other options course instructors can consider for making the work available to students online. Additional options for providing online access to

copyrighted works while teaching include fair use, utilizing works made available through the library, using openly licensed works, and obtaining permission or a license to reuse works.

## *Fair Use*

The application of the fair use exception found in Section 107 of the Copyright Act can be considered by course instructors when wanting to make works available to students in an online educational environment. The fair use statute reads:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies 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—

- (1) the purpose and character of the use,<sup>43</sup> 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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

There are tools and resources available that have been developed by reputable individuals and organizations that can help course instructors, librarians, campus administrators, and campus attorneys learn more about this exception and assist in making fair use determinations. They include

- *The Fair Use Evaluator*, developed by Michael Brewer and the American Library Association's Office for Information Technology Policy: <http://librarycopyright.net/resources/fairuse/index.php>;

- *The Fair Use Checklist*, developed by Kenneth D. Crews and Dwayne Butler for Columbia University's Copyright Advisory Office: <https://copyright.columbia.edu/content/dam/copyright/Precedent%20Docs/fairusechecklist.pdf>; and
- The Association of Research Libraries *Code of Best Practices in Fair Use for Academic and Research Libraries*: <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>.

## *Library Access*

College and university libraries license access to millions of resources, including scholarly journals, electronic books (e-books), and streaming music and film databases for use by members of the campus community. Often, as part of the license agreement entered into between vendors and libraries, course instructors can place links to or embed these electronic resources in LMS course pages. Course instructors can contact their institution's library to learn more about their online offerings and digital collections, receive assistance in searching the library's catalog to see if the library currently has a copy of a desired work in its collection, determine reuse options for the work available under the license agreement (e.g., placing a physical copy of the work in the LMS or linking to it) and, if not, inquire if the library is able to acquire a digital copy for its collection.

## *Openly Licensed Works*

Some rightsholders choose to share works they create with others using an open license. The Creative Commons (CC) licenses are a popular open license option available to the public that offers rightsholders "a simple, standardized way to grant copyright permissions to their creative work."<sup>44</sup> The CC offers six general types of licenses<sup>45</sup> that rightsholders can attach to works they create that allow others to "to copy, distribute, and make some uses of their [original] work."<sup>46</sup> These types of licenses are sometimes attached to scholarly research articles, monographs, and other resources that can be used in education, including data sets, graphics, and images. These types of openly licensed educational works are often referred to as "open access" (OA) works and is usually "digital, online, free of charge, and free of most copyright and licensing restrictions."<sup>47</sup> Course

instructors can share OA works online with students so long as they follow the terms of the license set forth by the rightsholder. The Directory of Open Access Journals (<https://doaj.org/>) provides a directory of Open Access journal titles that course instructors can use to find content on subjects they are teaching, and the Directory of Open Access Books (<https://www.doabooks.org/>) can be used to find books published under an open license.

### *Permissions and Licensing*

Course instructors can also consider reaching out to the rightsholder to ask for their permission to share copyrighted works with students as part of course instruction. The permissions process involves identifying the rightsholder, drafting the permissions request, and tracking responses. The “Asking for Permission” webpage made available by Columbia University’s Copyright Advisory Office provides quality information on how to go about obtaining permission to reuse works: <https://copyright.columbia.edu/basics/permissions-and-licensing.html>. Licensing the use of works can also be considered. Licenses usually involve the paying of a fee to reuse copyrighted works in a particular way for a set period. Examples of licensing agencies include the Copyright Clearance Center (<http://www.copyright.com/>), Swank Motion Pictures (<https://www.swank.com/>), and BMI (<https://www.bmi.com/>).

## **Is the TEACH Act Enough?**

Given the complexities of setting up a TEACH Act compliant campus, many educators ask themselves whether the TEACH Act is worth the trouble. The answer to this question will be unique to each educational institution. Some may say yes, choosing to utilize the TEACH Act for the sense of security it can provide. In these instances, institutions should be careful to fulfill all requirements found in the TEACH Act and, as a best practice, provide both print (e.g., training documentation, websites) and human resources (e.g., copyright librarian assistance, dedicated IT staff) to help guide course instructors and institutional staff through compliance requirements.

Some institutions will say no, that the TEACH Act is not enough, as they cannot comply with all requirements outlined in it or because they find the limits placed on the types and amount of works they can use under it are not the best fit for instructor's needs.

Surprisingly, the answer to this question could be both “yes” and “no” as nothing in the law prohibits educational institutions from considering multiple options for making copyrighted works available to students as part of online education. An institution could choose to put into place all of the utilize the policy and technological requirements outlined in the TEACH Act so that course instructors can consider utilizing it if it is the best fit for the reuse of copyrighted works in a distance education in certain situation, but when the reuse of a work does not fall within the scope of the TEACH Act, encourage course instructors to consider the application of the fair use exception, the utilization of licensed library resources, or permissions as alternatives for connecting course instructors and students with quality educational resources in an online education environment. The decision on which of these three options to utilize (saying “yes” to utilizing the TEACH Act, choosing not to utilize it, or taking a combined approach) should not be made by one person on campus. Rather, it should be made by a group of administrators, course instructors, librarians, and IT staff meeting as many times as needed to best understand teaching needs, pedagogical practices, technological infrastructure, and library resources available, and how these factors impact the situation. After initial policy and practice decisions are made, whatever they might be, informational resources and training opportunities on copyright compliance should be made readily available to course instructors. Additionally, the initial group of decision-makers should continue to meet on a regular basis to explore and discuss changes in the law, court rulings, technological advancements, and pedagogical practices to help ensure that the initial plan of action is still the best fit for the campus community. Attorneys representing the institution should be involved in each stage of this process, so they can give advice and recommendations to the group. Often, attorneys will approach these situations with the intent of mitigating legal risk as much as possible for the institution. While this is a good practice, the idea that “we may get sued over this” should not be used to place restrictions on course instructors and students that go beyond the force of law. Instead, when considering options for connecting students

with copyrighted works in an online education environment, institutions should work to identify the ways in which to best strike balance between the educational mission of the institution and the law.

## Endnotes

1. Elaine Allen and Jeff Seaman, “Distance Education Enrollment Report 2017,” *Digital Learning Compass*, Online Learning Consortium, <https://onlinelearningsurvey.com/reports/digitallearningcompassenrollment2017.pdf>.
2. Allen and Seaman, “Distance Education.”
3. *Ibid.*
4. “Intro to Blended or Hybrid Learning,” University of Rhode Island, <https://web.uri.edu/online/what-is-blended-teaching/>.
5. These systems are also sometimes referred to as Content Management Systems (CMS). Examples include but are not limited to Canvas, Moodle, and Blackboard.
6. According to Section 101 of the Copyright Act, “[t]o ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible”; 17 U.S.C. § 101 (2012).
7. Section 101 of the Copyright Act provides that “[t]o ‘display’ a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially”; *Ibid.*
8. The definitions of many of these types of “works,” including audiovisual work, literary works, pictorial, graphic, and sculptural works, sound recordings, and motion pictures can be found in Section 101 of US copyright law.
9. Laura N. Gasaway, “Balancing Copyright Concerns: The TEACH Act of 2001,” *EDUCAUSE Review*, 36, no. 6 (2001): 82.
10. See Laura N. Gasaway’s *TEACH Act Amended Section 110(2)* chart, found at <http://www.unc.edu/%7Euncnlg/TEACH.htm>, for a comparison of the “old” Section 110(2) language with the “new” TEACH Act.
11. 17 U.S.C. § 110(2)(A) (2012).
12. 17 U.S.C. § 110(2)(D)(i).
13. *Ibid.*
14. 17 U.S.C. § 110(2)(C).
15. *Ibid.*
16. *Ibid.*
17. 17 U.S.C. § 110(2)(C)(i).
18. 17 U.S.C. § 110(2)(C)(ii).
19. *Ibid.*
20. 17 U.S.C. § 110(2)(D)(ii)(I).
21. 17 U.S.C. § 110(2)(D)(ii)(I)(aa).
22. 17 U.S.C. § 110(2)(D)(ii)(II).
23. 17 U.S.C. § 110(2)(D)(ii)(I)(bb).
24. 17 U.S.C. § 110(2).
25. *Ibid.*

26. Ibid.
27. 17 U.S.C. § 110(2)(A).
28. 17 U.S.C. § 110(2)(B).
29. Kenneth D. Crews, "Copyright and Distance Education," *Change* 35, no. 6 (2003): 38.
30. 17 U.S.C. § 110(2).
31. Crews, "Copyright and Distance Education," 38.
32. Ibid.
33. 17 U.S.C. § 110(2).
34. Ibid.
35. Bryan A. Garner, *Black's Law Dictionary* (St. Paul: Thomson/West), 262.
36. Crews, "Copyright and Distance Education," 34–39.
37. 17 U.S.C. § 110(2).
38. Ibid.
39. U.S. Congress, Senate, Technology, Education and Copyright Harmonization Act of 2001. 107th Cong., 1st sess., 2001, S. Doc. 7, serial 107–31, 7–8.
40. Melville B. Nimmer and David Nimmer, *Nimmer on Copyright*, § 8.15[C][2][a] (2006).
41. Arguments have been made that if a copy of a work is being made in compliance with US copyright law (e.g., under one of the exceptions such as fair use or the TEACH Act), a violation of the DMCA will not occur. The courts have been somewhat divided on this issue though. See *Chamberlin Group Inc. v. Skylink Technologies, Inc.* (381 F.3d. 1178 Fed. Cir. 2004) for more information.
42. 17 U.S.C. § 110(2)(D)(ii)(I)(aa).
43. When determining the purpose and character of a use, the Supreme Court tell us that consideration should be given "to what extent it is 'transformative,' altering the original with new expression, meaning, or message..." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). Transformativeness within the context of educational uses is a subject of much debate. Additional information on transformativeness in online education can be found in the Association of Research Libraries' *Code of Best Practices in Fair Use for Academic and Research Libraries* that can be accessed online at <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>.
44. Information about these six licenses can be found online at <https://creativecommons.org/licenses/>. There is a seventh CC license, the CC0 license, that rightsholders can use to place their works in the public domain. More information about this specific license can be found online at <https://creativecommons.org/share-your-work/public-domain/cc0/>.
45. "About the Licenses," Creative Commons, <https://creativecommons.org/licenses/>.
46. Ibid.
47. Peter Suber, *Open Access* (Cambridge: MIT Press), 4.

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# But I Cited It! Best Practices in Teaching the One-Shot Copyright Instruction Session for Undergraduate Students

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Today's undergraduate students, born between the mid-1990s and the early 2000s, are the first members of Generation Z to attend college.<sup>1</sup> Born at the same time as the World Wide Web, this generation is the first to be comprised of true digital natives.<sup>2</sup> Not only do Generation Z students possess a digital savvy beyond cut-and-paste and have the skills to be producers and re-users of content, they also come to the classroom with technology ready in hand.<sup>3</sup> They have expectations that all information can be found quickly and that support should be available 24/7.<sup>4</sup> Given their easy and ubiquitous access to the technological tools and services of the peer-to-peer sharing economy, Generation Z is entrepreneurial in nature “with nearly half wanting to start their own business.”<sup>5</sup> However, these students are not equally savvy with copyright law, either in understanding their rights as creators or the contours of copyright exemptions for users, like fair use.<sup>6</sup>

The expectations and digital skills of students have led instructors to make changes in how they teach. Technology is now readily available in

many classrooms, more easily enabling the integration of PowerPoint presentations, audio, and video into lessons by the instructor and by the students for class presentations. Instructors will also use technology to provide content for the students to read and review in advance so that face-to-face time in the classroom can be spent on discussion, a technique sometimes referred to as the flipped classroom. Another advantage of integrating technology into instruction is the ability to more easily accommodate multiple learning styles and engage students in active learning exercises.

The assignments which instructors make for students also reflect the changing expectations of digital natives. Where previously a student may have been assigned to write a paper, read only by the instructor, now it is equally possible that a student may satisfy the requirements of an assignment by creating a website or a video posted on the web, which can be read or viewed by anyone with access to the internet. While the integration of third-party content into the paper turned into the instructor is clearly a fair use, the integration of third-party content in a website or video may not be as clearly established as a fair use. If a video is uploaded onto a hosting site, like YouTube, it could be brought down unexpectedly and without warning if the rightsholder of third-party content has notified YouTube that they do not want their content distributed on that site.<sup>7</sup>

For librarians, the past practices of focusing on providing students with assistance on selecting a research topic, citing sources, and managing citations are still important but may not be enough. While students are often savvy in how to use technology, including creating and reusing content, they frequently do not understand the intellectual property laws that both provide them rights in content they create and provide guidance on how they can use the content of others. For digital projects distributed on the web, knowing how to do research, cite sources, and manage citations are still essential skills, but successfully understanding and navigating copyright law is also essential. Students frequently do not understand how copyright ownership works, that they are copyright owners, or the rights which they receive under US Copyright Law. When reusing digital content, students may encounter Creative Commons licenses and not understand how to successfully use the license or assign a Creative Commons license to their own work. The nuances of fair use are also not

well understood, though students unknowingly rely on fair use frequently throughout their academic careers. Unless students publish their work, they have likely never needed to request permission to use the works of others. For many instructors, their understanding of copyright law may well be shaped and informed by their experiences publishing scholarly articles and/or books. This experience may not provide the breadth of expertise to adequately advise students on the application of copyright law.

The tools available to students may also not be familiar to instructors. For example, many libraries and academic technology centers are offering 3D printing, which can raise questions on the template used for printing, the appropriateness of the item being replicated, and potential trademark or patent protection.<sup>8</sup> One current source of templates is Thingiverse (<https://www.thingiverse.com/>), which has changed its intellectual property policies over time, including requiring those who upload a template to grant a license to Thingiverse and also to select a Creative Commons license to allow others to use the template. Students and instructors presented with these terms of use often need guidance on the implications of their use of the site and the selection of a Creative Commons license for their work.

When designing a one-shot copyright instruction session for undergraduate students, the ACRL *Framework for Information Literacy for Higher Education*<sup>9</sup> can provide guidance on how to frame the discussion for students. One of the six concepts in the *Framework* is that “information has value” and that “[i]nformation possesses several dimensions of value, including as a commodity, as a means of education, and as a means of understanding and negotiating the world.”<sup>10</sup> This includes the concept that “[l]egal and socioeconomic interests influence information production and dissemination.”<sup>11</sup> For students who have grown up with a wealth of free information at their fingertips on a smartphone, the underlying legal and economic structures in place that facilitate and regulate that access are not readily apparent. One of the knowledge practices for “information has value” is for a learner to “articulate the purpose and distinguishing characteristics of copyright, fair use, open access and the public domain.”<sup>12</sup>

In a one-shot copyright session, the topic of the session may lend itself to incorporating other concepts from the *Framework*. For example, if

your copyright session is in advance of a class doing projects using a 3D printer, it may be beneficial to incorporate some of the concepts articulated in “information creation as a process,” including for students to “develop, in their own creation processes, an understanding that their choices impact the purposes for which the information product will be used and the message it conveys.”<sup>13</sup> As creators in a 3D printing class project, students may also benefit from a discussion of how “authority is constructed and contextual,” particularly for students to “acknowledge they are developing their own authoritative voices in a particular area and recognize the responsibilities this entails, including accuracy and reliability, respecting intellectual property, and participating in communities of practice.”<sup>14</sup>

Reviewing the six concepts in the ACRL *Framework* before you begin to design your copyright session may provide you with a frame in which to articulate the learning outcomes you hope to achieve in the session.

## Designing Your Copyright Session

### *Instructional Design and Preparation*

Preparing for your one-shot copyright instruction session involves the application of instructional design. According to Ragains and Emmons, instructional design is a process comprised of two phases: analysis and design.<sup>15</sup> In the analysis phase, you need to know the ultimate purpose of the class. In order to best develop instructional content, you need to first have an understanding of the nature of the class. What is the subject matter or topic of the class? What are the instructor’s overall pedagogical goals for the class? Why does the instructor wish to educate her or his students about copyright? Is there a particular class assignment or practice that students are being asked to complete? Answering such questions will prepare you to offer the best possible information in a one-shot instruction session while still serving the pedagogical goals of the course.

The analysis phase involves conversations with the instructor well before walking into the classroom. Sometimes, instructors are willing to meet with you in person to discuss the needs of their class. However, you will

often find that these conversations take place exclusively over email. In conversations with instructors, ask logistical questions to help inform your planning and organization. Ragains and Emmons recommend that you “consult with faculty to determine their expectations. Ask them who, what, where, when, and why; for example, who are the students, what do you want them to learn, why is it important, when and where is the class?”<sup>16</sup> Table 11.1 outlines some specific questions that can help you in the design phase of your instructional design process.

<b>Question</b>	<b>Rationale</b>
How much time do I have with your students?	This will help you prioritize content and activities. If you only have 15 minutes with the students, focus on the single most important piece of content. Be sure to bring business cards and/or handouts to give to the students as you leave. Make sure to emphasize how students can reach you if they have questions while working on the project.
Can I assign readings for students to complete before our session?	It can be helpful to assign readings in advance, especially if you are short on time or want to spend more time engaging in a nuanced concept, like fair use. However, be careful—undergraduate students do not always complete assigned readings, especially when long and jargon-laden. You'll want to assign short, clear readings or videos for the students to watch before class.
Could students submit their specific questions to me in advance?	In some cases, you are being brought into the classroom because students already have specific copyright questions. In this case, it is best to review those questions in advance. You can then tailor your instruction session around the concepts inherent in those questions, increasing efficiency for both you and the students.
Should/can I assign homework for after my session? If so, who will be responsible for grading the homework?	Some instructors want to make a homework assignment to align with your instruction session. This can be a beneficial assessment tool. However, it is best to be clear about expectations around assignments. Will you develop the assignment or will the faculty? Does the instructor expect you to provide feedback on the assignments? If so, to what degree?

In addition to consulting with the instructor, you should review a copy of the course syllabus, a description of the assignment/activity that the students will be given, if any, and a statement from the instructor describing how your visit to the class best supports the class's learning objectives. These documents will give you a strong sense of the class subject matter and provide insights into what copyright concepts are necessary to best support the class. By reviewing these documents when developing your session, you can be sure to set up examples and activities that align with these learning objectives.

Once you have assessed the logistics and pedagogical goals of the class, your next task is to organize and design your instruction session. Utilize what you learned in the analysis phase of your instructional design process to make decisions about what content to include and how to arrange the concepts. Make sure you prioritize only the most important concepts. While it can be tempting to try to cover all potentially related concepts, it is impractical. Buchanan and McDonough emphasize that “you will have to step back and think about what you want the students to learn, and why—then consider what is reasonable to expect from a one-shot session.”<sup>17</sup>

As librarians, we provide information but we do not provide legal advice. When you get in the classroom, you want to set expectations with the students right away. You are there to provide them with information about the law. You are not there to give them specific legal counsel. Start your instruction session with your specific credentials: either you are a lawyer but not serving in that capacity in the class or you are not a lawyer. In either scenario, it is helpful to clarify for the students your role and intention.

### *Selecting Content*

Ideally, you want to cover the core concepts of copyright law basics described in table 11.2 in each session. These concepts provide a foundation for how copyright law functions practically and can inform some components of more complex topics. When short on time or trying to engage with a more nuanced and time-consuming topic, like fair use, you can choose to use videos or advance readings assignments to present these concepts outside of the instruction session.

<b>Table 11.2.</b> The core concepts of copyright law basics
Concept
US Copyright Law Origins
Exclusive Rights
Definition of Protectable Works
Ownership of Copyright
Duration of Protection and Public Domain

Beyond these core concepts, other topics may be appropriate to include in your session. Deciding when and how to teach these concepts is entirely dependent upon the class goals. The following sections can assist you in determining when to include a particular topic. The topics included are most relevant for undergraduate students. If you are working with a class of graduate students who may be teaching, you might consider including more in-depth discussions of the Classroom Teaching exemption and the TEACH Act.

### *Fair Use*

Fair use is arguably the most nuanced topic presented in one-shot copyright instruction sessions. Teaching it effectively to undergraduate students requires significant time and pacing to ensure student engagement and understanding. You can also expect a number of follow-up consultation appointments after your class visit from students seeking clarity under specific circumstances. While teaching fair use to undergraduates can be done, it should be done selectively given the commitment of class time. You want to ensure that the pedagogical goal of the class (e.g., the assignment being proposed) necessitates a strong understanding of fair use by the students. Often, when an assignment calls for students to use a specific type of third-party copyrighted content as evidence for a scholarly argument, fair use is appropriate. For example, if a class will be creating an online exhibit of a featured collection in your institution's archives, a robust understanding of fair use and online exhibitions can be very beneficial. Demonstrating to students how they can conduct a fair use analysis provides them not only with the skills to effectively develop the exhibit, but to conduct fair use analyses in their future professional and private ambitions.

## *Copyright Permissions*

Seeking permission to use a copyrighted work is a complex process hiding under the guise of a simple task. When students are required to work with specific content outside the scope of fair use or when permissions seeking is built into the course assignment, this topic is appropriate. For example, a class writing scholarly essays about twenty-first-century American photography that includes images and will be submitted for publication to an academic journal may require students to seek copyright permissions. In such cases, it is appropriate to model both example permissions workflows as well as specific scenarios to ensure students understand and can complete the permissions process.

## *Creative Commons*

One of the most popular topics taught in copyright one-shot instruction sessions is Creative Commons licenses. After wading through the core concepts of copyright law, many students feel overwhelmed by the complexity of determining if something is copyrighted and making decisions about how to proceed. When students need to use a particular type of work but not a specific item, Creative Commons licensing is a crucial topic to discuss. The Creative Commons provides an easy, stress-free solution that students do not know they need, particularly in classes focused on the creation of multimedia projects. For example, when a class requires students to create podcasts, students immediately gravitate toward the music in their personal collections without considering the copyright implications. Music licensed under the Creative Commons is abundant and easy to find. It provides a simple rights-free alternative for students to the complexities of music and sound recording licensing. If possible, demonstrate to students where to find Creative Commons-licensed content and how to include it in their particular assignment, including specifications around appropriate forms of attribution.

## *Distinction Between Plagiarism and Copyright Infringement*

Students often conflate copyright infringement with plagiarism. They know they need to cite their sources. Yet, often they believe citation

will protect them from copyright infringement liability. Plagiarism is an academic norm requiring authors to cite the authors of original ideas incorporated in their scholarship. Given the variance in the educational and cultural backgrounds of undergraduate students, an understanding of what is or is not plagiarism can vary. Copyright law requires authors to get permission or apply an exemption like fair use to use a copyrighted work. Citation alone is not a defense to copyright infringement.<sup>18</sup> Taking the time in an instruction session to explain the distinction between copyright and plagiarism is beneficial in developing information-literate students.<sup>19</sup> It is also of particular importance when students will be publishing and distributing their assignments online.

### *Contract Law and Licensing*

Undergraduate students already possess a strong grasp of technological skills. What they may not necessarily grasp is the influence of contract law, in the form of website terms of use or database licensing agreements, on their use of content in class assignments. When you know that students will be using websites or licensed databases for content to reuse, it is worth taking the time to review how terms of use and licensing agreements govern content. For example, if you are teaching your students how to text mine websites, the terms of use for a given website may specifically allow or exclude text-mining practices. It is also important to raise awareness of contractual obligations when assignments require students to use a particular technological service for distributing their own content. For example, if students are asked to develop a mobile app, they will be bound by the terms of iTunes or the Google Play Store in order to distribute their app on these platforms.

## Putting It Together

Given the specific alignment of pedagogical goals and copyright concepts, you will want to tweak your instruction session for every class that you visit. While you may have a standard method or practice for teaching a particular concept, the way in which you stitch concepts together

for a particular class will be different each time. To increase your efficiency in putting together an instruction session, you may want to have standard concept modules saved and ready to go. When an instructor contacts you to visit their class, you can quickly stitch together the relevant modules that will satisfy the particular teaching goal. Then, you can intersperse your session with specific examples relevant to the individual class.

In addition to planning the content for your in-class session, you will want to consider how to support students after the class ends. The one-shot instruction session offers the students the opportunity to get to know you as the copyright expert. It also positions you as the point of contact for copyright questions that arise during the course and the rest of their careers as students at your institution. Also consider what helpful resources to share with the students to support their work beyond the classroom, whether it is your own institutional library guide or an online tool from another institution, making resources available to students can give them a sense of agency and confidence to tackle their copyright concerns independently while still providing support from the institutional expert when needed.

## Teaching Copyright: Instruction Best Practices

While selecting the appropriate concepts for your instruction session is crucial, your instruction approach is equally significant for enhancing student engagement. To ensure student comprehension, you can employ several teaching strategies in your one-shot session. First, be sure to include plenty of examples or scenarios to work through as a group when focusing on a particular concept. Additionally, try to incorporate active learning exercises into the session to ensure that key concepts are well understood. Case studies or scenarios<sup>20</sup> present a rich opportunity for student learning. By providing real-life copyright issues for students to analyze and dissect, either through think-pair-share<sup>21</sup> or group discussion<sup>22</sup> activities, you can ensure students apply key concepts appropriately as they work toward a solution.

In addition to classroom engagement strategies, keep in mind that instruction is performance. If you are monotone, quiet, and inexpressive, your audience will disengage quickly. Additionally, talking at a slow and steady pace gives students the opportunity to digest the information presented. This is particularly important when teaching dense material like copyright law. Practice varying your tone and pace. When speaking, pretend you are talking on the phone to a person who cannot hear you well—speak slowly, enunciate, and project.

Students are also keenly attuned to a teacher's level of interest in a subject. They can tell if you are passionate about a topic and are more likely to engage with the topic if you demonstrate passion about it. Do not hold back on your love of copyright. If you are enthusiastic, your students will pick up on it and engage more.

In addition to being mindful of your teaching performance, also be mindful of your teaching tone. Copyright law is complex and can be frustrating for students to comprehend and apply. Try not to add on an additional burden by emphasizing negative consequences. Your goal is not to scare the students such that they are paralyzed by copyright fear. Your goal is to empower the students with the knowledge they need in order to work with intellectual property legally and ethically.

After you have completed your session, you will want to get feedback on how it went, both in terms of your effectiveness as a teacher and student comprehension. You can use a quick, three- to five-question survey<sup>23</sup> to gauge student's thoughts and feelings about the session and its relevance to the class. Or you could use the "minute paper" technique in which you ask students to respond to a broad and open-ended prompt question like, "What was the most important thing you learned in this class?"<sup>24</sup> Some instructors prefer to hand out paper surveys at the end of the session. Others email links to online surveys to the class, seeing the anonymity of the online environment as a boon to student candor. Others rely on follow-up correspondence with the instructor to get an anecdotal assessment of their work or follow-up on final assignments. The choice is yours. The key is to complete some kind of assessment activity and to use that data to further develop your instruction practice.

## Conclusion

The one-shot copyright session for undergraduate students is both a challenge and an opportunity. While it is a challenge to present the nuances and complexities of copyright in an hour session with students, it is an opportunity for students to better understand the underlying legal and ethical intellectual property constructs they encounter daily. Presenting these concepts in the context of a class or class assignment can also turn theory into practice and may provide students with a framework in which to better understand their role as both producers and users of copyrighted content. As technology continues to reshape the copyright landscape, providing students with an understanding of their rights as creators of content and their responsibilities as users of content will help them successfully navigate the new technologies they will encounter throughout their lives.

## Recommended Copyright and Information Literacy Resources

### *Books*

- Bowles-Terry, Melissa, and Cassandra Kvenild. *Classroom Assessment Techniques for Librarians*. Chicago: Association of College and Research Libraries, 2015.
- Buchanan, Heidi E., and Beth A. McDonough. *The One-shot Library Instruction Survival Guide*. Chicago: ALA Editions, 2014.
- Crews, Kenneth D. *Copyright Law for Librarians and Educators: Creative Strategies and Practical Solutions*. Chicago: American Library Association, 2012.
- Russell, Carrie. *Complete Copyright for K-12 Librarians and Educators*. Chicago: American Library Association, 2012.
- Smith, Kevin L. *Owning and Using Scholarship: An IP Handbook for Teachers and Researchers*. Chicago: Association of College and Research Libraries, 2014.

## Online classes and materials

Association of College and Research Libraries. *Framework for Information Literacy for Higher Education*. January 11, 2016. <http://www.ala.org/acrl/standards/ilframework>.

Association of College and Research Libraries Information Literacy Immersion Program. <http://www.ala.org/acrl/conferences/immersion>.

Association of College and Research Libraries Instruction Section. <http://acrl.ala.org/IS/> Berkman Center for Internet and Society. "Copyright For Librarians." [https://cyber.harvard.edu/publications/2013/copyright\\_for\\_librarians](https://cyber.harvard.edu/publications/2013/copyright_for_librarians).

Smith, Kevin, Lisa A. Macklin, and Anne Gilliland. "Copyright for Educators & Librarians." Coursera. <https://www.coursera.org/learn/copyright-for-education>.

Smith, Kevin, Lisa A. Macklin, and Anne Gilliland. "Copyright for Multimedia." Coursera. <https://www.coursera.org/learn/copyright-for-multimedia>.

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# Thesis and Dissertation Copyright Instruction for Grad Students: What They Should Know and Why They Should Care

*Andrea L. Schuler*

## Introduction

Graduate students are faced with a host of copyright problems throughout their academic careers, whether they realize it or not—everything from using another scholar's images in a presentation to navigating a publishing agreement to simply tracking down a copy of a particular article. These challenges often become clearer and more urgent when it is time for the student to write a thesis or dissertation. Not only is that often the largest, most in-depth research project a student will complete, and may serve as the foundation for future professional work, but it also likely involves the most opportunity to incorporate others' work, to use their own already-published work, and to make decisions about how to make their work available. With a future career on the line, the stakes are high.

Students need to be able to navigate the complex copyright issues that may arise while writing a thesis or dissertation, and this is where librarian-led copyright instruction tailored to graduate students is crucial. It

offers an important opportunity to equip a key population with copyright literacy skills and alleviate some of the stress and misinformation that graduate students may have about copyright. These are skills that will be useful for the thesis and dissertation process but also in other coursework and throughout their professional career. This chapter lays out specific copyright issues that arise with theses and dissertations and provides a framework for contextualizing instruction in practical, real-life applications that are meaningful for students: what they should know and why they should care. It considers copyright instruction for graduate students and basic copyright principles important for all instructors. It then focuses on the rights of the student author, considerations in using others' work, and decisions about open access to the finished thesis or dissertation. Example exercises for teaching copyright principles, fair use, and evaluating an author's contract are also included.

## Why Copyright Instruction Is Important, Especially for Graduate Students

In their academic careers, students have access to ever-increasing amounts of information, different forms of media, and new tools to use, synthesize, and share that information. They are both producers and consumers of scholarship. Students need a basic foundation of copyright knowledge in order to exercise rights to their own work, including licensing or openly sharing the work, while also using and respecting the rights of others' work.<sup>1</sup> This understanding of the ethical use of information and original work is a skill that serves students in both the classroom and beyond in their personal lives and future employment.<sup>2</sup> Indeed, as Jacob H. Rooksby suggests, “[C]opyright relates directly to perhaps the most prominent of higher education’s goals: to educate students through teaching, and to produce scholarship and research that benefit mankind.”<sup>3</sup>

The Association of College & Research Libraries’ (ACRL) *Framework for Information Literacy for Higher Education*, a set of six concepts central to information literacy, explicitly includes copyright knowledge practices under the frame Information Has Value. The frame notes that “learners who are developing their information literate abilities give credit to the original ideas of others through proper attribution and citation; under-

stand that intellectual property is a legal and social construct that varies by culture; [and] articulate the purpose and distinguishing characteristics of copyright, fair use, open access, and the public domain.”<sup>4</sup>

Importantly, there is student interest in the topic. A 2012 report published by the Intellectual Property Awareness Network (IPAN), the Intellectual Property Office (IPO), and the National Union of Students (NUS) in the United Kingdom surveyed university students and found that “overwhelmingly, students felt that a knowledge of IP is important to both their education and their future career” and that over 60 percent of students surveyed deemed publishing and intellectual property and copyright either appealing or strongly appealing to learn about in their course of study.<sup>5</sup>

Graduate students are a crucial population to equip with this knowledge. Focus groups of music graduate students conducted in 2015 at the University of California, Santa Barbara found that the students were unsure about copyright law and their fair use rights, and felt worried and guilty but also apathetic about infringing copyright.<sup>6</sup> It is not a stretch to assume that this uncertainty can be found in graduate student populations in other disciplines as well.

The thesis and dissertation writing process is an opportune time to offer students copyright instruction because there is genuine interest for many students at this point in their academic careers. Copyright education, although vital, can sometimes be a tough sell if students do not understand how it is relevant to them. Writing a thesis or dissertation can make it relevant. University of Washington librarians, for example, found that students going through the thesis and dissertation process and receiving instruction in the implications of different online access levels to their work had a greater interest—and were thus better educated—in issues related to “publishing, copyright, author rights, open access, and other scholarly communication-related issues.”<sup>7</sup>

Furthermore, graduate students are also preparing to enter the workforce in the not-too-distant future. Many will go onto careers in academia, where they will not only continue to need these skills but will also be able to impart them to the next generation of scholars. The 2012 IPAN, IPO, and NUS survey found that while 77 percent of students believed that an awareness of IP would be relevant for them in their future career, only 40

percent of students believed their current awareness was sufficient for that career.<sup>8</sup> Thus, librarian-led copyright instruction for thesis and dissertation writers is vital as students both need and want these skills at this point in their academic careers.

## Relevant and Important Copyright Principles

Students writing theses and dissertations, and indeed all students at every point in their studies, need to understand two related but different facets of copyright: the rights that they have to their own work and copyright for using others' work. In order to understand these things and the specific issues that come with each, students first need to have a grounding in basic copyright principles. In the case of instruction specifically related to theses and dissertations, this groundwork should not be in-depth and all-encompassing of all the minutiae of copyright law because that will overwhelm and distract from the practical applications of copyright that students need to understand. Instead, the instruction should aim for general understanding and awareness of principles such as

- what is copyright;
- what rights a copyright holder has in the work;
- the limits of copyright (what it can and cannot protect);
- how and when a work is copyrighted;
- how long copyright protection lasts; and
- the benefits of registering a copyright with the US Copyright Office.

This chapter does not address all of these basic concepts as they are covered in-depth elsewhere (see, for example, *Copyright Law for Librarians and Educators* by Kenneth D. Crews<sup>9</sup>), but any librarian providing copyright instruction should have a solid foundation in these principles so that their students will be able to build that same foundation.

For students who have not yet encountered a specific copyright issue, it may not be of interest unless we as librarians can help frame copyright fluency as a skill that will be crucial throughout the process of writing and submitting a thesis and in their future careers. It is important to emphasize the students' own rights in the process; as Kyra Folk-Farber

notes, “many undergraduate students are accustomed to hearing about copyright concepts in a punitive context.... Students might well tune out when the topic of copyright is introduced. The key to engaging students with this topic is to bring them and their own rights to the center of the conversation. Students own everything that they produce while they train to contribute professional-level work.”<sup>10</sup> Understanding these rights translates to an ability to incorporate a student’s previously published work, to share a completed thesis or dissertation with a wide audience, and to consider later publication. It is also useful to highlight a few very practical realities: an understanding of copyright ensures students can incorporate the work of other scholars that may be crucial to building their argument; they may not be able to submit the completed work to their university without verifying the copyright status of incorporated work; and may not be able to later publish the work without proper copyright clearance.

### *The Rights of the Student as Author of the Thesis or Dissertation*

The first thing a thesis or dissertation writer should understand is the copyright status of their own work. This highlights a specific example of copyright ownership for them and informs later conversations and decisions about making work openly available and future publishing. Theses and dissertations will likely be covered under an institution’s intellectual property policy. Students should understand what such a policy is, how they can find the policy at their institution, and what it says in regard to the copyright ownership of theses and dissertations. At Tufts University, for example, the Intellectual Property Policy states that “students generally own the copyright to academic work they produce. Academic work can include class papers, theses, dissertations, artistic and musical works, and other creative works produced by University students.”<sup>11</sup> Although the focus here is on theses and dissertations, this conversation can also highlight issues of copyright ownership at other moments in time, such as work created in the course of employment or scholarship submitted to a publisher.

Many students plan to incorporate work they have previously published into their thesis or dissertation, so it is crucial that copyright instruction also cover author’s rights. Instruction should emphasize that copyright

cannot be taken away without a creator's permission, and it is therefore vital for students to carefully read author's agreements and be prepared to negotiate so that they do not lose their rights. The fact that an agreement could potentially prohibit the use of published material in a thesis or dissertation is often one of the best hooks to get students interested in copyright and its implications, as this has clear and immediate real-world effects. Highlighting the reasons students should care about this aspect of copyright is easy: they need to know how to not sign away important rights to their work, they do not want to be required to subsequently ask permission from a publisher to use their own work in their dissertation, and if they are planning on a career in academia, this is an issue that will not go away as they continue to publish throughout their career. Additionally, if a student has received grant funding for their thesis or dissertation research, there may be provisions in the grant requiring that the results be published in an open access repository, and thus signing a restrictive publisher's contract may place an author in the position of violating the terms of their funding agency.

Students should learn to read an author's agreement with a critical eye, looking for things such as:

- Do authors keep copyright to their work?
- Can authors reuse content published in the article, especially in theses or dissertations?
- Can copies of the article be posted in institutional repositories, pre-print servers, or on other scholarly sharing sites?
- Can authors share copies of the article with colleagues or use it in teaching?

Refer to the last section of this chapter for a sample exercise on how to read a contract.

Students should also be given tools to determine a publisher's policy before submitting an article and later finding themselves faced with the choice between signing an agreement that may prevent them from using their work in their thesis or dissertation, or not publishing their article. Some easy-to-explain methods include the SHERPA/RoMEO database,<sup>12</sup> the fact that Googling “[Journal name] author's rights” will often bring up the relevant information, or that they can check with their liaison librarian-

ians or scholarly communications librarians for help (if this is, in fact, the case at your institution). Students can also be made aware of model author agreement addenda that allow them to retain some rights to their work, such as those provided by SPARC<sup>13</sup> and many universities.

### *Using Others' Work: From Fair Use to Copyright Permissions*

Once the student understands his or her own rights as the author of the thesis or dissertation, the copyright instructor can shift focus to begin addressing how to legally incorporate the works of others into a student work. Because fair use plays such an important role in academic work, it is a useful place to start. Students need to be aware of and understand fair use, including the general principles underlying the concept, the four factors and the idea of transformative use, and how these concepts apply to their work. To make it compelling, one can highlight how fair use is facilitating nearly every use of another scholar's words, figures, or images that they have included in their own work, including basic uses such as quotations. An understanding of fair use should also be important to students because even though something might constitute fair use during the thesis and dissertation educational process, if the student later chooses to publish the work with a commercial publisher, they may have to seek permission or find alternate material to use to clear a publisher's permissions process.

Fair use is a flexible test and judges may add other relevant considerations to the four statutory factors when considering a given case; thus, there is no bright-line rule as to what does and does not constitute fair use. Because it is discussed in a robust fashion in other texts, fair use will not be discussed in great depth here. However, some instruction strategies will be examined. It is useful, for instance, to provide students with scenarios to consider for a robust discussion of each of the elements of fair use. For example, in factor one, the purpose and character of the use, students can question whether their potential use is: for research or teaching in a non-profit educational setting; for parody, criticism, or commentary; or if their use is transformative (more likely to be fair), versus a commercial or purely aesthetic use (less likely to be fair). To help walk students through

the evaluation and documentation process in their own work, students can be made aware of resources such as Crews' "Copyright Checklist: Fair Use,"<sup>14</sup> the American Library Association's "Fair Use Evaluator" tool,<sup>15</sup> or the University of Minnesota's "Thinking Through Fair Use" tool.<sup>16</sup> A sample in-class activity for evaluating fair use is included at the end of this chapter.

It is also important for students to understand that a large body of material exists with either a copyright status or a license allowing them to freely use the materials without seeking permission or relying on fair use. The benefits of this are clear: licensed or public domain material has clear usage rights and permissions, saving the student time and ambiguity from having to do a fair use evaluation and creating a smoother path to possible publication in the future as rights will already be cleared. Students should understand what the public domain is and be given resources to help determine when copyright protection for a given work has expired, such as Cornell's "Copyright Term and the Public Domain in the United States" chart.<sup>17</sup> They should also understand what a Creative Commons license is and where to find such licensed content. The instructor can highlight resources like [creativecommons.org](http://creativecommons.org), Google Image Search's usage rights filter, Flickr's license filter, Europeana and other digital libraries and museums with open access content, or resources such as the *Directory of Open Access Journals* for finding journal content that may be assigned a Creative Commons license. Librarians should also know whether their institution has made any agreements with publishers that allow their community to use content, such as figures from journals for educational use, without seeking permission.

Copyright instruction should also provide students with information on when and how to seek permission for using copyrighted material. Although this may not be necessary during the course of writing a thesis or dissertation due to fair use and openly licensed content, instruction taking place during the writing process should take advantage of the opportunity to provide students with a foundation in best practices for the future. Many thesis and dissertation writers may have ambitions to publish their work in the future, and it is important to highlight work they can do now, such as keeping track of all sources of material and under what terms it was used, to save time in the future. Check to see if your institution offers sample letters students can use to request the use of

copyrighted material from a copyright holder, or use sample letters available online, such as the one included by ProQuest in their “Copyright and Your Dissertation or Thesis” guide.<sup>18</sup>

### *Open Access Considerations*

The final issue students may face related to their thesis or dissertation is whether and how to make it available upon completion. Although this is not strictly a copyright issue, it is inherently tied to ownership issues and is an area of concern for students, and thus copyright instruction offers a useful opportunity to provide guidance to students. Many schools either require or offer the option to make submitted theses and dissertations available via an institutional repository and/or ProQuest. It is important for librarians to be aware of their school’s policies and options and to highlight for students the fact that copyright to and access to the completed product are two different things. While students will typically maintain copyright, submission to ProQuest or an institutional repository will require students to agree to a non-exclusive license to archive and distribute their work. Students may have the option to embargo their work, restricting it for a period of months or years in order to pursue future publication, a patent, or to protect personal data. Librarians can offer information about general norms in disciplines and specific reasons why an embargo might be appropriate or why open access would be most beneficial, and the potential future effect on access, use, and citation of their work.

The conversation will likely vary depending on the discipline of the students: a 2010 study of electronic theses and dissertation (ETD) personnel at 520 ETD universities in the United States on the member list of the Council of Graduate Schools (CGS) found that the academic departments most concerned with publisher rejections as a result of online availability of ETDs were creative writing, chemistry, English, science programs, engineering, and MFA programs.<sup>19</sup> Some professional organizations have taken stances on the subject. For example, the American Historical Association (AHA) recommends embargoing work up to six years,<sup>20</sup> while the Association of Writers & Writing Programs recommends that universities give creative writing students the option to submit a paper thesis or dissertation or to embargo an electronic version.<sup>21</sup>

Data from publishers themselves provides a useful counterpoint to the advice by some academic disciplines to embargo a thesis or dissertation for a lengthy period of time. A Harvard University Press blog post, in response to the statement from the AHA in favor of embargoes, quoted Assistant Editor Brian Distelberg, who noted “I’m always looking out for exciting new scholarship that might make for a good book.... And so, to whatever extent open access to a dissertation increases the odds of its ideas being read and discussed more widely, I tend to think it increases the odds of my hearing about them.”<sup>22</sup> A 2011 survey of journal editors and university press directors found that nearly three-quarters of the survey respondents said ETDs “are welcome for submission,”<sup>23</sup> indicating that the majority of the time, the presence of an online thesis or dissertation does not dissuade publishers from considering a manuscript for publication. McCutcheon’s 2010 study of university ETD personnel found that only two universities out of 109 respondents reported publisher rejections as a result of an ETD being available online, or less than 2 percent of those responding to the survey.<sup>24</sup>

## Conclusion

The decision to make available or embargo work, like many of the other copyright decisions a student faces over the course of writing a thesis or dissertation, is not one a librarian can make for the student. However, through thoughtful and comprehensive copyright instruction, librarians can equip their students with the literacies necessary to make informed choices for their work. Librarians need to have a strong foundation of basic copyright skills, an understanding of the specific copyright issues students face while writing a thesis or dissertation, and an ability to frame these issues in a way that is meaningful to students and their academic careers. Armed with these skills, librarians can build a community of engaged, informed, and empowered graduate students who can successfully exercise their rights to their own work and build on the scholarship of others, advancing the global scholarly conversation forward.

## Appendix 12A: Sample Exercises

Active learning strategies that involve making real-life decisions about copyright can be very effective in demonstrating and reinforcing these issues to students. This section includes sample exercises that can be used to teach general copyright principles, make fair use decisions, and understand an author's contract.

### *Exercise 1: Are these things copyrighted?*

This exercise allows students to spend time actively thinking and discussing general copyright principles, helping to lay the foundation that is critical for understanding the specific copyright challenges they may encounter while writing their theses and dissertations.

Identify a handful of copyrighted materials where the copyright status may not seem clear to students unfamiliar with copyright or where the location that the material was found may cause confusion about copyright. Depending on the size of the audience, this could either be accomplished with a handout or as a whole-class discussion. Prior to an introduction to general copyright principles, larger classes could be provided with a handout with images and brief information about the items. Students are given time to talk with their neighbor or in small groups to come to a decision regarding the copyright status for each item and then reconvene as a whole class to vote whether each item is still protected by copyright. Smaller groups could simply discuss among the whole group, with images shown on a screen in front of the class rather than on a handout.

In the example handout shown in figure 12.1, the different material types included are:

- A chapter of book, published in 2007, found on ResearchGate [assessment: in copyright]
- A published advertisement from the 1890s, found on Pinterest [assessment: in the public domain due to creation date]
- A personal photo taken with a phone [assessment: copyrighted, highlights the immediate conferral of copyright status upon creation]
- A table of US population data, found on a university summer course's website [assessment: not copyrighted, due to the material type—data which cannot be copyrighted—and the lack of creati-

ty in the visualization of the data. This example provides the opportunity to discuss how copyright of the arrangement or visualization of data can differ from the copyright of the underlying data]

### Are these things copyrighted?

**1. A chapter of a book, published in 2007, that I found on ResearchGate**



**2. A Coca-Cola ad from the 1890s that I found on Pinterest**



**3. A photo that I took with my phone**



**4. A table of US population data that I found on course website for a Harvard summer school class**

United States Urban and Rural Populations		
Year	Percent Urban	Percent Rural
2000	79.2	20.8
1950	64	36
1900	39.6	60.4
1850	15.4	84.6
1800	6.1	93.9

Data from United States Census Bureau

**Figure 12.1.** Are these things copyrighted?

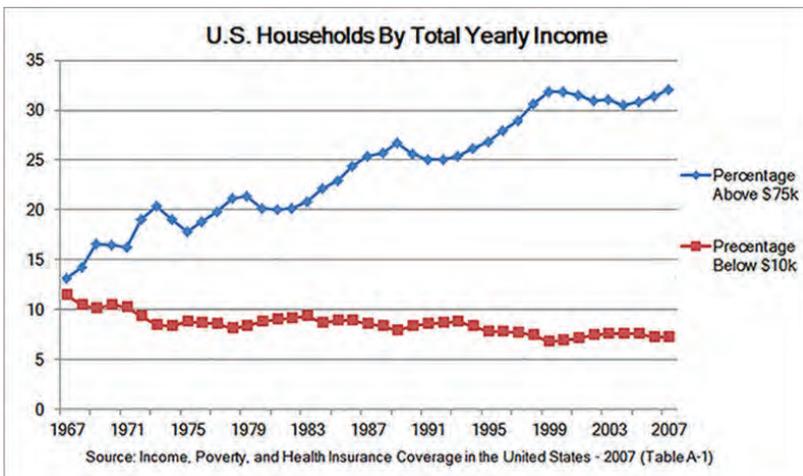
In multiple different classes, students were generally unanimous that they believed the book chapter was in copyright but were typically fairly evenly split about the status of the other material. After taking the initial vote, students were provided with an introduction to general copyright principles laid out in the “Relevant and Important Copyright Principles” section above and then asked to evaluate the items again for copyright status. After the introduction, students correctly assessed the copyright status of each item.

## Exercise 2: Is this fair use?

This exercise is similar to the general copyright principles exercise above but instead asks students to make a fair use evaluation for various use cases that might arise while working on their thesis or dissertation. Although fair use will likely cover the majority of their use cases, it is important for students to understand the process and reasoning behind a fair use evaluation. The exercise also offers the opportunity to highlight general copyright principles.

An example series of prompts might be:

Can you use this chart in your thesis to support your argument?

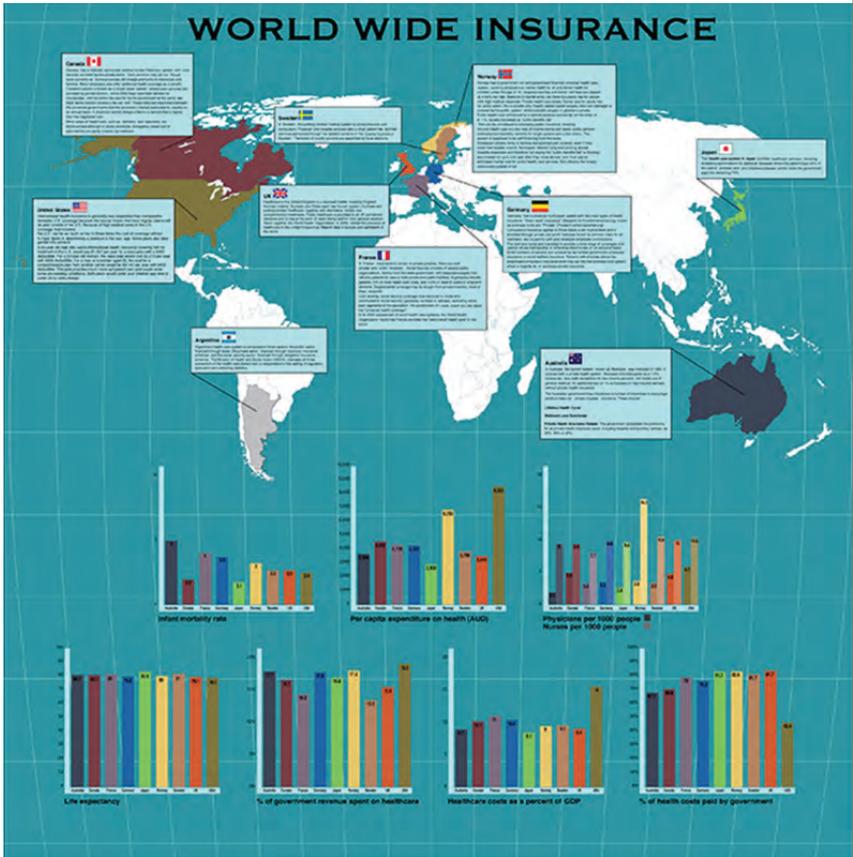


Source: CoffeeWithMarkets, "U.S. Households by Total Yearly Income (Line Graph)", 2013. [https://commons.wikimedia.org/wiki/File:U.S.\\_Households\\_By\\_Total\\_Yearly\\_Income\\_\(Line\\_Graph\).png](https://commons.wikimedia.org/wiki/File:U.S._Households_By_Total_Yearly_Income_(Line_Graph).png) (accessed October 18, 2017). Licensed under CC0 1.0.

**Assessment:** Yes, the material is not copyrighted. This highlights that using material generally in support of an argument in a thesis is fair use, but that data and charts with no creativity involved are not copyrighted, so the material can be used without even doing a fair use analysis.

**Figure 12.2.** Note that copyrighted materials used in this figure is Creative Commons-licensed, but that examples used in class were specifically **not** so that a fair use assessment was required. Students were told the original sources of the material before making their assessment.

How about this chart?



Source: Kirie Mukai, "INFOGRAPHIC—World Wide Insurance Statistics," 2011. <https://www.flickr.com/photos/61136105@N03/5567908085/> (accessed October 18, 2017). Licensed under CC BY 2.0.

**Assessment:** Yes. This highlights the minimal amount of creativity required for something to be copyrighted but again reinforces the fair use of the material in a thesis. Students can also be told about the option to use the underlying data to create their own version of the chart.

You used this photo, which you found on a commercial website, in your dissertation under Fair Use. Now you want to use it in an article you're publishing about teaching with Legos. Can you?



Source: Laura Billings, "Mobile&Mint Teach First," 2012. [https://www.flickr.com/photos/twenty\\_questions/7692535958](https://www.flickr.com/photos/twenty_questions/7692535958), (accessed October 18, 2017). Licensed under CC BY NC 2.0.

**Assessment:** Likely requires permission or the use of an alternate image. This scenario highlights later implications for using material under fair use in dissertations. A publisher often will not consider fair use in the permissions process, so this reinforces the idea of using public domain or openly licensed material where possible.

You want to include the first 4 pages of this 16-page article in your dissertation as part of an appendix section supporting your argument. Can you?



Source: Oksman, Mimmi, Kaarina Weckström, Arto Miettinen, Stephen Juggins, Dmitry V. Divine, Rebecca Jackson, Richard Telford, Niels J. Korsgaard, and Michal Kucera. “Younger Dryas Ice Margin Retreat Triggered by Ocean Surface Warming in Central-Eastern Baffin Bay.” Nature Communications 8, no. 1 (October 18, 2017). doi:10.1038/s41467-017-01155-6.

**Assessment:** No. The amount of material used goes beyond fair use, and there is an existing market and mechanism to license this material.

Can you include this image in your thesis on 19th-century advertising?



Source: Forbes Co. Boston, “Advertising card featuring Jumbo drawn by spools of Willimantic thread,” ca. 1883. <http://hdl.handle.net/10427/35361>, (accessed October 18, 2017).

**Assessment:** Yes, the image is in the public domain. Again, this highlights that using material generally in support of an argument in a thesis is fair use, but that in this case, the image is in the public domain and fair use is not required.

### *Exercise 3: Author's rights*

Even students who already have experience with publishing often have not read the author's contract they have signed, so an exercise that requires reading and understanding a contract provides a useful model for the future and opens up a conversation that highlights the various rights that publishers may take from often unknowing authors.

In this exercise, students will read various author's contracts and evaluate them for rights that may or may not be retained, including the right to use published work in a later thesis or dissertation. Use SHERPA/RoMEO to identify a few journals whose contracts allow authors to retain various levels of rights, and locate copies of the contracts online. If possible, include a very restrictive contract that takes the author's copyright and offers no sharing or reuse rights, a middle-of-the-road contract that takes author's copyright but does allow some green open access options and other reuse and sharing, and a relatively liberal contract that allows the author to retain copyright and reuse and sharing rights. If the audience is all from a particular field—say, engineering grad students—look for journals in that field if possible.

<b>Table 12.1.</b> Author's Rightsworkshop	
1. Do you keep your copyright?	
2. Can you send your roommate a copy? How about your advisor?	
3. Can you post a copy in the Tufts Digital Library, on a pre-print server, or another scholarly sharing site?	
4. Can you reuse content published in the article? Check for thesis use especially!	

Some helpful author's rights resources:

- Tufts Scholarly Communications site—<http://sites.tufts.edu/scholarlycommunication/>
- Tufts Amendment to Publication Agreement- <http://sites.tufts.edu/scholarlycommunication/amendment-to-publication-agreement/>
- SHERPA/RoMEO—<http://www.sherpa.ac.uk/romeo/index.php>
- How Can I Share It? -<http://www.howcanishareit.com/>
- Contribute to the Tufts Digital Library—<http://tischlibrary.tufts.edu/services/contribute-tufts-digital-library>
- Tisch Scholarly Publishing guide: <http://researchguides.library.tufts.edu/publishing>
- Copyright Term and the Public Domain in the United States—<http://copyright.cornell.edu/resources/publicdomain.cfm>

Give each student one of the contracts and give them time to read through it, looking for a certain number of rights that they may be retaining or signing away. Students can work alone or with a partner. In the example worksheet in table 12.1 students look for a set of four rights:

- Does the author keep their copyright?
- Can the article be shared, both within and outside of academia?
- Can the article be posted in an institutional repository, on a pre-print server, or other scholarly sharing site, and under what terms?
- Can content from the article be reused after publication, especially in a thesis?

After students have had time to read through the contracts, bring the group back together and go through each of the rights, asking students to report on what they found in the various contracts. The range of rights variously taken from or retained by authors is typically illuminating to students and provides a real-world example of what may otherwise be theoretical topics. More than one tenured faculty member, after doing this exercise along with their grad students, has commented that it was the first time they actually read a contract, highlighting the need for this instruction at the graduate school level.

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# “Caring about Sharing”: Copyright and Student Academic Integrity in the University Learning Management System

*Roger Gillis*

The growth of the Learning Management System (LMS) has become a fixture in many postsecondary classrooms, putting a wealth of course material at students’ fingertips. Many postsecondary courses today are taught within a virtual learning environment, whether solely online or using an LMS as a supplement to an in-person class, which provides students with access to readings, the course syllabus, assignment instructions, and recorded lectures, among many other things. College and university LMS online classrooms are typically closed environments—providing students with access to course material for a limited time—often with an expectation that the material will not be shared outside of the LMS system. Problems arise, however, when students share course materials (including tests, syllabi, and other material) from these virtual classrooms on the web. Websites such as Course Hero and other third-party course material sharing sites (referred to in this chapter as Academic Resource Sharing (ARS) sites) that enable this type of sharing have gained media attention in Canada, the United States, and beyond and have drawn the ire of faculty and administrations in many postsecondary institutions.<sup>1</sup>

Instructors and institutions alike are concerned that sites of these nature not only encourage students to take instructors' intellectual property and post it without permission but also that these sites take that information and sell access to it for a profit. Moreover, some argue that these sites facilitate academic integrity offences such as plagiarism and various forms of academic dishonesty.<sup>2</sup>

The issue of sharing course material outside of the classroom is very much intertwined with academic integrity and information literacy issues. This chapter explores the key issues surrounding this topic. First, this chapter explores the ill-conceived notions that might exist around students' perceptions that everything on the internet is free and can be shared.<sup>3</sup> This chapter explains that copyright—as it relates to the sharing of course materials through third-party sites—is part of a larger conversation about academic integrity and information literacy. Also, this chapter will explore ways in which postsecondary institutions and instructors have responded to the issue and what actions have been taken to prevent the unauthorized sharing of course material. In seeking potential solutions for this problem, this chapter examines the place that copyright occupies within academic integrity and what conversations and collaborations might occur among academic integrity offices, information literacy initiatives, and copyright offices to attempt to address this issue. As part of this, the sharing of teaching material as part of open pedagogy and open educational resources are explored and whether some course materials should be licensed in such a way to facilitate sharing and reuse (such as through the use of Creative Commons licensing) to optimize student learning and promote academic integrity.

## Students' Understanding of Intellectual Property

Postsecondary students can and do access a wealth of digital information to advance their educational goals. Despite such access, many postsecondary students have unclear ideas about the legitimate and ethical use of information resources used as part of their education.<sup>4</sup> Students may receive piecemeal instruction on matters related to academic integrity, either incorporated into statements on class syllabi or delivered as part of

a larger program, covering topics like plagiarism, academic dishonesty, and other associated academic integrity issues. Copyright infringement is distinct from plagiarism in that it involves the copying of substantial or whole parts of works without permission, whereas plagiarism involves the copying of a smaller portion of works without appropriate attribution. Library instruction generally does not include content addressing the inappropriate sharing of course materials and basic concepts surrounding intellectual property in the classroom. To make matters more complex, the digital age has made it difficult for students to discern how they are permitted to use works they receive as part of classroom instruction. Students may not know (or be informed by their instructor) about the nature of the intellectual property status of materials they routinely use in the classroom. Instructors may assume that students already know what constitutes ethical and unethical sharing of materials distributed as part of classroom instruction, but this is not likely to be the case.

Students are not homogeneous when it comes to their understanding of intellectual property. Students’ understanding of intellectual property may vary considerably. Generations of younger students, immersed in the creation and consumption of content online for most of their lives, are often characterized by their lack of understanding around intellectual property.<sup>5</sup> The term “digital natives”—those who have grown up immersed in the digital world “with access to technologies and the skills to use them in sophisticated ways”—encompasses one group of students that are noted to have less copyright awareness in this area.<sup>6</sup> Digital natives may not understand what actions constitute copyright infringement, and this confusion is pervaded with myths about copyright and other related notions such as plagiarism.<sup>7</sup>

Students do not always receive adequate information regarding the appropriateness of sharing classroom materials. Can a student share a syllabus? Assignment instructions? Policies concerning the distribution of classroom material are not always made explicit (or even sometimes adequately understood by the instructor). The sharing of classroom materials in and among students is certainly not a new practice.<sup>8</sup> However, the amount of classroom material that students are now capable of accessing through LMSs and the means through which they are able to share this material has changed considerably in recent years. Students—especially undergrad-

uate students—may not have much awareness around intellectual property, let alone intellectual property in a classroom context. Or, students may have many misconceptions about what exactly this means in the classroom. While some more copyright-savvy instructors may be in the know, others may lack the requisite knowledge to address and express issues surrounding copyright. Some instructors may have a lack of understanding of the copyright ownership of material they use as part of their classroom instruction (e.g., the use of third-party materials such as journal articles or other course material) that is not their own intellectual property.

## Ownership of Intellectual Property in the Classroom

The intellectual property (IP) ownership of classroom content can vary considerably among postsecondary institutions. Universities may have policies or collective agreements with a clause clearly stating that the faculty member owns the rights to the material that they develop in the course of research, teaching, and scholarship. Other colleges and universities may not, and it may be the institution that lays claim to owning the IP. There is some variety in this schema as part-time instructors may have a different intellectual property arrangement whereby they do not retain the intellectual property rights of material they create in the course of research, teaching, and scholarship. Additionally, some of these materials may constitute students' own IP, and students may be within their rights to upload the material they create (for example, in the case of their own notes based on a class lecture). In some cases, it is the institution that may own the material in question, if created under the pretense of work-for-hire or if the institutions' policy states that it owns the intellectual property rights to course material.

## Academic Libraries and Copyright Expertise

Academic libraries have become an important authority for copyright-related expertise on campus.<sup>9</sup> Libraries have mostly provided information about copyright issues affecting research and teaching at their home institutions, through online guides or other information resources. Copyright

instruction has typically been aimed at faculty members' use of copyrighted materials in their teaching and research.<sup>10</sup> Instruction pertaining to copyright geared toward students, especially undergraduate students, tends to be less common. Efforts should be made to help students understand the importance of allowances and limitations afforded to them regarding sharing copyrighted works in a postsecondary context. Such understanding is a valued skill as part of an increasingly digitally enabled society and labor market in which information is a core resource.<sup>11</sup>

Instructors responsible for teaching their own subject matter generally have less flexibility to address issues related to copyright in and out of the classroom.<sup>12</sup> Librarians, or copyright office staff, tend to be responsible for educating students on copyright-related matters. Librarians typically provide information literacy instruction in a one-shot instruction session, which may not cover copyright due to the complexity of the topic or may mention it just briefly.<sup>13</sup> Even if students are fortunate enough to take part in more in-depth information literacy curriculum, such as a for-credit information literacy course, copyright and the appropriate sharing of copyrighted materials is seldom addressed.

## Copyright and the *Framework for Information Literacy for Higher Education*

An earlier set of information literacy objectives established by the Association of College and Research Libraries (ACRL) acknowledged that students should have some basic understanding of key copyright concepts. Despite the emphasis on copyright as part of these objectives, the economic, legal, and social issues associated with sharing information (of which copyright is one part) may not register on the radar of many librarians who might provide information literacy sessions as part of classes or integrated into a broader curriculum. The ACRL *Information Literacy Competency Standards for Higher Education* were a benchmark for what to teach as part of information literacy efforts in many postsecondary institutions, and provided that, ideally, a student should be able to “post permission granted notices, as needed, for copyrighted material.”<sup>14</sup> The updated ACRL objectives (2015) frame copyright issues as they relate to information literacy in a different light. Rather than focusing on a series

of standards or learning outcomes as the last iteration of the objectives did, the new framework focuses on a number of conceptual underpinnings (frames) that organize many other concepts and ideas about “information, research, and scholarship into a coherent whole.”<sup>15</sup>

The ACRL *Framework for Information Literacy for Higher Education* emphasizes copyright and intellectual property more broadly, as one of the “frames” that is part of the overall “framework.” This particular frame, Information Has Value, elaborates on how information is a commodity and explains that there are legal and socioeconomic interests at play when it comes to information production and dissemination.<sup>16</sup> One practical application of this frame for those providing information literacy instruction would be to discuss copyright as it relates to the sharing of classroom material. For example, a librarian teaching an information literacy session could ask students what kinds of sharing they thought was permissible regarding classroom material. Such discussions could result in some interesting class discussion and a teachable moment around how intellectual property relates to classroom material.

The new ACRL *Framework* also emphasizes knowledge practices, “which are demonstrations of ways in which learners can increase their understanding of these information literacy concepts, and dispositions, which describe ways in which to address the affective, attitudinal, or valuing dimension of learning.”<sup>17</sup> It is important that students understand knowledge practices as they relate to their ability (or inability) to share instructional materials outside of the classroom. For example, one knowledge practice provides that information-literate learners “give credit to the original ideas of others through proper attribution and citation.”<sup>18</sup> This type of attribution is unlikely when material is shared through ARS sites, where the creator may not be acknowledged and credited as the author of the work. This knowledge practice notes that information-literate users “articulate the purpose and distinguishing characteristics of copyright, fair use, open access, and the public domain.”<sup>19</sup> Understanding, for example, that the instructor of the course is likely to own the intellectual property of a certain amount of material that is part of the course and that it is the instructors’ decision as to how it is disseminated outside of the course is an important concept for students to grasp. Another concept is to “respect the original ideas of others”<sup>20</sup>—again reiterating to students

that they should respect intellectual property owners and realize that considerable effort has been expended to create information resources used in courses.

Students’ misunderstandings about what constitutes appropriate sharing of someone’s intellectual property has multiple dimensions. For example, cultural differences exist in the understanding of ownership of intellectual property. In some cultures, a greater emphasis is placed on collective rather than an individualistic approach to the ownership of intellectual property.<sup>21</sup> Interestingly, in countries such as the United States, national and state teaching standards may even endeavor to ensure that students in secondary education are aware of what constitute copyright violations and what potential penalties might result.<sup>22</sup> Despite this, the existence of robust unauthorized student sharing on ARS sites demonstrates that students continue to misunderstand the appropriate use of the intellectual property shared with them.

The importance of student understanding of the commodification of the production and dissemination of information is a key part of the ACRL *Framework*. Students using sites like Course Hero might not pause to think about the site, its business model, and how it operates; they are more likely to see how it benefits them (and possibly their peers who might benefit from their sharing). Students should also understand the business models of commercial sites benefitting from the distribution of others’ intellectual property without compensating or attributing copyright owners. Recognizing one’s own role as a creator of intellectual property is a message around copyright that resonates more with digital natives.<sup>23</sup> It is important for students to recognize their own roles as information creators and disseminators. For example, in uploading a resource to Course Hero they have, in effect become a creator (albeit an illegitimate one)—they have created a digital resource that will have unintended implications and may have the ability to enable academic dishonesty. The unauthorized sharing of this resource has an impact on the creator and the student has played a role in facilitating the dissemination of material that is not their own intellectual property. By the same token, students should consider what outputs constitute their own intellectual property: How would they feel if their copyright-protected works were shared without their consent? Putting themselves in their instructor’s shoes, so

to speak, and considering their own role in the creation of intellectual property and the distribution of it, can help to illustrate the importance of author's rights to students.

Cornell University openly acknowledges the students' stake in their own intellectual property (and the exceptions afforded as a part of copyright law) by emphasizing students' roles as both creators and consumers. For example, the Cornell digital literacy initiative provides:

[C]opyright considerations for undergraduate and graduate students extend to academic work as well. Your original work—for example, a research paper or a video that you make for a class project—is copyright protected. By the same token, other people's work is protected, too, although often with meaningful exceptions that allow you to use it in classroom or academic settings.<sup>24</sup>

This kind of copyright statement enables students to “see themselves as contributors to the information marketplace rather than only consumers of it.”<sup>25</sup> The latest ACRL *Framework* is still relatively new, and librarians are still in the midst of determining how to best incorporate this framework into different types of instruction, so it will take some time for its impact to become more apparent, including in the context of copyright literacy. Collaborating with copyright colleagues to ensure that information related to students' responsibility to share class-based resources in an appropriate manner can go a long way toward getting the message across to students about unauthorized sharing of intellectual property. Even if students were to receive a brief mention of copyright in a library instruction session and are then referred to the appropriate copyright experts on campus, this type of instruction would at least make students aware of their responsibilities around intellectual property in the classroom. There are a number of aspects of the new ACRL frames that afford opportunities for students to think about intellectual property. Giving these specific aspects at least some priority in information literacy instruction would be a step in the right direction.

Fostering students' knowledge on responsible and ethical use of information “is a key aspect of information literacy.”<sup>26</sup> Not teaching the responsible and ethical use of information can have significant consequences

for students who might misappropriate or misuse information, either as part of their postsecondary studies or possibly in future work contexts. Concepts like plagiarism and proper citation may be covered as a part of library instruction or emphasized by the instructor of the course, whether as part of formal instruction or being included as part of class policies or through some other means. Additionally, libraries may also use self-directed learning materials in the form of short instructional videos or other online resources intended to provide “just in time” instruction through library websites. Taking a proactive approach would be preferable, which entails training students early in their postsecondary education (i.e., first or second year) rather than a reactive approach designed to respond to students who might run afoul of academic integrity guidelines. And, in particular, a proactive approach, should serve as part of a broader information literacy plan in which intellectual property is a key consideration.<sup>27</sup>

## Academic Integrity and Copyright—A Shared Responsibility

Teaching students to be responsible stewards in their use of intellectual property is not a burden that can fall squarely on the shoulders of libraries. Academic integrity statements, policies, rules, and regulations developed and adopted at the institutional level may or may not include course material sharing on external websites. Academic integrity statements may be included as part of student codes of conduct, honor codes, or may appear in the form of statements in syllabi. Such statements may give mention to copyright, but still, students’ perceptions of copyright may vary and the sharing of course material might not resonate with their own understanding of what constitutes copyright infringement.

Some institutions have drafted policies aimed directly at the issue of ARS sites. The approach taken as part of these policies (or sometimes they exist in the form of guidance) is typically aimed at faculty members and advising them what to do should they find their copyrighted material on ARS. Advising faculty members on protecting themselves against copyright infringement is one aspect of such policies. However, it is also important to help students to understand when and where to share infor-

mation ethically, which will better equip them to address with intellectual property in future workplaces.<sup>28</sup>

## Addressing Unauthorized Sharing

Some institutions have started to tackle the problem of students disseminating instructors' material from ARS sites without their permission but have done so from the perspective of protecting the faculty members' intellectual property from unauthorized uses. This is prudent, especially as some postsecondary institutions may have some obligation to protect instructors' copyright (or the institutions themselves may own the intellectual property) when infringed upon (or at least endeavor to assist with the matter by providing advice). A first step in addressing this issue is acknowledging it as an issue and clarifying to students why it is wrong and how such unauthorized sharing intersects with other institutional policies. In particular, acknowledging that unauthorized sharing of copyright-protected resources is, in fact, a violation of the academic integrity policy/student honor code/code of conduct (if spelled out in an institutions' policies) is key. And it would be best to explicitly mention the use of these sites in an academic integrity policy/student code of conduct/honor code, etc. For example, the University of Waterloo in Canada mentions ARS sites as part of an FAQ:

Below are examples of some of the more common violations. It's not an exhaustive list but provides some examples of what NOT to do:

Posting your Professor's lecture notes, presentation slides, assignments, exams/quizzes, answer keys, pages or excerpts from text books and/or any other material you receive in class or via the learning management system to note sharing web sites including (but not limited to): Book Neto, Course Hero, OneClass (formerly Note Solution)<sup>29</sup>

The University of Colorado Boulder's (UCB) frequently asked questions (FAQ) takes a different approach:

Like it or not, Course Hero and similar websites are probably here to stay. They’ve introduced an innovative product that will not stop here, but grow in the future. The thing to worry about now, is how to address these websites. Instructors need to be sure to tell their students what will be considered cheating and what won’t. Request that students tell you if they find your information online. Share with students that posting information online may result in harder tests, at the detriment of an instructor’s time and a student’s grade.<sup>30</sup>

The FAQ issued by UCB acknowledges that sites like Course Hero are unlikely to go away and that the best option is to be forthright with students about copyright infringement and to discourage the use of sites like Course Hero for illegitimate purposes. The statement also acknowledges that there is some merit in sites like these and that they do, in some cases, share legitimate material and facilitate students’ academic success. By acknowledging unauthorized resource sharing, students understand acceptable behavior with respect to sharing classroom material. This does not completely solve the problem of students making use of sites like Course Hero for illegitimate purposes, but it does provide students with some advanced notice of the kinds of practices that are acceptable to the institution and their instructors.

It can be difficult to pinpoint a particular individual responsible for uploading infringing material on an ARS. The approach that many institutions and individual instructors have taken, or at least recommended, is to issue take-down notices to sites like Course Hero. Issuing take-down notices involves the copyright owner asserting their rights and requesting either a website or online service provider remove their copyright-protected material.<sup>31</sup> This is a right afforded under the United States’ Digital Millennium Copyright Act; other countries may have similar provisions in their copyright legislation. This approach has limited impact since offenders can easily repost the material once the site has taken steps to remove the offending documents. Infringing behavior is often not monitored or moderated by ARS sites unless reported. Sites like Course Hero seek to distance themselves from any liability for copyright infringement, noting that they do not exercise any oversight over posted content, and much like the approach taken at YouTube, they only take down content in the event of a complaint.<sup>32</sup> This is a futile approach, as the same resource

can be posted again even after being taken down from a site, and it can be quite difficult to identify those involved in the infringing activity.<sup>33</sup>

An additional issue is *where* to address this problem and how to make students aware that the unauthorized sharing of course material constitutes unethical behavior. Granted, it is likely only a small number of individuals who are taking an individual instructors' material and uploading it to ARS, but having a conversation about copyright as a part of academic integrity in the classroom is important. This conversation could begin with a short section in a syllabus notifying the students of the copyright status of materials produced as part of a course and what constitutes appropriate sharing of these materials. This could include letting students know which materials are the intellectual property of the course instructor (or the institution), and which may belong to third parties. Additionally, marking the instructor's intellectual property in such a way that clearly notes it as their intellectual property and prohibits (or allows) sharing of the work according to the instructor's preferences is another method of informing students of what may or may not constitute ethical use of the work.

Dalhousie University Libraries' Copyright Office offers some advice on this matter, providing advice to instructors concerning labeling their material with copyright information:

In some cases there has been concern about students downloading and reposting this material on third party websites. If you are concerned about marking your slides and course materials to clearly communicate your ownership of the material may be a method of deterring this behavior. The materials may be marked with a simple statement like the following:

© Your Name, Year

You may also wish to add a statement such as this: "***Note: copying this material for distribution (e.g. uploading material to a commercial third-party or public website) may lead to a violation of Copyright law.***" Alternatively, you may also wish to add a **Creative Commons (CC) license** to your material. This communicates that

you are allowing the re-use and distribution of your course content, but only under certain conditions you set. There are six licenses, which are outlined here: <https://creativecommons.org/licenses/>.<sup>34</sup>

Informing students within the LMS about their responsibilities around intellectual property can be an important way to send this message. Students access course materials in an LMS for a limited amount of time—while their course is ongoing. During this time, they should have an understanding and appreciation for what constitutes ethical and appropriate use of the information contained in their course materials. Students should be aware of what their rights and responsibilities are with respect to use the material within an LMS for the purposes of the course. Can they download material for personal use? Share it with classmates? Share it outside of the classroom? Students unfamiliar with copyright are not likely to be well-informed of what they can and cannot do with course material unless it is made known to them in some manner. One approach is to provide clear messaging in an LMS. For example, at Dalhousie University, a “widget” (displayed in figure 13.1) was developed that a faculty member can easily deploy in the LMS to prominently display this notice to students.



**Figure 13.1.** Learning Management System “Widget” providing copyright information to students <https://libraries.dal.ca/services/copyright-office/for-faculty/protecting-your-own-copyright.html#idents>. Dalhousie University Libraries. Licensed under CC-BY-SA. Retrieved from: <https://libraries.dal.ca/services/copyright-office/for-faculty/protecting-your-own-copyright.html>.

Making instructors aware of the need to provide this information, and making it easy for them to do so, is a step in the right direction.

## Open Educational Resources and Open Pedagogy

The ACRL frames emphasize scholarship as a conversation noting that research and scholarship do not occur in a vacuum, rather scholars draw on previous scholarship for inspiration and the same is true for instructors seeking new teaching materials. The goal of open access advocates is to make research outputs openly accessible. Prominent open access scholar John Willinsky notes that “a commitment to the value and quality of research carries with it a responsibility to extend the circulation of this work as far as possible, and ideally to all who are interested in it and all who might profit by it.”<sup>35</sup> Similarly, the principle of open pedagogy promotes the free availability and permission for reuse and sharing of Open Educational Resources (OER)—teaching outputs rather than research outputs. Kwantlen Polytechnic University, a leader in open pedagogy in Canada, provides the following primer on Open Pedagogy:

Open Pedagogy refers to a set of teaching and learning practices that are only possible in the context of the free access and additional permissions that characterize open educational resources (OER). In practice, open pedagogy often takes the form of a “renewable assignment” in which students produce, adapt, or refine useful resources for the commons. This is contrasted with more traditional, “disposable” assignments in which students produce content that is meant only for their instructor’s eyes and that will likely be discarded as soon as the course ends. Open pedagogy empowers students by granting them more ownership over their learning process and allowing them to make valuable contributions to the world and their community while simultaneously helping to develop critical skills (e.g., digital literacy).<sup>36</sup>

Students upload material to ARS sites without authorization sites in an attempt to give themselves more control and engagement over their learn-

ing processes. Granted, there are a number of underlying issues related to ARS sites, such as commercialization of the work of academics and the aforementioned issues concerning copyright infringement. However, students’ use of ARS sites is not necessarily motivated directly by a desire to cheat or engage in academically dishonest behavior, but rather stems from an expectation to have more engagement around course content matter that is not available in the traditional classroom or even the virtual classroom that is part of the LMS. Yes, on one level, students engaging in infringing activity might be misusing such a platform by adding materials without permission. But, on the other hand, this begs the question: Can instructional materials be shared and licensed as OERs to help mitigate some of the issues associated with copyright infringement when it comes to ARS sites?

The concept of open pedagogy extends to allowing students to produce, adapt, and refine useful resources instead of only permitting the reproduction of course content as required by the instructor, empowering students and giving them more ownership over their learning processes while simultaneously helping students to develop critical digital literacy skills.<sup>37</sup> ARS sites may well be filling a gap that closed-access LMS sites neglect to fill, even though students might be misguided in their thinking around the ability to share.

Even though instructors own the intellectual property rights to their instructional materials, they can still permit those materials to be openly distributed and licensed in the digital environment. New efforts in open pedagogy have opened up a number of doors in for instructors to make their teaching resources openly available and licensed to permit other instructors to remix and adapt the materials. Open education advocates assert that the use of OER can help raise the quality of education for students because instructors will be in a position to share and build on one another’s pedagogical innovations.<sup>38</sup>

Some instructors might be hesitant to share their work outside of the classroom and in an online environment, but should they be? What harm is being done by sharing a course syllabus, class slides, or even assignment instructions with other instructors and students? Concerns over sharing materials such as test banks, assignment instructions, and even test answers are legitimate because the sharing of such material might lead

to academic dishonesty.<sup>39</sup> On the other hand, open pedagogy expert and psychology professor Rajiv Jhangiani engaged his students in the creation and peer review of exam questions that are used for their final exam. He emphasized that such experiences can serve to foster engagement with the class subject matter and can be rewarding and engaging for students.<sup>40</sup>

For material that is openly licensed and permits sharing, such as materials with a Creative Commons license, it is important that students also understand the legal implications of each type of license. For example, the Creative Commons BY license—a commonly used Creative Commons license—requires that the creator of the work being reused be appropriately attributed.<sup>41</sup> The terms of the license are key for the instructional material to meet the requirements of an OER. For example, the Open Content alliance stipulates that OER should be licensed for free and perpetual permission to engage in the five “R” activities:

- Retain—the right to make, own, and control copies of the content (e.g., download, duplicate, store, and manage)
- Reuse—the right to use the content in a wide range of ways (e.g., in a class, in a study group, on a website, in a video)
- Revise—the right to adapt, adjust, modify, or alter the content itself (e.g., translate the content into another language)
- Remix—the right to combine the original or revised content with other material to create something new (e.g., incorporate the content into a mashup)
- Redistribute—the right to share copies of the original content, your revisions, or your remixes with others (e.g., give a copy of the content to a friend)<sup>42</sup>

Not all instructors who have the ability to share their teaching materials with open licenses will be willing to do so. There may be some who might be happy to share their work and have others remix and reuse it. Others, though, may not be comfortable making their teaching materials available on open platforms for fear it could be misappropriated.<sup>43</sup> A move to an open pedagogy model requires a significant shift in thinking on the part of instructors and institutions in terms of the treatment of instructor-created, copyright-protected material. Further, resources, training, labor, and incentives for the production of OER are also important considerations for helping faculty to create OER. For example, in terms of incentives and

recognition, the University of British Columbia has acknowledged and emphasized OER as a part of promotion and tenure processes.<sup>44</sup>

Open pedagogy and OER acknowledge that creative works, including instructional materials, are part of a larger conversation—they build upon preexisting works and can be used to build on future works. The concept of pedagogy as a conversation aligns very much with the ACRL frame of Scholarship is a Conversation. As open pedagogy expert Robin Derosa notes, “What we once thought of as pedagogical accompaniments to content (class discussion, student assignments, etc.) are now inextricable from the content itself, which has been set in motion as a process by the community that interacts with it.”<sup>45</sup>

The use of OER lets students see that thought and effort goes into creating such assignments and that they have value past being evaluative measures that they must persevere through to pass a class. Students stand to benefit the most from having access to OER, and enabling the sharing of such materials can serve to help students meet learning outcomes.

Jhiangiani notes this that this particularly relates to assignments and what are termed “disposable” assignments, ones that “students complain about doing and faculty complain about grading.” He notes further that these assignments that “add no value to the world—after a student spends three hours creating it, a teacher spends 30 minutes grading it, and then the student throws it away.”<sup>46</sup> On the one hand, yes, students need to think before sharing, but on the other hand, instructors and institutions need to think about why students have taken this route to sharing. Are students driven to sharing content in this manner due to a lack of access to course materials?

The issue of unauthorized sharing of classroom materials is unlikely to go away anytime soon. Faculty, librarians, academic administrators, and the broader campus community involved in academic integrity need to collaborate to effectively address this issue. Understanding where student perceptions of intellectual property might fall short is a key step forward in addressing this issue. For librarians involved in information literacy instruction, in particular, the new ACRL *Framework* offers a real opportunity to include copyright as a part of the conversation to help develop students understand the ethical and legal use of information. It is critical

to ensure that students understand their own place as creators of intellectual property to prepare them to be part of a digital environment that is increasingly concerned with the creation, curation, and dissemination of information. There are a number of concrete steps that libraries, learning management system administrators, instructors, and others involved in the dissemination of information in postsecondary instructional context can take to ensure that the message is clearly conveyed to students. Clear messaging through academic integrity guidelines in learning management systems and as part of instructional material is key. It is important for instructors to know what rules apply to their own intellectual creations. Instructors should also understand how sharing beyond the classroom can have an impact on students' learning. Open pedagogy and OER offer an important opportunity for instructors to rethink their relationship to the materials they produce and to openly share and invite remixing and reuse of materials they produce to benefit other instructors as well as their own students. The issue of unauthorized sharing of classroom materials and the rise of sites like Course Hero offer an important opportunity for instructors and students alike to engage in meaningful dialogue about what ethical and legal sharing of pedagogical material can look like in the digital age.

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**RESEARCH AND POLICY**





# Copyright Essentials and Information Policy (Policy Implications for Copyright Law)

*Carrie Russell*

Not every librarian wants to be a copyright specialist. Some librarians do not want the responsibility of making copyright decisions that may lead to library or university liability. To prevent this risk, some will overreact and restrict many uses by faculty and students that are lawful. Some assume that one must be a lawyer to understand copyright law because the law is simply too complex and can be intimidating. The law can be ambiguous and uncertain, especially fair use. In addition, most librarians are unfamiliar with copyright law and how it relates to libraries because information policy was never taught in schools of library and information science. Yet, who better to address copyright than librarians with the professional responsibility to maximize access to information in the public interest? Who better understands what educators and students want to do with protected content and why? Who else can approach copyright from the perspective of advancing their institution's mission so core to the very purpose of the copyright law—to advance learning?

Copyright law is a policy that allows or disallows the creation, access, use, dissemination, and storage of copyrighted works. The founding fathers of the United States (“founders”) so recognized its importance to democracy, free expression, access to information, and the advancement and

enrichment of the public that they made it a constitutional mandate. This chapter discusses how the public policy implications of the law provide the grounding for a deeper understanding of the copyright law, one that demonstrates that copyright is not a disciplinary system of “yes you may” or “no you cannot” but central to free speech and democracy. Moreover, without this understanding, librarians will have a tough time feeling confident enough to be a successful copyright specialist. Copyright experts will find that there is a policy rationale behind what seems to be a perplexing set of legal principles.

There are foundational tenets to United States copyright law—the essentials of copyright law—that if learned and embraced will help librarians by providing the necessary context from which librarians should approach any copyright issue. Understanding copyright as a public policy keeps all of us on the same page, helps us make better copyright decisions, and helps us recognize when the balance of copyright is shifting in significant ways that are not in the public interest. This chapter will address the most noteworthy aspects of United States copyright policy, including the purpose of copyright, authors’ rights versus exclusive rights established by Congress, the utilitarian nature of US copyright law, exclusive rights versus property rights, the public domain, library exceptions, and, of course, fair use.

## Why Copyright?

To begin understanding copyright as a policy inevitably begins with why it was created in the first place. What is it about copyright law that necessitated its inclusion in Article 1 of the Constitution? Section 7 of Article 1 calls on the Congress to enact copyright legislation “to advance 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 Inventions.” There is a lot to be parsed out of the copyright clause. The copyright clause includes both the purpose of the law and the means to achieve it—advance knowledge and creativity to benefit the public by establishing exclusive rights for authors and inventors in their creations. The clause also notes that exclusive rights will make up the monopoly that must be limited. Ray Patterson and Stanley Lindberg further explain “the ordering of the policies in the clause indicates their priority: the first is

that copyright promote learning; the second is that it preserve the public domain; and the third is that it encourage creation and distribution by benefitting the author.”<sup>1</sup>

The founders believed that encouraging the production and dissemination of knowledge and creativity was directly related to the success and well-functioning of democracy. James Madison articulated this in a letter to William T. Barry:

Throughout the Civilized World, nations are courting the praise of fostering Science and the useful Arts, and are opening their eyes to the principles and the blessings of Representative Government. The American people owe it to themselves, and to the cause of free Government, to prove by their establishments for the advancement and diffusion of Knowledge, that their political Institutions, which are attracting observation from every quarter, and are respected as Models, by the new-born States in our own Hemisphere, are as favorable to the intellectual and moral improvement of Man as they are conformable to his individual & social Rights. What spectacle can be more edifying or more seasonable, than that of Liberty & Learning, each leaning on the other for their mutual & surest support?<sup>2</sup>

The founders knew that there was a great divide between those who had access to knowledge, books, and culture and those that did not. They envisioned a democratic republic where information would more freely flow to all people. Their hope was that every (free) person would have a voice in a democracy and that every person would be up to the task of contributing to democracy.

But writings and discoveries might not necessarily be shared or distributed to the public unless a creator or inventor has a reason to do so. To enable the creation and distribution of information, invention, knowledge, and creativity, the founders—with some hesitation—allowed creators and authors the exclusive right to their work. Thus, Congress established a statutory monopoly, limited in scope, to create a market for the exchange of information goods that would ensure the production and distribution of copyrighted works at an appropriate level.

## Copyright is Not a Natural Right

Unlike many other nations' copyright laws, US copyright law restricts the scope of author rights to exclusive rights. US law is not based on the notion that, by their very nature, some people are “born” to be creators and therefore are “due” certain rights and privileges whether stated in the law or not. Our policy is that authors do not have control over every use of their works. Moreover, US copyright law is thin on moral rights, the thought that creators should be able to control how their works are used would contradict freedom of expression and limit dissemination of information. US copyright law is focused first on the interests of the public, even if creators' interests are negatively affected. In policy debates, rights holders or copyright aggregators will argue their rights extend beyond economic rights and into the realm of moral rights.

In many European countries, moral rights are a central aspect of their copyright laws based on natural rights philosophy. The rights consist of the right of attribution, the right to publish anonymously or pseudonymously, and the right of integrity. The first two rights—attribution and the right to publish anonymously or pseudonymously—are not codified in US copyright law. The right of attribution—that is, to accurately note who is the author of a work—is practiced in the US, and we think of that practice as the right or ethical thing to do—acknowledge the creator. We also allow authors to publish without identifying themselves. The right of integrity is the right that strays from US law. It is the right to control the use of the work when it is prejudicial or reflects poorly on the author. In the United States, the right of integrity would butt up against the first amendment. The right of integrity is narrowly applied in The Visual Artists Rights Act of 1990 (VARA) ([https://en.wikipedia.org/wiki/Visual\\_Artists\\_Rights\\_Act](https://en.wikipedia.org/wiki/Visual_Artists_Rights_Act)), which recognizes moral rights for a small subset of visual art.<sup>3</sup> At Congressional hearings, the rhetoric of natural rights is often evoked by rights holders and policymakers to stir emotion and position the artist or creator with the burden of being naturally creative but never fully compensated for their efforts. Scott Turow, for example, said at a Moral Rights symposium that “artists traditionally are believed to have put a little bit of their soul into whatever they create.... And I think we do have the right to assert that there is a kind of specialness in creative work, and that is recognized in terms of moral rights.”<sup>4</sup>

## *Utilitarian Copyright*

Another essential is that copyright law should “do” something. If that something is to advance knowledge and learning for the public good, it should function in a way that achieves that aim. Providing a statutory monopoly to incite creation and dissemination of creative works was the way Congress chose, but Congress could have chosen another method or could still choose another system in the future if they thought another was better. Of course, they will not do so, at least not at this moment, but the point is that we have copyright to serve a purpose. The purpose is not to ensure that authors are rewarded but to ensure that the public would benefit from access to knowledge, creativity, and other protected works. We are reminded time and again in numerous court decisions and legislative histories that the interests of authors are secondary to the public interest. For instance, the Supreme Court in *Fox Film Corporation v. Doyal* noted that “[t]he sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors.”<sup>5</sup> Similarly, in *Twentieth Century Music v. Aiken*, the Supreme Court stated that “copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”<sup>6</sup>

## **Rights Holders Do Not “Own” Creative Works**

The distinction between ownership and limited rights is a necessary one because ownership implies property, and property is governed by other legal policies—in particular, an owner of property has the authority to determine how his property can be used and the unauthorized taking of property is theft. The copyright law does not define how copyrighted works can be used. It provides exclusive rights to authors and other creators that are limited. This limitation is necessary to enable free speech, creativity, and the advancement of knowledge. Moreover, despite the rhetoric often heard in policy debates, infringement is not theft. Copyright is not taken. The use of the term “piracy” for copyright infringement is incorrect and only used to incite reaction. The term intellectual property likewise is a misnomer, at least under US copyright law.

Language is important and can influence one's opinion, and the term "piracy" is effective to argue that rights holders are not being properly compensated. Librarians should not buy into that term. Instead, refer to authors and creators as rights holders to remind decision makers that copyright is a limited right.

## Term of Copyright and the Public Domain

Congress initially established a fourteen-year term of copyright with the option to renew for an additional fourteen years if the author is still alive. The founders discussed the problems with monopolies and felt they should be allowed only when necessary and for a limited time period.<sup>7</sup> Like the Statute of Anne, they choose fourteen years thinking this would be sufficient to encourage people to create and distribute their works.<sup>8</sup> After that time, to further advance the dissemination of information and promote additional creation, creative works would enter the public domain to encourage their re-publication and for all to use in any way without prior authorization.<sup>9</sup> Unfortunately, Congress threw good public policy out the window by repeatedly extending the term of copyright to life of the author plus fifty years and then, in 1998, to life plus seventy years.<sup>10</sup> Because dead people cannot create or invent, clearly the term is no longer an incentive for the creation of new works. One might argue that life plus fifty years was a necessary change to comply with international treaties, but there are other aspects of international copyright law that the United States does not comply with.<sup>11</sup> There is no public policy rationale for extending the term an additional twenty years.<sup>12</sup> Term extension only provides an inheritance for the grandchildren of creative people. It is important to understand that long copyright terms do not benefit the public, so librarians can better advocate against it.

### *Essential "Non-Copyrightables"*

Copyright protects original creative expression fixed in a tangible medium. Fixation is a policy that ensures that creative works will be perceptible to the public and in a tangible medium that can be distributed to further ac-

cess.<sup>13</sup> Today, we simply hit the send button to further distribute opinions, commentaries, photographs, and more—all protected by copyright if creative, original, and perceptible. “Ideas” are not protected by copyright unless they are not expressed in an original creative way, allowing ideas themselves to flow freely.<sup>14</sup> Because ideas can be expressed in a variety of ways, free expression is advanced. Thus, the building blocks of creativity—ideas—remain in the public domain.

Likewise, facts are not protected by copyright. Once a fact is discovered, it slips into the public domain. The square footage of your house is a fact that no one can own. If facts were owned, one would need to seek permission or obtain a license to know or use facts. This limitation to copyright aids in advancing knowledge. As Justice Warren Brandeis said, “The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions and ideas—after voluntary communication to others, are free as the air to common use.”<sup>15</sup>

For similar reasons, government documents are not protected by copyright.<sup>16</sup> The government that we financially support crafts legislation, provides reports, makes court decisions, and other information. Every person should have access to content to know what the government is doing and to be a fully informed member of society. The public needs access to laws and regulations because these are the rules of our country.

### *First Sale*

The right of users to share or rent a lawfully acquired copy, including the rights holders’ right of distribution for that lawfully acquired copy, is core to the operation of libraries and a policy that advances the further distribution of a work.<sup>17</sup> Content, expressed in a tangible copy once read and known, becomes more valuable the more it is used, a condition that economists call non-rival.<sup>18</sup> A library copy of a book has greater social value by reaching more people, even those who might not be able to acquire their own copy. First sale also helps clarify the distinction between copyright and property. Once I purchase a work, it is my property, but I do not hold exclusive rights. Again, the policy benefit of first sale advances the very purpose of the copyright law.

## *Fair Use*

Fair use is the fail-safe of United States copyright law. When the copyright law does not operate the way that it should, fail-safes are necessary to mitigate harm and restore balance. Under fair use, people can exercise an exclusive right without authorization. Fair use is our flexible exception—most countries do not have it—and is critical to learning and creating new works and new functions of works that benefit the public. Arguably, without fair use, the United States would not lead the world in innovation. Most of technological revolution started here, where people could reverse engineer and even copy entire works if necessary. Courts have agreed that internet companies can copy whole works to create search engines, which is socially beneficial.<sup>19</sup> When a person with print disabilities cannot access a work, the copyright law has failed by hindering the very purpose of copyright law. Making an accessible copy removes a barrier to learning. Moreover, fair use is good policy because it can be applied in ways not foreseen by Congress. It has stood the test of time regardless of technology.

Some argue that fair use is a form of market failure.<sup>20</sup> They argue that the ability to use the work in lawful ways cannot be accomplished under normal marketplace conditions and, as such, infringement occurs. What this theory ignores is that requesting permission to use an exclusive right can be an arduous process and involve delays, with no guarantee that the appropriate rights holder will be found. Moreover, rights holders can deny a request, thwarting free expression and the purpose of the copyright law. Under the market failure theory, if getting permission to use a work was easy and definite and everyone had the funds to pay for a license fee, we could solve that market problem and no longer require fair use. Librarians should understand that always asking for permission and paying a fee is not in the public interest. A librarian once told me that if she had the necessary funds, she would always ask for permission just to be on “the safe side.” Do not forfeit your right to first think, “Is permission necessary?” A desire for clarity makes the establishment of some form of automatic licensing also desirable but ultimately negates free expression. Avoiding the burdensome ambiguity of fair use is not good public policy, so any efforts toward blanket or extensive licensing should be questioned.<sup>21</sup>

In policy discussions, the idea that all uses should be paid for is often used under the guise of being helpful. The story goes that librarians prefer clarity and that establishing an automated licensing system would really be doing them a favor. Of course, this is true to an extent. Some librarians want clarity, fair use guidelines, and definitive answers. When educating librarians, the benefit of a flexible exception like fair use cannot be overstated. Always paying for fair use is the same as ending fair use. An effective public policy that allows for fail-safes and flexibility, regardless of assumed risk and ambiguity, ultimately advances the goals of copyright.

The fact that libraries and archives hold a privileged position in the copyright law demonstrates that Congress understood that libraries are central to advancing the purpose of the copyright law.<sup>22</sup> Libraries and their affiliated educational institutions are the places where copyrighted works will be purchased, made available, and preserved for future generations. People will use these works in ways that build on knowledge and creativity and enable learning. Thus, libraries (along with archives and educational institutions) are places, both physically or virtually, where the public will most likely use an exclusive right of copyright.

The law specifies a specific exception for libraries and archives—Section 108—because Congress knew that reproductions and other exceptions would occur in places of learning and be lawful.<sup>23</sup> Understanding the role librarians play in copyright law is essential. There are other exceptions to the law for other uses and for other entities—for example, a copyright exception for non-dramatic public performance for non-profit agriculture or horticulture organizations at an annual agricultural or horticulture fair or exhibition<sup>24</sup>—but these exceptions are circumscribed and limited to certain times. The negative fiscal impact of these exceptions on rights holders is minimal. Instead, the library exception is broad in comparison—it will always occur, again and again *even if some uses occasionally do have a financial impact*.

## Conclusion

One might argue that the noble goals of the founders regarding copyright are passé or even quaint. Regardless of what the founders intended, the reality is that copyright is primarily valued for its contribution to eco-

conomic growth. Rights holder groups are eager to reel off statistics like those reported by the Copyright Alliance:

[copyright] industries are directly responsible for 5.6 million jobs in the workforce, and indirectly responsible for an additional 2.8 million jobs. Not only is copyright creating jobs, it's creating jobs that pay well. In 2014, workers outside of IP industries were earning, on average, \$896 per week. Within copyright-intensive industries, this number nearly doubles to roughly \$1,701. What's most impressive, though, is the monetary value that these industries add to the economy as a whole. According to the report, 5.5% of the GDP—or \$954 billion—is attributable to industries that rely on copyright.<sup>25</sup>

The problem with this focus is that it tends to ignore the “public” side of the copyright equation, so well-articulated by the founders. It is great that copyright industries make money and employ a lot of people, but it is just as great that copyright enables access to information and knowledge in the hope that all people will benefit and grow to contribute to democracy. Just because values are high-minded and principled does not mean they are not worth fighting for. Lydia Pallas Loren summed it up when she stated:

The economic importance of copyright will only continue to grow, and the contours of the rights of copyright owners and users will continue to change with much debate about the direction that change should take. In all of this debate, however, we should not let a fundamental misconception of the primary purpose of copyright law in this country shape our rules to the detriment of the true constitutional aim of the limited statutory monopoly of the copyright: to promote the progress of knowledge and learning.<sup>26</sup>

This is what librarians should emphasize when teaching their communities about copyright.

Copyright education is not just about answering copyright questions. Responding to questions is just skimming the surface of what people

actually need to know. Providing the policy context of copyright is what people will remember when they leave your copyright class. It is what makes copyright interesting and not arbitrary. In part, it is a story about the United States and why fundamental values embraced by librarians are naturally linked to copyright. Ultimately, it better prepares librarians when they must resolve to a copyright question.

Shaping federal public policy is a long and drawn-out process, and it is easy to get discouraged. But influencing public policy on the front lines can be just, if not more effective. With a solid grounding in copyright policy, librarians can help their communities with copyright issues but also have the resolve to push the envelope at their home institutions, even if this means convincing administrators that abandoning fair use guidelines is a prudent idea and then turning to fair use.

In the last several years, the biggest gains librarians have won in shaping copyright balance have not been won in halls of Congress, but rather achieved by informed colleagues on the front lines. Spreading the word about fair use, developing community best practices for fair use, giving copyright workshops, preparing copyright materials, collecting stories and, more recently, making well-considered risk assessments for new services that are lawful such as HathiTrust, requires that one know why we have a copyright law to begin with.

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12. 17 U.S.C. § 108(h)(1) (2012). In this section, Congress provided an amendment allowing libraries under certain conditions to preserve the last twenty years of any published work.
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# Seeing the Whole Picture: Insights into Copyright Risk Literacy in Higher Education from Enterprise Risk Management

*Alexandra Kohn*

For anyone who regularly fields questions related to copyright in a higher education or research setting, a common thread quickly emerges from the wide variety of queries received: the inquirer's desire for a clearly prescriptive response. Users want to be told what they can or cannot do. However, in many cases, a yes or no response is not appropriate or even possible.<sup>1</sup> Matters of copyright are often open to interpretation and fraught with uncertainty and, as such, there is a range of possible courses of action, depending on the inquirer's appetite and/or tolerance for risk. Consequently, a major component of the work of those in a copyright education or advisory role is engendering copyright risk literacy in our users and clients to make informed decisions about their copyright-related activities.

This chapter engages with the concept and practice of enterprise risk management (ERM) to explore what insights it may give to librarians and

patrons to understanding the copyright issues that affect higher education institutions. By looking at copyright risk through the lens of an ERM framework, librarians and copyright advisors can engage their users with an understanding of copyright risk in a research or academic environment that does not begin and end with legal risk but may extend to reputational, operational, and strategic risk. In addition, instead of viewing copyright risk activities in isolation, as a danger to be avoided wherever possible, an ERM approach can facilitate a more nuanced grasp of copyright risk within the context objectives and activities of the entity taking the risk, be that at an institution, a department, a particular project, or an individual.

This chapter begins by introducing the spectrum of copyright-related risk that exists in a research/higher education context. It then discusses some the sources of this risk, including new legislation, court decisions and new interpretations of existing law, and reviews some of the literature and studies suggesting that librarians often approach these risks from a place of caution. This is followed by the introduction of ERM as a conceptual and practical framework and its use in the research and higher education sectors. Three example scenarios are used to illustrate some of the common elements and factors that copyright advisors and librarians engaging with copyright in this environment may grapple with and how they might be viewed and addressed through an ERM framework. The chapter concludes with some reflections on the limitations and possibilities of this approach for librarians.

## Copyright Queries and the Continuum of Risk

For a small selection of the copyright queries a librarian faces, a relatively straightforward and definitive answer is possible. For example, if the item that is the subject of the query is no longer protected by copyright due to expiration of the term of protection or the desired course action falls clearly under a specific license or an exception in copyright law, then the user can be given an unqualified go-ahead or a specific set of conditions or directions to render such action risk-free. However, the majority of copyright scenarios a librarian encounters will entail at least some level of le-

gal risk; as one best practices document from the Association of Research Libraries notes: “Perfect safety and absolute certainty are extremely rare in copyright law.”<sup>2</sup> In these cases, the answer to the question is not a clear yes or no but a highly qualified “it depends.” For these types of queries, taking the desired action exist somewhere on a spectrum of risk, the severity of which is determined the specific facts and circumstances of the scenario.

## Sources of Copyright-Related Risk

### *New Laws, New Court Decisions, New Interpretations*

Copyright legislation and practice are constantly evolving, with amendments and new exceptions being introduced on a regular basis and landmark court rulings changing how we interpret and apply existing law. The first few years after a new provision has been introduced, before there is a significant corpus of case law and accepted practice to rely upon, are particularly subject to uncertainty about the parameters of a provision and what actions comfortably fall within its limits. For example, the non-commercial user-generated content or “mashup” exception introduced into Canadian law by Bill C-11 in 2012, which allows individuals to create new work from existing copyrighted works and to disseminate them for non-commercial purposes, has enormous potential but has yet to be tested in the courts.<sup>3</sup> As such, the scope of the exception is open to interpretation and the librarian or copyright advisor may feel uncertain about suggesting that her users take full advantage of the exception.<sup>4</sup> Would posting a video-game modification created for educational purposes on the open worldwide web be considered to “have a substantial adverse effect, financial or otherwise” on the market for the original work (one of the pre-conditions of the exception)?<sup>5</sup> What about using in-copyright photos on a personal blog? Until such use cases have been put to the test, the viability of taking advantage of this exception for a variety of potential applications is left to the judgment of the user or advisor and, as such, presents a potential risk of copyright infringement.

When cases involving exceptions to copyright law do come before the courts, this can have a significant effect on how risky actions associated with the case are perceived to be. In some cases, accepted and widespread practices may suddenly be called into question when they become the

subject of legal action. For example, the lawsuit brought against York University by the Canadian Copyright Licensing Agency (known as Access Copyright) regarding educational copying for course readings was seen by some as casting doubt on the legal robustness of the fair dealing guidelines that York and many other Canadian postsecondary institutions rely upon to regulate educational copying.<sup>6</sup>

### *Fair Use and Fair Dealing*

The area of copyright law and practice that is perhaps the most prone to uncertainty and where both users and librarians feel the weight of risk most fully is most certainly fair use and fair dealing. As Kenneth Crews notes:

Fair use is indefinite, vague, deliberately flexible, deliberately subjective, and intended to apply in different situations.... We always have to evaluate risk, that is, making a judgment about how likely is it that what we are doing is an infringement of copyright. Fair use is an analysis of that risk, and we have to decide how comfortable we are taking this particular risk.<sup>7</sup>

This uncertainty extends to all jurisdictions in which a fair use or fair dealing doctrine has been incorporated into copyright legislation and practice. Historically, the fair use exception in US copyright law has been more flexible and all-encompassing than fair dealing provisions in other territories, where fair dealing is generally limited to the enumerated purposes, such as research and news reporting. However, scholarship indicates that fair dealing, especially in Commonwealth countries, is starting to more and more closely resemble US-style fair use.<sup>8</sup>

## **Librarians as Traditionally Risk-Averse in Copyright Matters**

For many librarians, an awareness of copyright-related risk along with a fear of legal and possibly financial liability for themselves or their users has led to the adoption of a risk-averse approach.<sup>9</sup> In advising patrons on

copyright, librarians often start from a position of minimizing risk rather than establishing and asserting the rights their institutions and users may avail themselves of under law.

A 2010 ARL report on fair use in academic and research libraries provides an extensive and far-reaching list of some of the ways in which librarians in research libraries reported placing restrictions on research and teaching activities that arguably comprise the main goals of research universities out of uncertainty and fear of the applicability of fair use.<sup>10</sup> In addition to the frequently explored chilling effect on digitization initiatives, such restrictions also included limitations on courses, research projects, researcher access to collections, inadequate provision of learning materials to students with disabilities and allowing the deterioration of collections in near obsolescent formats. In line with this study, Smith contends that copyright in higher education is frequently looked upon, “not as a subject of risk management but as an obstacle, that must be avoided completely or allowed to completely block a desired...project.”<sup>11</sup> Library administrators are fully cognizant that the daily operations of running a library involve some degree of legal risk, for example, liability for injuries suffered onsite and put in place maintenance procedures and policies to mitigate that risk. However, when it comes to copyright risk, this pragmatism toward risk management seems to evaporate and, as a result, risk aversion often takes precedence over educational or research objectives or priorities, with “decisions...being made not based on scholarly needs or the importance of the material itself, but merely to avoid controversy and risk.”<sup>12</sup>

## Risk Management and Enterprise Risk Management

Traditionally associated with insurance to protect industries, businesses, and individuals against losses incurred as a result of unforeseen events, risk management is the process of identifying and assessing risks that have the potential to negatively impact the operations of a business or organization and subsequently taking steps to minimize those risks, so that the negative consequences are lessened.<sup>13</sup>

An ERM framework builds upon the basic principles of traditional risk management but conceives of risk in a more multi-dimensional fashion. Instead of examining individual risks in a silo, ERM attempts to look at the effect of risks holistically across an organization. Risks are identified and assessed in relation to how they affect the entity's ability to attain its organizational goals. After risk assessment is conducted, the organization or business selects an appropriate response aimed at minimizing the identified risks, with the understanding that taking on a certain level of risk is often necessary to achieving those goals. Instead of conceiving of risk as a purely negative element, to be avoided to the extent possible, ERM views risks as inseparable from reward, positing that erring toward extreme risk aversion diminishes the potential gains or advances that an entity might make toward its objectives.<sup>14</sup>

## ERM in Higher Education

ERM has gained prevalence as a risk management strategy over the past decade both in practice and as the subject of academic research. In addition to widespread use in the private sector, particularly in business, finance, and industry, ERM has been adopted increasingly in recent years by a wide variety of organizations in the non-profit and public sectors. Though perhaps not as pervasively as in other sectors, the ERM framework has also been implemented in the higher education sector, with many universities using ERM frameworks or operating ERM offices to manage risk across the institution.<sup>15</sup>

At first glance, the application of a framework designed for a corporate environment might appear to be an odd fit for the regulation of a higher learning environment. While both public and private universities and colleges are concerned with profit and financial stability, these goals or concerns are ancillary to the main aim of institutions of higher education—that is, “to gather, develop, and disseminate knowledge.”<sup>16</sup> However, scandals, losses, and mishaps in the sector have led to increased media attention and demand from stakeholders to address risk around a plethora of university activities, such investments and spending, privacy, conflicts of interest, information technology, security, fraud, research compliance, and transparency.<sup>17</sup> In addition,

the structure of ERM is adaptable to a higher education environment by allowing an organization to frame risks in relation to the main goal of furthering knowledge.

## Sources and Types of Copyright Queries in a Research/Higher Education Environment

One of the most rewarding and challenging aspects of answering copyright queries in a higher education context is the breadth and diversity of both the users served and the nature of their questions. Copyright touches every aspect of the operations and activities of the university, and questions can come from administrators, researchers, instructors, students, and student groups.<sup>18</sup> The following scenarios, while by no means exhaustive, are illustrative of both the scope and variety of the type of queries librarians working in these environments may encounter.

### Scenario 1:

As part of a grant-funded project, a faculty and postdoctoral music research group designed a website on which they plan to upload sound files of short clips of canonical performances of a selection of pieces of music. Each clip is accompanied by a critical discussion of technical aspects of the performance and the site is set up to crowdsource transcriptions of the clips, which the research group will subsequently analyze.

### Scenario 2:

The history department has a collection of departmental meeting minutes, letters, notes, and other documentation that date from the time of a major social movement when the department was the site of protests and sit-ins. The department believes that the documents are of scholarly and public interest and would like to make them widely available online, but the works have multiple unknown authors.

### Scenario 3:

A student intern at the university art gallery has been tasked with promoting a little-known collection of the original artwork for mid-cen-

ture advertisements to the university community for research and object-based teaching and learning. She would like to post photographs of the work on gallery's social media pages along with curatorial notes and suggestions for how the works might be used for teaching in various disciplines at the university.

The above scenarios are emblematic of the diversity of stakeholders, materials, and uses and copyright statuses of works librarians may face when advising on matters of copyright in a research or higher education environment. Different stakeholders may vary in terms of copyright knowledge and relationship to the institution faculty. In the above scenarios, in scenario 1, there are faculty and postdoctoral researchers as well as members of the public involved; scenario 2 may include faculty (including emeritus faculty), alumni, and administrators, whereas the main actor in scenario 3 is a student. The profile, copyright status, and rightsholders of the works are also diverse, with scenario 1 dealing with publicly available, creative and potentially highly commercialized works with known creators; the documents in scenario 2, conversely, are mostly unpublished and likely of little commercial value, with many of them constituting orphan works whose rightsholders may never be discovered. Scope and mode of dissemination also vary with scenario 1 dealing with an open website and scenario 3 working with social media. All of these factors may have an effect on the scope, urgency, and risk involved in the query.

## Application of the ERM Framework to Copyright Issues in a Research/Higher Education Context

This section outlines the components of an ERM framework in the context of a higher education or research environment and then discusses some of the ways in which these components might be applied when dealing with copyright quandaries in such an environment, with reference to the above example scenarios to illustrate specifics. The ERM literature refers to the enterprise whose risk is being managed as the entity. In applying this framework to copyright queries in higher education, the entity in question may refer to the institution as whole but could equally be

applied to an academic or administrative unit, a library, research group, or a category of users, such as instructors or students.

There are a variety of articulations of ERM frameworks developed by professional associations and consultants, and many organizations use a customized framework,<sup>19</sup> but at its base, it consists of eight interrelated components: understanding environment, objective setting, event identification, risk assessment, risk response, control activities, information and communication, and monitoring.<sup>20</sup>

### **1. Understanding Environment**

The starting point of setting up an ERM framework is to establish an understanding of the culture of the entity, which includes its values as an organization and its appetite for risk. Given the diversity of disciplines and the variety of academic and administrative units in a university, it can be difficult for librarians to get a handle on the context in which a particular copyright conundrum is taking place.

In a higher education setting, both formal and informal tools can be used to get a sense of the institution's culture. For example, the mission statement of the university, library, or other unit can be a good source of information about how that organization self-identifies and articulates its overarching goals. A mission statement may also provide clues about the entity's appetite for risk, with words like "innovation," "cutting-edge," "leader," and "change" suggesting a higher tolerance for risk in the service of goal attainment. Where an institution already has a formal risk management practice in place, there is likely to be existing documentation where many of these elements are made explicit.

Moving from the institution level to understanding the environment of a department, research group, or project, sector and discipline-specific best practice documents can help flesh out the context in which a copyright issue is being raised by outlining the major issues users in that area face, what is considered accepted practice, and providing a general sense of the spectrum of risk-tolerance or appetite in that context.<sup>21</sup> Finally, any communication that the librarian or copyright advisor engages in with the user, from a reference interview to casual conversation, can help draw out useful contextual information about the entity's culture and attitude toward risk.

## 2. Objective Setting

In order to understand the potential impact of both positive and negative events on the organization, it is necessary to first identify the entity's main goals, both strategic and operational. Many entities will have a strategic plan or objective documents, at the institutional level and within academic or administrative units, which will detail both the strategic goals and, in many cases, the concrete metrics by which the entities measure whether said goals are reached. At the research group or individual level, research plans or grant proposals can provide a good indication of the desired objectives.

It is easy to focus on the intricacies of the copyright issues; however, bearing in mind the user's wider objectives throughout the process of grappling with the copyright issues will help both the user and the librarian to understand what level of risk is necessary or appropriate in the service of achieving those objectives, be they learning or teaching objectives, the answering of research question, or communication and outreach goals. A coherent cost-benefit analysis of taking a copyright risk is possible only with a nuanced understanding of how taking the risk helps the user meet an objective or how not taking that risk would interfere with the user's ability to achieve said objective. In addition, understanding the user's objective can also be essential for the purposes of making a fair use or fair dealing determination, as educational and non-profit uses are more likely to sway an activity toward falling under this exception than use for commercial or purely decorative purposes.

Thus, articulating the entity's objectives may also help both the user and the librarian or advisor to understand where and how the activity that is the subject of the copyright concern fits in with its goals and, as such, how risk can best be managed while adhering to those objectives.

## 3. Event Identification

Internal and external events with the potential to affect the ability of the entity to achieve its objectives must be identified, distinguishing between risks and opportunities. Risks and opportunities are considered in relation to their potential to have a negative or positive impact on the organization's ability to achieve these objectives.

In order to properly identify potential risks, an ERM framework will provide a set of categories of risk that could affect the organization's ability to undertake regular operations and to carry out operational and strategic goals. A typical set of categories might include external (which may include risks from other actors, such as competitors and suppliers or environmental risks, such as natural disasters); financial (changes in financial markets, credit or currency fluctuations); operational (having to do with continuity in the day-to-day operations, including business and administrative, physical plant/estates, etc.); strategic (relating to the entity's business strategy, governance, and external relations); regulatory/legal (compliance with applicable laws and regulations); informational (risks associated with intellectual property and IT).<sup>22</sup> In a higher education context, these categories of risk may differ slightly to account for the unique context and the nature of the educational and research environment. In addition to the above, risk categories in higher education may include those related to student/faculty/staff experience, including morale, injury, or illness, and risks relating to continuity in teaching and research activities.<sup>23</sup> There is a distinct lack of consensus in higher education ERM frameworks as to whether reputation constitutes a distinct category in or whether risk to the institution's reputation is implied in the each of the foregoing categories, but in any case, there is a recognition that risk to reputation can have a major impact on the operational and strategic continuity of a university.<sup>24</sup>

As discussed above, in a copyright context, risk has traditionally been conceived of purely legal risk, perhaps stretching to attendant financial risk. This prompts educational organizations to ask: "What is the risk that we will commit copyright infringement by virtue of this act, have legal action brought against us by the copyright holder, and consequently be held financially liable?" However, approaching risk identification from an ERM perspective provides a space to factor other types of risk into a copyright risk management approach. For example, in the case of the music research website in scenario 2 one risk is that one or more of the copyright holders of the works will either ask or compel the researchers to remove one of the performances from the website. Negative consequences of this could include an interruption of the research process and the resultant inability to collect robust data for analysis, thus jeopardizing the integrity of the research results. If the website has been listed among the expected outputs in the grant proposal, this may also affect the princi-

pal investigator's ability to write a satisfactory end of grant report which could subsequently have a negative effect on the research group's ability to get funding in the future. Conversely, the opposite action, i.e., not taking the risk of posting the material online, will also have a negative effect on the group's ability to achieve its research objectives.

Recently, projects examining risk in the context of large-scale digitization by libraries have also begun to recognize reputational risk as a factor in the making copyright decisions.<sup>25</sup> For example, reputation was a major concern in the risk-assessment process of the Wellcome Library's Code-breakers project, which digitized roughly 1.6 million pages of books and archival material relating to the history of genetics, much of it still in copyright.<sup>26</sup> Project partners feared that if copyright clearance procedures were seen to be less than robust by donors or members of governing boards, this would damage their institutional reputation.<sup>27</sup> However, the Wellcome also has a well-established reputation for advocating open access, which was further affirmed by the successful completion of this project.<sup>28</sup>

#### **4. Risk Assessment**

Once risks are identified, they should be analyzed along in order to evaluate (1) the likelihood that they will occur and (2) the impact they will have on the entity if they were to occur. In this way, the entity can begin to determine whether the potential benefits or opportunities that arise from taking the risk outweigh the possible costs that those risks entail.

In order to assist with this assessment, organizations will often develop a scale with descriptive and sometimes quantitative definitions to help illustrate what each level of likelihood and each echelon of severity of risk means within that organization's context. In developing the scale, several factors might be taken into account. For example, the risk of being compelled to remove materials from a website is likely to be higher when dealing with the works of an identified rightsholder with a history of actively defending their copyright through litigation or otherwise. Potentially litigious rightsholders may be identified through press coverage or a search of legal databases. The music research group in scenario 1 may already be aware of which record labels have a reputation for crawling the web for their content and issuing takedown notices and which are more amenable to innovative non-commercial uses of their work and can build this information into their risk assessment.

Knowledge sharing with peers can also provide useful information about whether certain types of activities have resulted in negative consequences in the past, which can help users to gauge the risk of undertaking such behavior in the future. This was the recommendation of a 2013 study of library copyright policy and practice around electronic reserves.<sup>29</sup> The experience of the libraries surveyed as part of the study indicated that publishers did not seem to be targeting e-reserves for legal action, but that since these experiences were not being shared among institutions, libraries had an inflated sense of the level of risk they faced. The art gallery in scenario 3 may be able to gain a greater sense of the likelihood of rightsholders asserting objections to their works being reproduced on social media by reaching out to peers with similar collections and initiatives to learn about their experiences.

## 5. Risk Response

Following the assessment of the identified risks, the entity should decide how it will respond to each of the identified risks, by selecting one of four courses of action: avoiding, accepting, reducing/mitigating, or transferring/sharing risk. Ideally, this choice will align with the entity's risk tolerances and risk appetite.

### *Avoidance*

In the event that the risk is deemed too high or the perceived cost outweighs the perceived benefit, librarians may suggest ways for the user to avoid the risk completely either by refraining from the risky activity entirely or perhaps by pursuing an alternative. For example, if the art gallery in scenario 3 determines that posting on social media images of works with unclear copyright status is too big of a risk to take, they may elect to post similar Creative Commons licensed or public domain images instead, with promotional text indicating that there are analogous works in the collection that can be used for teaching purposes.

### *Mitigation/reduction*

Reducing risk to a level that is acceptable to the user or institution may be achieved in a variety of ways. Risk mitigation can be achieved by reducing either the likelihood that a negative event will take place and/or by reducing the impact such an event will have if it does occur.

A common risk reduction strategy in the area of copyright is seeking permissions from rightsholders. Even in cases in which the rightsholders cannot be located or are unresponsive, documenting steps taken in this regard can be helpful in demonstrating the user's diligence and desire to respect the rights of the copyright holders. This can help diffuse conflicts in and reduce the risk of litigation.<sup>30</sup>

There are several additional risk mitigation strategies available to the users the scenarios discussed in this chapter. In scenario 1, in keeping with best practices for sound recordings and in order to help tip the balance toward fair use/fair dealing, several measures can be taken that should not have a significant adverse effect on the group's research goals.<sup>31</sup> Among these steps, access to the music clips on the website may be limited to streaming only; a click-through terms-of-use screen could be added requiring users to agree that they will not attempt to copy or redistribute the clips and that access is being made available for research purposes only before accessing the site.

### *Sharing or transferring risk*

In some cases, it may be possible to transfer all or some of a specified risk to another entity. Within industry ERM frameworks, this is often accomplished through insurance for some types of financial, incident, or natural disaster-related risk. For copyright risks, this may take the form of indemnification by another party. For example, since the history department in scenario 2 wishes to make part of its archive widely available, if it is deemed to be of sufficient interest, it may look into partnering with a content vendor or cultural memory institution, which, as part of their agreement, may agree to compensate them for any cost or losses incurred in the event that the rightsholders decide to take legal action for copyright infringement.

### *Accepting*

Users may decide that a risk is sufficiently low, either inherently or due to the implementation of a risk reduction measure, that they are willing to actively accept it as part of their organizational strategy because the potential benefits that may be gained by engaging in the risk activity are such that they outweigh the possible negative consequences that may ensue. As part of an ERM framework, many organizations employ a rubric for determining the appropriate response to different levels of assessed

risk, depending on the likelihood that the risk event will materialize and the impact that it will have on the organization in the event that it does, such as the example below:<sup>32</sup>

Likelihood	Impact	Response
High	High	Avoid
Low	High	Reduce/Mitigate
High	Low	Transfer/Share
Low	Low	Accept

## 6. Control activities

Once risk responses are selected, policies and procedures are designed, formalized, and put into practice so that the measures to manage identified risk are adopted efficiently and methodically. This may take the form of a project plan and workflows for each measure. For example, should the history department in scenario 2 decide to make attempts to locate and ask for permissions from the rightsholders of their archive, such efforts should be planned out and then documented in a coherent and systematic fashion.

## 7. Information and communication

Once the strategies for dealing with risk are established, the processes needed to carry these out should be communicated throughout the entity. In a copyright context, this might mean making sure workflows, project plans, and other documentation are made available to any affected stakeholder. This can include both those involved in carrying out the project as well as the public and/or rightsholders. For example, if the history department elects to make its archive available on a public-facing website, communication may include a section of the website which details attempts to locate copyright holders and invites anyone with information regarding possible rightsholders to come forward.

## 8. Monitoring

Once risk control activities are put into place and communicated to stakeholders, the risks should be monitored on a regular basis and modifications made as necessary if the risk shifts due to internal circumstances or changes in the legislative policies or laws.

## Conclusions: ERM for Copyright Librarianship

Application of the entire ERM framework to copyright queries may not be practical or even possible in every setting. Time constraints often make it difficult to pursue any investigation outside the immediate scope of the query. Information about organizational culture, goals, and objectives and appetite for risk is not always available or easy to find. Users may be reticent or unwilling or unable to invest the time and effort required to provide much of this contextual information. In addition, smaller projects or relatively straightforward queries may not merit a full ERM-style analysis.

However, regardless of the scope of the ERM analysis, application of elements of the ERM framework for risk analysis and management can enable both librarians and their users to have a better sense of their institutions' priorities and appetite and tolerance for risk. This, in turn, can facilitate a more balanced and nuanced cost-benefit analysis when grappling with copyright issues and will allow users and librarians to make a more effective case for recommendations in this area to their administration.

Another insight of ERM that can be brought to bear on the copyright decisions librarians make and the advice we give is the inseparability of risk and opportunity. ERM asks us to consider not only what the risks are in taking a given set of actions but also the risk of *not* acting. What opportunities are lost when we adopt an entirely risk-averse approach? Considering copyright queries through the lens of an ERM framework brings to the fore that taking some degree of risk is inescapable and often necessary to obtain our objectives.

## Endnotes

1. As one librarian put it, "For non-copyright queries, the answer is yes or no or a series of instructions. For copyright queries, the actual answer is maybe, maybe—and that is why it is different—you can't give them the answer they want." Chris Morrison and Jane Secker, "Understanding Librarians' Experiences of Copyright: Findings from a Phenomenographic Study of UK Information Professionals," *Library Management* 38, no. 6/7 (July 24, 2017): 30, <https://doi.org/10.1108/LM-01-2017-0011>.

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26. Stobo, Deazley, and Anderson, "Copyright & Risk."
27. *Ibid.*, 43.
28. The Codebreakers project was successful in making a relatively high proportion of the desired material (most of which was in-copyright) available on the Codebreakers website using a combination of rights clearance and risk-assessment where permissions were not obtained. Regarding library material (published books), the Wellcome Library was able to make available 1357 of the 2025 works originally selected for inclusion. Of these, 48 percent were made available outright, with 19 percent put online using a risk-managed approach (e.g., released in phases according to date of publication without a download option). For archival material, rightsholders were identified and contacted for 84 percent of the material and 134 letters were sent seeking permission. Of these, 103 rightsholders responded, with all but two granting permissions. For those remaining works where rightsholders could not be identified or located or did not respond, a risk assessment was performed weighing such factors as whether the creators had intended for the material to be widely disseminated (e.g., AIDS awareness posters), whether the content was created for commercial purposes and the relationship of the creator to the donor archive. Low-risk materials were then placed online, with or without delay, and high-risk materials set aside. The high success rate in gaining permissions for this project may issue in part from the subject matter, as scientists and academics working in the field of genetics "may be more positively disposed towards the aim of open access to research than, for example, commercial authors." Stobo, Deazley, and Anderson, "Copyright & Risk," 20. In Stobo et al.'s report, the risk assessment process is characterized as finding a balance between preserving the trusted reputation of the Wellcome Library and upholding its commitment to open access.
29. David R. Hansen, William M. Cross, and Phillip M. Edwards, "Copyright Policy and Practice in Electronic Reserves among ARL Libraries," *College & Research Libraries* 74, no. 1 (2013): 69–84.
30. Hansen outlines four legal strategies to reduce the likelihood of a dispute under these circumstances: (1) using quitclaim grants to obtain partial permissions from authors and others; (2) obtaining broader voluntary permissions from larger rightsholders or collective organizations; (3) using class action lawsuits to clear rights in large numbers of works; and (4) challenging standing of potential litigants. David Hansen,

- “Digitizing Orphan Works: Legal Strategies to Reduce Risks for Open Access to Copyrighted Orphan Works,” 2016, <https://dash.harvard.edu/handle/1/27840430>.
31. “Fair Use and Sound Recordings: Lessons from Community Practice,” Center for Media and Social Impact, accessed December 9, 2017, <http://cmsimpact.org/code/fair-use-sound-recordings/>.
  32. Adapted from Marchetti, *Enterprise Risk Management Best Practices*, 42.

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# Social Media and the Ethics of Scholarship: A Call for the Assessment and Communication of Rights Information, Provenance, and Context

*Rina Elster Pantalony*

Social media plays not only societal and social roles as a platform for the exchange of ideas but a scholarly role, too. As scholars communicate in the online environment using social media platforms, their communications practices emulate the standards set by social norms captured in these communications. The difficulties become apparent when scholars try to discern context, source, attribution, provenance, and rights associated with subsequent use of information and materials. In this era of fake news, we are often unable to discern, with a degree of probability, the reliability of out-of-context materials or materials that have been separated from source and attribution information. Is the story being reported true and does it come from a reliable source? Is the story based on facts and, if so, what facts?

Scholarly communications in the online environment can suffer from the same malaise when separated from source, provenance, and attribution information. The digital age often leaves the academic community with a

number of questions, such as: Where does material come from? Who created the material? Is it a primary source that can be validated? What can I do with the material and in what context may I use it? Has a library made curatorial decisions about the collection to provide me with a measure of comfort? Can I share the materials lawfully to meet my academic objectives and disseminate knowledge? Can the library provide me with the tools and capacity to answer my questions and judge material accurately?

These are some of the seminal questions that define what constitutes information literacy. Indeed, as defined by the Association of College and Research Libraries in their *Framework for Information Literacy for Higher Education*, information literacies capture the discovery of information, the understanding of how one creates, values, and uses information while creating new knowledge and participating ethically in the scholarly community.<sup>1</sup>

This chapter examines the role that libraries can play to promote information literacies for both the scholarly community and, where materials are made available in the public online environment, to the public at large. Libraries do not simply have a role to play by promoting information literacies. Rather, libraries have, within the context of the ethics of scholarship, an ethical obligation to do so. Libraries assist scholars by providing the information that determines the reproducibility, authenticity, and reliability of materials. In addition, when libraries provide greater access to materials in the online environment, they hold a similar ethical obligation to provide information to inform the scholarly community about the rights provenance of the materials at issue. Information literacy depends on such ethical standards being met.

This chapter documents two exercises undertaken by Columbia University Libraries in an ever-growing environment of skepticism about the integrity and authenticity of information found on the internet and, in particular, on social media sites. Within this context, Columbia University Libraries undertook both a purposeful examination of the creation and development of a rights metadata system associated with distinct collections at Columbia University Libraries and a review of scholarly and strategic priorities. Copyright literacy is defined as having and using the knowledge, understanding, and practice skills that enable the ethical creation and use of copyright-protected materials.<sup>2</sup> As part of Columbia

University Libraries' review, copyright and, in particular, copyright literacy was assessed and prioritized as a facet of the ethics of scholarship.

## The Context: The Ethics of Scholarship and Strategic Directions

Even before Columbia University Libraries commenced its strategic review, known as Strategic Directions,<sup>3</sup> there was already a growing awareness that the online environment was placing considerable strain on the ethics of scholarship. In 2015, the Libraries at Columbia University advocated publicly about the importance of source and attribution information in the form of rights metadata associated with content being posted in the online environment. The notion of adding rights metadata to materials being posted in the online environment was premised on and in support of good scholarly best practices, regardless of medium.

Columbia's position, articulated in a letter by University Librarian and Vice-Provost Ann Thornton and addressed, to Maria Pallante, Register of Copyrights, US Copyright Office on July 23, 2015,<sup>4</sup> responded to a notice of inquiry issued by the US Copyright Office on the protection for visual works. The letter provided that Columbia University Libraries supported systemic rights identification protocols so that rights metadata, if well-structured, could provide key fields of information, such as author attribution and source identification, to facilitate educational and scholarly access to materials. Rights protocols were supported in the letter on the understanding that the objective of any such system was to provide information about the copyright status and origins of the work, without limiting education and scholarly access.

Furthermore, in the letter,<sup>5</sup> Columbia University Libraries acknowledged the existent practice of many individuals, institutions, or entities (including library professionals and scholars) to reproduce and distribute visual works in the online environment without including rights information, source attribution, or even author information. This practice, the letter concluded, only added to the ongoing complexity of orphan works, creating frustration on the part of those attempting to reproduce or distribute these materials for scholarly purposes. In addition, it was argued, this

practice diluted the scholarly endeavor. That is, the scholarly and historic value of the materials were diminished because they could not be cited with any degree of certainty nor could they be identified as materials created by a particular author or artist.

The letter concluded by stating that as stewards of important collections, Columbia University Libraries has a responsibility to researchers, scholars, and the general public to communicate collections lawfully and in a manner consistent with academic standards.<sup>6</sup> Any practice of stripping out existing metadata, including author attribution or source information would require us to re-assess the legal risks when we considered releasing copies of these works into the online environment. Such re-assessments of risk can have the effect of inhibiting our capacity to fulfill our mandate to facilitate access to scholarly material.

In 2016, Columbia University Libraries embarked upon strategic directions<sup>7</sup> that required an analysis of the potential role that the ethics of scholarship could play in leveraging the wealth of knowledge communicated by the Libraries at Columbia University to students and scholars.<sup>8</sup> As a first step, a working group tasked with assessing the ethics of scholarship attempted to define the notion of “ethics” in this context. By examining more closely some of Columbia University’s codes of ethics,<sup>9</sup> the reoccurring theme was that of honesty and truthfulness. On this basis, we framed the ethics of scholarship by concluding that we meant both the integrity of scholarship and the contextualization of it.

Three of Columbia University Libraries’ newly articulated strategic directions implicate the ethics of scholarship, as defined.<sup>10</sup> With respect to the first, known as “catalyzing discovery,” Columbia University Libraries is expected to cultivate a campus research environment that generates expertise, accelerates the production of new knowledge, and amplifies research outcomes. With respect to the second, known as “inspiring inquiry,” library professionals are also expected to engage with students and, by extension, with faculty to discover, explore, and participate meaningfully in our global and diverse society. Faculty and library professionals provide students with direction, guidance, toolsets, and the requisite knowledge that inspires their inquiry. Therefore, faculty and, in particular, library professional staff require the underlying expertise that subsequently transfers to students embarking on their scholarly journey.

In addition, if we are successful in engaging faculty by facilitating their ability to address their students' needs in this regard, we will, in fact, be successful in reaching our students in their scholarly pursuits at Columbia University. Finally, we are expected to continue to play a role of leadership, in keeping with the third strategic direction, known as "shaping discourse," by forging ambitious agenda and pursuing strategic innovations to accelerate library performance in partnership with collaborators nationally and internationally.

If the overall goal or objective in this instance is to provide scholars with the opportunity to discover deeply and participate meaningfully, then access to knowledge with an understanding of its provenance, source, and context is particularly important within the context of current contemporary culture that includes social media.

In dealing with materials in the online environment, we realized that scholars must ask themselves the following series of questions, including: Where does material come from? Who created the material? Is the material accurate? Is it a primary source that can be validated? Who has determined that the material has valid and reliable provenance? Have the Libraries made such curatorial determinations to provide me with a measure of comfort? Can I share it lawfully to meet my academic objectives and disseminate knowledge? Who can help me answer these questions? Are my questions anticipated and do the Libraries provide answers to them in their own online resources? Can they, in fact, do so? Can they provide me with the tools and capacity to answer my questions and judge material accurately?

These typify seminal questions when defining the role of the Libraries in creating the opportunity and environment for students, scholars, and faculty to engage in deep discovery, broad exploration, and meaningful, scholarly community participation.

## Information Literacies

If the Libraries at Columbia University were called upon to build capacity within our scholars to learn, explore, and discover to meet strategic directions, it became apparent that library professionals more generally would

require specific tools and activities to achieve a level of information literacy and, specifically, copyright literacy in order to achieve useful results. Our working group at the Libraries identified three distinct strategies necessary to achieve a competent level of literacy associated with rights.

The first distinct strategy was to identify and communicate the correlation between descriptive metadata, rights metadata, and the ethics of scholarship as we had defined it. Descriptive metadata plays the role of providing both integrity and provenance information and allows both students and faculty to engage with others in their respective disciplines with conviction and confidence in the overall value of their scholarship. Rights metadata, short for copyright metadata, is the second half of the integrity and contextual puzzle. It not only supports the integrity of the materials by confirming authorship and ownership of the material. It also provides the scholar with an understanding of how the materials may be used and reused. It speaks directly to access and allows scholars to create research foundations from which they can with confidence build upon existing scholarship while understanding the degree of risk assumed in doing so. In addition, outward-facing rights metadata informs the scholarly community at large about the degree to which materials may be used and re-used. The objective is, in part, to minimize the number of orphaned works in the publicly accessible environment with an agreed-upon standard of communicating rights information. The objective is to also minimize the friction of unknown copyright status when trying to use or communicate materials online. As an academic library, we have an obligation to provide access to digital materials in a way that increases the understanding of the context, integrity, and provenance. We should not be contributing to an online environment that decreases our collective capacity to rely upon the information as being truthful, as having integrity, or as being represented in an accurate context. Rightsstatements.org, a project of the Digital Public Library of America and Europeana, has made considerable progress in developing standardized outward-facing copyright metadata to provide users with a degree of understanding about the ability to reproduce and distribute content. Columbia University Libraries has taken significant steps to incorporate these outward-facing copyright metadata standards into its own copyright management system, now in development.<sup>11</sup>

Second, as a strategy, libraries should be engaging in ongoing professional development education in copyright as a means of supporting and promoting copyright literacy to our faculty and our students about the extent to which they can use materials, citation, and data management. To this end, consistent and advanced copyright education has become an urgent requirement. As determined by a 2017–2018 Copyright Education Study, conducted by Copyright Advisory Services at Columbia University Libraries and funded by LYRASIS,<sup>12</sup> over the course of the past ten years, there has been a redirection and, arguably, a decrease in the availability of sophisticated and advanced copyright education opportunities for our own sector. Organizations whose missions are antithetical to our own are now active within this education space, and it is imperative that we recapture it and claim it as our own.<sup>13</sup> Copyright law should be perceived and practiced in a way that affords our community with opportunities to share knowledge reasonably online.

The third strategy requires us to play an advocacy role within a larger national and global context for a robust use and re-use environment in which discovery, exploration, and learning take place. The objective is to promote recognized copyright practices that ensure equitable and lawful access to materials and opportunities to share knowledge using new communications technologies and online tools and platforms. For better or for worse, copyright reform has been on the agenda of the House Judiciary Committee for some time.<sup>14</sup> On the international front, the Standing Committee on Copyright and Related Rights at the World Intellectual Property Organization has been debating whether to create a treaty about copyright exceptions for libraries, archives, and now museums.<sup>15</sup> All of these developments can change the impact copyright law has in achieving our university and library missions. If changes to either national or international copyright laws are being contemplated, we must ensure that these changes conform to the objective of knowledge sharing, particularly across borders, so that communications technologies can be leveraged to their greatest potential. For this reason, our voice as librarians and scholars has to be heard.

## The Evolution of Social Media: Integrity, Authenticity, and Context

While undertaking our Strategic Directions exercises at Columbia University Libraries, we concluded that standards of practice, such as robust descriptive and rights metadata, copyright education and documentation, and informed advocacy about legislative reform, were necessary elements of information literacy. At the same time, the actual behavior of scholars, library professionals, and the general public when interacting with information on social media platforms evolved differently.

Initially, library professionals considered social media as an exciting research and development opportunity. Social media, in particular Twitter, was considered a tool that provided scholars with the means to aggregate primary source information and library professionals with the opportunity to promote information literacy.<sup>16</sup> However, even at the outset, library professionals understood that while social media platforms provided a tremendous opportunity to harness primary source materials and, despite the informality when interacting on social media platforms, there was still a need to maintain scholarly standards. Library professionals supported the view that social media platforms provided an important source of accounts of history by those experiencing it firsthand. However, it was also the case that the literature of the day encouraged library professionals to expand their efforts to create approaches for students to discern and filter “trustworthy” materials on various social networks.<sup>17</sup> There was an expectation that library professionals needed to keep current with social media developments as a means of assisting faculty and students in various disciplines to understand, use, and migrate information and materials obtained from interacting on social media platforms. Library professionals were also required to be ready to change approaches when developments necessitated them. It was only in this context that library professionals would be successful in their teaching the ethics of scholarship and the scholarly endeavor within the social media-rich landscape.

It is likely true that no one really understood the impact that social media would have on human social interaction and the exchange of information. While, initially, it was presumed by scholars and library professionals that accepted practices associated with scholarship would be introduced

consistently in the online environment, it appears that the informality of communications and the common denominators of practice in social media spaces may have overshadowed scholarly standards. How and why did this happen? What, in fact, should libraries be advocating as good scholarly practice in this space?

Scholars had actually begun using social media platforms as a means of carrying out primary research some time ago. This fact is evidenced by my own students, both masters and doctoral candidates at New York University, who were known to seek out and aggregate survey information using social media platforms, such as on Facebook and Twitter. Apart from the obvious copyright and privacy issues that could arise in this context, the burning issue was and continues to be one of attribution, authenticity, and integrity. Can we assume that such primary source material aggregated on Facebook or on Twitter is factual, authentic, and accurate? If the value in primary research is due to its provenance as factual and unique, do our scholars have the means to assess the information that they are gathering via social media as factual, authentic, and accurate? What are the current standards of practice by scholars and library professionals in this context?

As the uptake and adoption of social media exploded as a means of communication in our culture, standards associated with the authenticity, integrity, and attribution of information on social media sites started having an impact on library standards related to the ethics of scholarship. Literature of the day<sup>18</sup> provides that social media was perceived by the library community as providing an opportunity to teach information literacy to students using social media as a model of scholarly discourse. Traditionally, library professionals stressed policy compliance and punishment in the context of teaching copyright standards, plagiarism policies, and the need for attribution and source information. This approach was considered antithetical to the mission of higher learning. It was argued<sup>19</sup> that this created a false dichotomy that did not resonate with students and, thus, it was important for library professionals as teachers of scholarly endeavor to meet students on their own playing field so that they could digest scholarly standards with a degree of empathy and understanding. Students were presumed not to understand the need for “compliance” because their formative years had been spent in an environ-

ment where the ability to share information online through social media was accorded greater value than attribution, authenticity, and integrity of the information itself. It was advocated further that in order to resonate with students, library professionals should, instead, stress to students that their work contributes to the “scholarly discourse” as a whole so that they should have an interest in being attributed and accorded attribution and citation as not just users but as authors of scholarly materials.<sup>20</sup>

While this approach may, in fact, still hold some value, it is the subsequent presumptions that prove problematic. It was argued that since students are using social media as sources of information and communication, library professionals should respond in kind and use social media as frameworks for teaching and learning the ethics of scholarship. For example, Twitter’s interface, it was argued, can be a useful tool for demonstrating how discourse unfolds and how individual content creators can participate within the context of this discourse. An analogy was suggested between traditional academic discourse and Twitter discourse because they share a number of conventions. They describe how citations and references in both Twitter and academic discourses trace and footnote and reference prior materials both forward and backward in time through the use of date stamps, @replies, and mentions, and credit, provide citation, and quote prior materials through re-tweets and hat tips and vials.

“Twitter, therefore, is a suitable analog for discussing attribution and the scholarly machine, but its more familiar social conventions and real-time scale make it more accessible to students than the traditional slow-moving examples of scholarly communication.”<sup>21</sup>

They conclude by stating that scholarly discourse and behaviors emulate social media behaviors and we should therefore adopt social media as the platform to engage with students to teach them about scholarly discourse.

The presumption in the analogy above is that the metadata generated by the information exchanged on social media provides the necessary verification of authenticity, integrity, and attribution. That is, as a scholar you can rely upon the metadata or technical envelope or footprint generated by the platform in the same way that you can rely upon traditional means of attribution, authenticity, and integrity in research. Is this, in fact, the

case? If it is not, should we, as a profession, promote an emulation of social media informality in scholarly practice? And by emulating behaviors in the social media environment, are we, in fact, promoting behaviors antithetical to the ethics of scholarship?

## Learning from Research in Ethics and Substantiation in Journalism

Journalists have been the subject of much scrutiny and criticism over the past several years. Their practices, sources, the authenticity of their stories, and their ethics have been questioned more than ever before. Social media platforms, democratizing the distribution of opinion, thereby creating instantaneous media personalities and providing the means by which to promote news stories, both real and suspect, have also caused much confusion among the public and among journalists about how to determine authenticity, integrity, and source in the online environment. The mantra “fake news” has been heard overwhelmingly in the context of online sources of news information.

The Tow Center for Digital Journalism at Columbia Journalism School and, in particular, Professor Susan McGregor, has published significant research about the standards that journalists are expected to meet when aggregating source information in the online environment as the basis of a story.<sup>22</sup> In her work, Professor McGregor goes to great lengths to articulate how to track and verify time stamps, handles, and other information that make up the envelope of data associated with information—that is, the metadata. She concludes that the technical process of verification—the technical ability to confirm one’s ownership of a digital identity through encryption and other means—is an essential aspect of communication in the online space for journalists since it provides them with the ability to protect their reputation in case one or more of their digital identities, whether email, Facebook, or Twitter accounts, has been compromised.<sup>23</sup>

In addition, the Tow Center recently published a study about the public perceptions of information found in online spaces, particularly in social media. The study, published this past fall, examined audience attitudes toward distributed journalism in four US cities. Distributed journalism

refers to stories picked up by media aggregators and social media platforms.<sup>24</sup> The research was conducted as part of a greater effort to understand the need for authenticity, integrity, accuracy, and perceptions of reliability as a result of our experiences during and after the 2016 presidential election.<sup>25</sup> The overall approach carried the purpose of exploring attitudes and understandings about news and how technology platforms operate in contemporary news ecosystems.

The authors of the study found that, overall, three platforms dominated the discussion: Facebook, Twitter, and Reddit. The research concluded that most participants, regardless of region or generation, were in the dark about the way algorithms operated on social media platforms, based on their online activity, to feed them news stories based on their habits, practices, and interests. Both publishers and readers alike appeared to be frustrated by the effects of algorithms, unsure how these “filters” really operated, and uncertain about what news sources they obtained. In addition, some users were even, erroneously, convinced that they could control these algorithms. Focus group participants stated that it was up to them what they read or watched on social media sites.<sup>26</sup> The perception was that human interaction and conscious choices made on social media platforms could actually alter how the algorithm filtered news. Finally, some participants even underestimated the role that algorithms played by taking social media platform feeds at face value.

Overall, participants exhibited hostility and paranoia about how algorithms operated, suggesting that they were designed to meet the social or political objectives espoused by the technology industry or the individual companies that owned the social media platforms. In this case, users were therefore less likely to trust the integrity of news stories, believing that they were being surfaced or “fed” as part of a conspiracy. Researchers determined, therefore, that social media platforms could and should improve their transparency about how they work and about the role that algorithms play in surfacing, prioritizing, and ranking news stories to users.<sup>27</sup>

Another key finding of the study concerned the loss of the brand, similar in nature to source or author attribution. Decontextualizing content from its source was found to harm the integrity of the content. Audiences appear to still recognize publisher and source branding and, in fact,

seek it out as a measure of confirmation of the integrity of the information before them. At the same time, participants admit to having been duped into sharing “fake” news stories so that they were admittedly not as diligent as they would have liked. Stories were often shared due to reliance on a third party’s decision to share it. Confusion stems from the difference between trusting the integrity of the person sharing the story—that is, “I know that person or of that person and therefore it must be trustworthy”—and relying on the integrity derived from brand or actual source information of the story to begin with.<sup>28</sup> Participants in the study laid blame at the feet of the social media platforms rather than the people sharing the stories who had not verified the stories’ authenticity in the first instance.

The study concluded that, aside from the call for better social and corporate responsibility in the kinds of news that social media platforms support, there was an urgent need for a new type of “algorithmic literacy.” That is, there appears to be an urgent need for transparency about how algorithms work, how user data is aggregated, and then how it is used, with or without the consent of the individual whose data has been aggregated.<sup>29</sup> Users of social media, and not just specialists, need algorithmic literacy to understand, verify, authenticate, and trust the materials on social media platforms in order to engage in civic discourse.<sup>30</sup>

Social media accounts are subject to hacking and manipulation, making valid authenticity and attribution even more difficult. The number of followers of a specific Twitter account can be manipulated with bots. Similarly, the number of retweets of a Twitter posting can be increased artificially. Journalists James V. Grimaldi and Paul Overberg published a story in the *Wall Street Journal* on December 13, 2017<sup>31</sup> about the results of an investigation about posts to the public docket of the Federal Communications Commission. The investigation revealed that many posts on the public docket of the Federal Communications Commission website endorsing the repeal of net-neutrality regulations were, in fact, fake. The investigation uncovered thousands of such fraudulent comments, some using what appeared to be stolen identities posted by computers programmed to load comments onto the dockets. The Federal Communications Commission repealed net-neutrality regulations one day after this story was published.<sup>32</sup>

## Lessons Learned

What can we learn from these studies and experiences? Certainly, material posted online and on social media sites requires additional scrutiny, assessment, and verification. At a minimum, scholars and educators participating in the research enterprise need to uphold scholarly standards consistent with standards long-held and advanced,<sup>33</sup> regardless of media or communications means. Despite the opportunities that social media provide scholars and library professionals alike in conducting research or suggesting new teaching and learning opportunities about the scholarly endeavor, the traditional values of upholding the ethics of scholarship should remain constant. If scholarship is an ongoing conversation, as suggested by the Association of College and Research Libraries in their *Framework*,<sup>34</sup> consistent practices, providing attribution, authenticity, and integrity of materials will allow scholars to trace and understand the legacy and evolution of a particular scholarly discipline. Thus, never before has the need for information literacy, copyright literacy, and metadata been stronger.

Libraries should include programming to assess materials in collections for rights information and develop standardized rights metadata protocols. In order to provide our scholars with the ability to exchange information about their research seamlessly on social media platforms, scholars need to understand the degree of liberty or risk associated with the materials they engage with during their research. To the degree possible, as determined by undertaking risk assessments, we should provide outward-facing metadata on the materials we place in the online environment. If scholars are unsure about the rights status of materials they post in the online environment, they will be inhibited in their capacity to exchange scholarly views or unable to engage in scholarly interactions as robustly as social media platforms may allow.

Libraries should set academic standards by providing, to the extent possible, attribution and source information about the materials they post in the online environment, whether on their websites or posted in social media contexts. Libraries, archives, and museums have been subjected to the frustrations of working with orphaned works collections, particularly primary source materials found in archives or collections that include twentieth-century materials, such as music recordings, film, and video collections. Libraries should not, wherever possible, be adding to the mis-

ery of chasing copyright information by failing to provide attribution and source information about the materials they post online.<sup>35</sup>

If librarians continue to advocate the use of social media as a means of conducting research, we must do so with a certain degree of sophistication. Thus, librarians will also need to be well-versed in algorithmic literacy in addition to information and copyright literacy, as recommended by the Tow Center's report. Only then will scholars be provided with a better understanding about how algorithms aggregate information, research, and news stories on social media sites. This is an essential element of the ethics of scholarship and essential when teaching the scholarly endeavor. We need to arm our scholars with the ability to discern the authenticity, value, or integrity of the materials they access through social media sites.

As the Tow Center Report concluded, authenticity related to scholarship is found in the brand.<sup>36</sup> Scholars should be assisted to recognize from where they obtained their research, who published it, whether it was peer reviewed, and whether it was a respected source. This might seem obvious. However, given how algorithms decontextualize information on social media platforms, it becomes necessary to re-emphasize these skills and teach them within the context of the online environment. This is no easy task. It will require us to follow technology developments and advancements in algorithmic literacy. Finally, in addition to advocating for copyright reforms, we need to be casting a larger net. The transparency of how algorithms operate in aiding online searches will only assist us in teaching ethics of scholarship.

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# Law and Literacy in Non-Consumptive Text Mining: Guiding Researchers Through the Landscape of Computational Text Analysis

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Imagine you are working with two digital humanities scholars studying post-WWII poetry, both of whom are utilizing a single group of copyright-protected works. The first scholar has collected dozens of these poems to closely analyze artistic approach within a literary framework. The second has built a personal database of the poems to apply automated techniques and statistical methods to identify patterns in the poems' syntax. This latter methodology—in which previously unknown patterns, trends, or relationships are extracted from a collection of textual documents—is an example of “computational text analysis” (CTA),<sup>2</sup> also commonly referred to as “text mining” or “text data mining.”<sup>3</sup>

In accessing, building, and then working with these collections of texts (or “corpora” to use the jargon of the digital humanities), both scholars are exercising rights and making elections that carry legal impact. Indeed, they may not even be aware of the choices they can or must make:

- From a copyright fair use perspective, does it matter whether a scholar compiles poems to read (or “consume”) or, like the CTA scholar above, uses algorithms to mine information within them (often referred to as “non-consumptive” analysis)?
- How does an added layer of university database licensing, a publisher-provided API (application programming interface), a university archives agreement, or a website’s “terms of use” fit into a CTA researcher’s protocol for content access, collection, and analysis? When might conditions of those agreements or tools bear upon the researchers’ fair use rights?
- And what should researchers know about whether they can subsequently share the corpus they use or create or republish excerpts from it in their scholarship?

Guiding scholars in addressing these issues before they build their research corpora can help them avoid unexpected pitfalls, particularly when a CTA scholar must grapple with unique copyright scenarios. Currently, many CTA researchers programmatically access and download copyright-protected works—even when it potentially violates copyright, licenses, privacy, or computer fraud law—because it is technically feasible. Few of these researchers are malicious in intent; rather, they may lack the necessary training or support to safely navigate the obscure regulatory environment of the field.

Already, some guidance on the legal issues arising within CTA has been created for European Union researchers.<sup>4</sup> Resources offering similar assistance under a US legal framework are just beginning to emerge.<sup>5</sup> This chapter attempts to build upon such input in an effort to address CTA support from a researcher’s perspective. Here, we survey copyright and other legal terrain affecting CTA, exploring where these legal issues intersect with CTA methodologies to illuminate pain points for researchers. We then sketch a scholarly workflow that unites law and CTA practice—a roadmap meant to be both adoptable and adaptable by scholars in the field.

## Framing the Issues

### *Copyright, Fair Use, and Computational Text Analysis*

Modern researchers are often copyright savvy and understand that authors (including themselves) have protectable rights. Not all researchers, however, are familiar with what the Constitution intended copyright to *encourage*—the progress of science and useful arts.<sup>6</sup> Indeed, as the Second Circuit Court of Appeals recently observed, “While authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship.”<sup>7</sup>

In implementing the Constitution’s directives, Congress therefore built exceptions into the Copyright Act. Congress created these exceptions to achieve the aims of advancing public knowledge and understanding by limiting the scope of copyright holders’ exclusive rights. One of the strongest such limitations is the right of fair use, codified in 17 U.S.C. § 107. It provides that the fair use of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research is not an infringement.”<sup>8</sup> In Section 107, Congress offered four non-exclusive factors to consider in making a fair use determination:

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 (with use of factual works more likely to be fair under this factor than use of fictional works that come closer to the “core of creative expression”);<sup>9</sup>
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.

Evaluating whether a given use of copyrighted material is “fair” requires balancing these four factors on a case-by-case basis.<sup>10</sup>

As a practical matter, courts often tend to give particular weight to factors one and four, which are, themselves, interconnected, given that as the

character of a new use becomes more distinct from the original, the less impact the new use would have on the market for that original.<sup>11</sup> Because factors one and four have a special importance, particularly in the adjudication of research-related uses, it is important to dig a bit deeper into how they pan out:

- Factor one’s consideration of the “character” of the use prompts courts to inquire whether the new use “merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character.”<sup>12</sup> Significantly, use of a copyrighted work need not modify or augment the original to be transformative.<sup>13</sup> Rather, the use need only be productive and employ the material in a different manner or for a different purpose from the original—adding “new information, new aesthetics, new insights, and understandings.”<sup>14</sup> The more transformative the new work, the less significant countervailing aspects (like commercialism) would be under this factor.<sup>15</sup>
- Factor four requires courts to determine whether the new use of a work would “materially impair the marketability” of the original and whether the new form “would act as a market substitute” for the original.<sup>16</sup> It is significant to note that the focus is not on whether the secondary use suppresses or eliminates the market for the original or its potential derivatives but rather “whether the secondary use *usurps* the market of the original work.”<sup>17</sup> In other words, a mere adverse market effect alone is not enough for a fourth factor to weigh against an overall finding of fair use. This is critical for new scholarly works like criticism or parody because merely suppressing demand for the work being criticized does not overcome a fair use determination.<sup>18</sup>

While CTA researchers may be familiar with some of these contours of fair use, exactly how fair use relates to their specific computational methods or their plans to publish can be quite complex. CTA allows users to, among other things, “discern fluctuations of interest in a particular subject over time and space by showing increases and decreases in the frequency of reference and usage in different periods and different linguistic regions.”<sup>19</sup> Yet, to achieve a sufficient corpus for reliable and thorough analysis, scholars must often create intermediate downloads of materials from various sources *en masse*—not to read them, but to perform compu-

tations on them. Is creating a corpus or database of copyrighted materials for CTA fair use?

Several courts have considered the intersection of full text searching a corpus and fair use, each finding non-consumptive text mining to be fair.<sup>20</sup> Particularly instructive are the Court of Appeals' holdings in *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (*HathiTrust 2014*): Scanning and creating a database of digitized materials so that users could conduct full text searching within the content, rather than read that content, was both transformative and a fair use overall. In *HathiTrust 2014*, a collection of authors and authors associations sued HathiTrust,<sup>21</sup> certain of its member universities and university presidents for copyright infringement. The basis of their claims was the fact that, pursuant to a relationship with Google, HathiTrust received digital copies of nearly ten million books—the majority of which were still in-copyright. HathiTrust then made these books available for full-text searching (and, inherently, CTA) essentially within a “black box”—i.e., without the researcher being able to read or “consume” the book. For instance, HathiTrust permitted users of the HathiTrust Digital Library (HDL) to search HDL to determine where in a book (i.e., on which page numbers) and how often a search term appeared but without a user window into the text.<sup>22</sup> As the court noted, “HDL does not display text from the underlying copyrighted work (either in “snippet” form or otherwise). Consequently, the user is not able to view either the page on which the term appears or any other portion of the book.”<sup>23</sup>

The court found this arrangement to be fair use, notably because the textual analysis that HDL enabled was transformative under the first fair use factor. The court explained:

An important focus of the first factor is whether the use is “transformative.” A use is transformative if it does something more than repackage or republish the original copyrighted work. The inquiry is whether the work “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message....” [citations omitted].<sup>24</sup>

In turn, under this standard:

The creation of a full-text searchable database is a quintessentially transformative use.... [T]he result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn. Indeed, we can discern little or no resemblance between the original text and the results of the HDL full-text search.<sup>25</sup>

In fact, full-text searching was considered so transformative that the first factor outweighed any of the other three factors that might have otherwise leaned against fair use.<sup>26</sup> Still, the court observed that other factors also supported a determination of fairness: copying of books in their entirety (factor three) was necessary to enable full-text search functionality and reliability, and full-text searching was not a market substitute for purchasing and reading the original books (factor four).<sup>27</sup>

The Second Circuit Court of Appeals also ruled in *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015)<sup>28</sup> (*Google Books 2015*) that Google Books' creation of a full-text searchable database and "Ngram Viewer" (discussed below) were fair uses. In addition, allowing users to view three-line snippets of the underlying works, to provide context for where desired phrases appear, was similarly fair use. As Jockers, Sag, and Schultz had described before *HathiTrust 2014 and Google Books 2015* were decided, "Scanning words from library books to make a search index, or to compile a list of word frequencies, does not interfere with the rights of the author. These uses simply convert masses of text into metadata."<sup>29</sup> Indeed, the cases that followed affirmed both the transformativeness of this arrangement and the ability of digital libraries to leverage fair use in the creation of CTA interfaces and mechanisms.

### Implications of Case Law, and Limits of a Black Box

New tools that rely on transformativeness and fair use continue to be developed. Increasingly, there are options for users to access derived downloadable datasets representing texts (e.g., ngrams), or to use web tools to visualize trends from digital collections without exposing the underlying texts. Further, the HathiTrust Research Center (HTRC) provides secure computing environments, or "data capsules," where researchers can work with public domain texts (with plans to expand access in the future to in-

clude in-copyright works) from the HDL on a virtual computer, without allowing for the release of full-text data.<sup>30</sup>

Yet, these tools also introduce digital literacy challenges because they transform works in ways that an aspiring CTA researcher may find puzzling. For the researcher hoping to bulk download .txt or PDF files of a particular corpus, for example, it may be confusing to encounter data from *JSTOR Data for Research*<sup>31</sup> or the *HTRC Extracted Features Dataset*,<sup>32</sup> where the words from articles and books are not available in their original order, but rather as word-counts, ngrams, tokens, or features. Learning more about both the copyright restrictions governing access to the original documents and the fair use considerations that have enabled these new forms of access can help users determine whether these pre-compiled corpora suit their research purposes.

For some research projects, however, word-counts, ngrams, or tokens may be insufficient. One major disadvantage for researchers who download Google Books Ngrams,<sup>33</sup> for example, is that they will be unable to clearly define or articulate the boundaries of their corpus<sup>34</sup>—that is, to identify which books are and are not included or to ask questions of specific volumes.<sup>35</sup> Further, there are a variety of CTA methods that require words to be available in their original order, and that would, therefore, be inappropriate to attempt using derived downloadable datasets or other “bag of words” models.<sup>36</sup> At the simplest level, for example, one might wish to track the occurrence of an exact eight-word phrase in a corpus, a technique that would be impossible if one is unable to access any more than three words in a row (trigrams) from copyrighted texts. Since derivative datasets introduce design artifacts that can be difficult to fully understand or explain, many researchers prefer a corpus that closely resembles the original, readable collection of texts.

Even if the scope of the pre-made corpus is clearly defined, the inclusion of disparate formats of text can be another artifact compromising the coherence of a corpus. As Kichuk observes, “Although digital repositories continually refer to their text collections, such as [Internet Archive’s] Text Archive, as ‘book collections,’ many of their digitized e-books are not books at all. Many are fragments, pamphlets, even journal articles or book chapters.”<sup>37</sup> Reliance on a pre-assembled corpus can also introduce methodological concerns regarding the institutional, cultural, and corpo-

rate biases that have shaped the corpus: Why were these texts preserved and digitized while others were not? The serious CTA researcher may find both predefined corpora and derivative datasets insufficient for research questions that require a clear outline of methods and a detailed understanding of the underlying corpus.

Certainly, there are other corpora that are open for viewing, are relatively easy to assemble, and allow the desired context. Archives from many public memory institutions, such as the Library of Congress's *Chronicling America* project,<sup>38</sup> provide complete access to full text from their collections. A researcher using optical character recognition (OCR) bulk data downloads from the early American newspapers on the *Chronicling America* website, for example, can avoid questions about where to access specific newspapers (she will simply use the ones collected by the Library of Congress) and how to legally access them (she will assume the research arm of the US Congress does not offer illegal downloads). Inherently, though, this approach is likely to limit one's sources to older texts that are already in the public domain since these are sometimes the only texts that those institutions are able to legally provide.

### **Beyond the Black Box: Fair Use When Building a Corpus from Scratch**

As a result of the limitations and artifacts of pre-made corpora, often CTA researchers—like our own scholar of post-WWII poetry—will need to create their own dataset. In doing so, they intrinsically have access to the underlying contents and could read or consume the text if they wanted to. How does building a corpus of copyrighted works from scratch comport with fair use? Would our researcher's use be equally fair if she has access to “consume” the corpus but does not intend to?<sup>39</sup>

Some scholars suggest (as we also do here) that researchers ought to consider the use they are actually making. As more than 100 digital humanities and legal scholars explained in their *amici curiae* brief to the *HathiTrust 2014* court, “Copying to enable purely non-expressive [or non-consumptive] uses, such as the automated extraction of data, does not infringe the statutory rights of the copyright holder.”<sup>40</sup> Further, they argued that “if a human's *reading* of copyrighted expression to extract non-expressive material is fair use, the result should be the same when a computer

performs the extraction.”<sup>41</sup> Case law supports this construction. Of particular interest is *A.V. ex rel Vanderhye v. iParadigms*, 562 F.3d 630 (4th Cir. 2009) (“iParadigms 2009”), in which defendants made a commercial use of copyrighted works (student papers) to create plagiarism detection software. In affirming summary judgment on defendant software creator’s fair use defense, the court held that use of copyrighted works for plagiarism detection had an entirely different function and purpose (i.e., to prevent plagiarism by comparative use) than the expressive content in the original works and was both transformative under factor one and a fair use overall.

Under the *HathiTrust 2014*, *Google Books 2015*, and *iParadigms 2009*, along with other cases that have considered intermediate copying or the creation of searchable databases,<sup>42</sup> building a corpus of poetry used to compute elements of syntax should be found to be equally transformative, even if access to consume is available.<sup>43</sup> Indeed, some cases, like *White v. West Publishing Corp.*, 29 F. Supp. 3d 396 (S.D.N.Y. 2014), have even held that preparing a text-searchable, issue coded, and metadata-rich database with copyrighted materials where full access to consume was expressly provided is a transformative use. In *White v. West*, WestLaw and Lexis had included two copyrighted briefs into their text-searchable legal database. Relying on *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994), the district court held that “West and Lexis’s processes of reviewing, selecting, converting, coding, linking, and identifying the documents ‘add...something new, with a further purpose or different character’ than the original briefs”<sup>44</sup> and were also a fair use overall even where the database had a commercial purpose.

But will all transformative changes to texts in the creation of corpora for CTA be a fair use overall? Transformativeness under factor one will always still need to be balanced with the three other fair use factors with the understanding that “the more transformative the new work, the less will be the significance of other factors...that may weigh against a finding of fair use.”<sup>45</sup>

Moreover, a researcher should understand that while it may be fair use to create and utilize the database for personal research, subsequently *publishing* that database and its substantive contents for others to use (and potentially “consume”) may exceed those bounds. Suddenly, one may move from the realm of transformative use (assembly for computational analysis) to pure duplication of copyright-protected texts as the

Second Circuit recently concluded in *Fox News Network, LLC v. TVEyes, Inc.*, 2018 U.S. App. LEXIS 4786 (2nd Cir. Feb. 27, 2018). TVEyes, a media aggregator, records commercial news and radio audiovisual content, imports it into a database, and permits its clients to (among other things) search for, view, download, and share that content in ten-minute clips. Search functionality is made possible because TVEyes copies the closed-captioned text of the content it imports, allowing its clients to search by keyword, date, and time. Fox News Network sued for copyright infringement and, on appeal, the Second Circuit found that enabled features like redistribution exceeded fair use. While keyword-enabled searching would be both transformative and a fair use overall, permitting redistribution was not because it made “available to TVEyes’s clients virtually all of Fox’s copyrighted content that the clients wish[ed] to see and hear, and because it deprive[d] Fox of revenue.”<sup>46</sup>

CTA researchers should thus separately undertake a fair use analysis if they intend to publish excerpts or whole content from the corpora they assemble. If a scholar aims to publish a couple of 500-word annotated excerpts from book-length works so that other scholars may test her algorithm, this may indeed be fair use. Yet, republishing multiple coded chapters for others to work with may not. There is no magic formula here; a researcher’s careful consideration of intended uses is key.

## ***Contract Law***

Assuming that our CTA researcher has made a fair use of the poems in her creation of a database and is not republishing the database content, has she satisfied law and policy due diligence within the research process?

Indeed, understanding fair use is only one aspect of a scholar’s necessary CTA literacies, as contract law can determine what a CTA researcher can do within legal bounds. To illustrate this, suppose our scholar is compiling her digital database of poems from several sources:

- She will download the bulk of the poems from *ProQuest’s Literature Online*, a database to which her institution subscribes.
- She will “web scrape” book reviews about the poetry from relevant date ranges within the *New York Times* online.

- For those poems from obscure sources held in print by local archives, she will scan the originals and run optical character recognition (OCR) on them.

She may be surprised to learn that different contracts and agreements govern her access to these materials and what uses she can make of them. A critical early question when attempting to compile a corpus, therefore, is to consider the means by which one has access: is it an institution or library-licensed resource that she is accessing through campus proxies, publicly available on a website, or available via an individual subscription or arrangement with the provider or archives?

### Database License Agreements

Information access is sometimes so seamless that researchers do not realize when they are gaining access to licensed content through library subscriptions.<sup>47</sup> Library subscriptions to licensed content bind authorized users to their terms, even if a researcher was not a party to the library's agreement. To be sure, academic publishers are inclined to enforce these terms: the content is a major commodity for vendors, who charge academic libraries steep (and ever-increasing) sums in exchange for granting access via a license agreement.

Given the potential market value of tightly controlling that content, not all publishers or vendors permit data mining in their license agreements. Standard prohibitory language might be included in a clause labeled "Data Mining" or buried in a paragraph that effectively precludes "downloading all or parts of the content in a systematic or regular manner so as to create a collection of materials."<sup>48</sup> These limitations are possible because, even if building a corpus for research is a fair use, contract law can limit what would otherwise be permitted under federal copyright law.<sup>49</sup>

Academic institutions are beginning to push harder on publishers to permit CTA uses of the licensed materials and may refuse to sign license agreements that, via contract, are end runs around fair use. Successful advocacy may result in text mining clauses that expressly permit bulk downloading, sometimes for "personal research use only," and are often still prohibitive of republishing. As CTA advances, libraries have increasing opportunities (if not obligations) to leverage their role in facilitating

text mining, including by developing better professional advocacy materials to assist other libraries and research institutions.<sup>50</sup>

A significant challenge for researchers in all of this is: How can a researcher discover what her institution's license agreement does or does not permit vis-à-vis text mining? The transparency of such information varies widely across institutions. Library websites and online guides typically offer generalized support regarding CTA but often do not drill down to individual database license terms. The University of British Columbia Library's "License Information" database, however, provides one compelling model for helping users navigate these licenses: the portal allows researchers to search by journal and journal package title and displays information about what CTA (and other) uses are permitted under the university's license agreement covering that resource.<sup>51</sup>

Yet, maintenance of such a database and public-facing portal about license agreements terms requires personnel and resources that not all university libraries are able to provide. Some libraries have instead organized personnel to triage incoming researcher requests. For instance, UC Berkeley's library has a text and data mining e-mail list through which incoming requests reach the library consultants who can advise on various aspects of CTA—including database licensing terms.<sup>52</sup>

In each of these "solutions," there remains a need for literacy education: CTA researchers would need to understand the landscape of library-licensed databases before they knew to ask librarians if their intended use is permitted. Without sufficient outreach on this initial point, it is more likely that systematic or programmatic downloading activity, potentially in violation of library license agreements, will occur. When these violations take place from an IP address for a library proxy, a vendor may block access for all off-campus users by terminating IP access to troubleshoot a potential breach.

### Website Terms of Service

For the poetry reviews our hypothetical researcher is downloading from the *New York Times*, she will not find options to bulk download them from <https://nytimes.com>. So, she has begun to explore web scraping tools and methods, which have considerable advantages for compiling a text corpus.

Web scraping can automate repetitive tasks such as downloading thousands of PDFs or extracting text from millions of HTML pages via software or code.<sup>53</sup> Unfortunately, scraping articles from <https://nytimes.com> runs counter to their “terms of service,” which appear through a hyperlink in light gray text at the bottom of the *New York Times* website.<sup>54</sup>

Would a court find that our researcher has agreed to be bound by those terms? Some jurisdictions recognize that website “terms of service” or “terms of use” can constitute a valid “browsewrap” agreement.<sup>55</sup> A browsewrap agreement consists of terms and conditions governing use of an internet website that are posted on the website (often accessible by a hyperlink) to which a party assents simply by using the website.<sup>56</sup> This differs from a “clickwrap” agreement, which asks users to check a box affirmatively indicating they assent to the terms provided.<sup>57,58</sup> Browsewrap agreements that contain terms regarding how disputes will be resolved—e.g., mandatory arbitration clauses—or stipulations about attorneys’ fees may at times be found unenforceable against public policy in a given jurisdiction. Nevertheless, barring containment of terms that run counter to consumer protections, browsewraps can indeed be valid mechanisms for web content providers to control how their content is used.

Whether a court will enforce the browsewrap, however, depends not only on the jurisdiction and any relevant principles or statutes therein but also the facts of the case. Without a user’s actual or constructive knowledge of the terms, courts often do not find the mutual assent required for the formation of a contract.<sup>59</sup> The courts will inquire as to whether the hyperlink to the terms of use is placed in a noticeable location and is of sufficient size, color, font, and more.<sup>60</sup> A few courts have even held that browsewraps cannot be enforceable based solely upon a link to terms at the bottom of a web page.<sup>61</sup>

Given these disparities in browsewrap enforcement, what should a CTA researcher know? A court will look to the facts of whether a researcher had actual or constructive notice, but of course it will do so once a lawsuit has been filed. Needless to say, the mere threat of such a suit can be a deterrent to conducting research. Nor should one advise researchers to bury their heads in the sand and willfully ignore awareness of terms of service—since that fact, too, may be a consideration for the court and constitute constructive awareness.

We encourage researchers to be on notice that terms of service may exist. This is also a best practice because, if a researcher is on campus while crawling a site, it may be a violation of a university or university library's internet policies to violate website terms of use.<sup>62</sup> So, by complying with the website's browserwrap, the researcher also is less likely to run afoul of university policies. Additionally, compliance with both browserwraps and the database license agreements discussed above may eliminate the spectre of potential violations of other statutes like the Computer Fraud & Abuse Act (18 U.S.C. § 1030),<sup>63</sup> the Digital Millennium Copyright Act's anti-circumvention provisions (17 U.S.C. § 1201), and common law rights like trespass to chattel—all of which require further exploration than we are able to undertake here.

A researcher should also consider whether the desired content might actually be available under her institution's licensing agreements, as these agreements can carve out necessary exceptions. For instance, our poetry scholar's library may have negotiated a text and data mining provision in the license agreement that expressly permits CTA. So, if our researcher wanted to crawl the *New York Times* online, this might be disallowed under the public site's terms of use—but permitted via her library's license to ProQuest (a content aggregator).

In addition, and before looking to scrape text from a website, researchers should investigate whether or not the desired data is available via an API or other “framework implemented explicitly to handle and respond to automated data requests.”<sup>64</sup> APIs are generally designed to enable commercial reuse that will drive traffic to the content provided via the API host but can also provide a simple, legal point of access for the CTA scholar. In the case of the *New York Times* website, there is an “Article Search API” that might help our scholar identify and access metadata related to reviews of the relevant poetry, but it is not designed to enable full-text access to the *New York Times* archive.<sup>65</sup> Ultimately, therefore, awareness of how a researcher intends to access and download content is another critical step in understanding whether such activity is authorized.

### **Agreements with Archives and Special Collections**

Our researcher is also digitizing materials from a local archive. All researchers—CTA and otherwise—should be aware that if they are using published or unpublished material from libraries' special collections or archives, they

may need to consider a use agreement they signed with the archives. These agreements typically govern whether the materials can subsequently be published, not whether the scholar can use them in her research *ab initio*.

Why would some libraries and archives restrict one's ability to publish from works in their collections? They may have signed agreements with donors that restrict reuse of the records being contributed. For instance, a donor of unpublished personal letters might—as a condition of donation—restrict use of the letters to researchers in a reading room and prohibit publication or digitization. The archives may pass this condition on to researchers with a “terms of use” (or equivalent) agreement. In exchange for the archives granting access to the correspondence, researchers may waive rights to publish excerpts from the letters, even if doing so would be fair use. Here, too, we also face the distinction between permission to use for research and permission to republish in digital scholarship.

The good news is that archives and cultural heritage institutions are often willing to engage in discussion about expanding permissible uses; at a minimum, it is worth asking the institution if the intended use can be allowed. Indeed, sometimes the archives' “terms of use” agreement is more restrictive than even the archives had intended while institutional practice catches up to the growing landscape for how to describe reuse rights.<sup>66</sup>

## *Ethics*

Lastly, even in cases where scraping text from a site may be permissible under the Copyright Act, a database license agreement, and a website's terms of use, a researcher should also consider best practices regarding the impact of programmatically downloading or indexing content from a web server. As Munzert et al. detail, “Maintainers of websites sometimes want to keep at least some of their content prohibited from being crawled, for example, to keep their server traffic in check. This is what the robots.txt file is used for. This ‘Robots Exclusion Protocol’ tells the robots which information on the site may be harvested.”<sup>67</sup>

Robots.txt files and the “robots” <meta> tag in HTML headers are designed primarily to tell search engines when web crawlers used to index a site for public retrieval are prohibited or allowed. While prohibitions

in robots.txt fall into a legal gray area and may not explicitly forbid web scraping, it is a generally accepted best practice that any programmatic access to a site respects the wishes of the web host.<sup>68</sup>

## Toward a Workflow

How can we transform these principles into a workflow adaptable and adoptable by CTA researchers in the field who are using or building corpora? We believe it may be helpful to interweave these literacies into three stages of outreach and education: use of precompiled corpora, corpus creation, and corpus publishing.

### *Use of Precompiled Corpora*

Many libraries provide online text mining guides listing open access and licensed resources that are available to their users for CTA purposes.<sup>69</sup> In this section of the workflow, however, rather than focus on where researchers should *look* for these corpora, we enumerate the literacy considerations they should make when choosing to *use* any pre-compiled corpora.

#### **Address Scope of the Corpus**

A researcher should be able to articulate the boundaries of her corpus, not simply in terms of the total number of items represented, but taking into consideration the original sources represented in the collection and the granularity with which one can query subsets of the collection. While black box corpora may not allow for traditional consumption of texts, platforms offer various levels of access to information about the objects in their collections. Consideration should also be given to what may not be included in the corpus and whether or not those items were left out for reasons related to copyright, privacy, or other legal policy.

#### **Consider Legal Frameworks Shaping Corpus Format or Contents**

Relatedly, if a researcher uses a corpus shaped by legal contours like copyright or privacy statutes and agreements, she should understand how

these factors can limit potential uses of the underlying texts. For instance, (1) familiarity with fair use law illustrates why Google makes only Snippets views of certain works available or why HDL allows full-text searching but not full-content viewing; (2) similarly, an understanding of privacy law can help a researcher explain why various items were not viewable or were excluded entirely from a given corpus.

### **Account for Mode of Access**

While CTA researchers may initially seek out access to bulk downloads of familiar representations of texts from any given collection, familiarity with emerging modes of access enabled by fair use—including derived downloadable datasets, secure computing environments, and web-based tools for interacting with a corpus—will open up significant new opportunities for access. It is equally important for researchers to recognize which modes of access allow specific research methods and questions that they are hoping to pursue.

### **Explore Digital File History and Metadata**

The CTA researcher should consider how and when a particular corpus has been digitized, the degree to which it represents the original objects in the collection—considering, for example, the quality of OCR—and the role that various institutions played in defining and digitizing its contents. Along the same lines, researchers should pay careful attention to the quality and kinds of metadata provided for individual items in a corpus. Without accurate bibliographic publication dates, for example, a researcher will be unable to perform temporal analyses of items in the corpus.<sup>70</sup>

### ***Corpus Creation***

A CTA researcher who seeks to develop a corpus must rely on additional literacies that integrate a more nuanced understanding of copyright and licensing that librarians are well-suited to provide.

### **Consider Copyright and Fair Use Rights**

Researchers should be equipped to consider whether the content of the corpus they build is protected by copyright and, if so, whether it would

be fair use to create a searchable database of these materials under *Hathi-Trust 2014*, *Google Books 2015*, and other cases. Creating a research database for personal use or non-consumptive text mining has typically been found to be fair, though the fair use balancing test may yield a different outcome with respect to publishing from those corpora (as noted below).

### Assess Means of Content Access

- Via institutional license agreement. Sufficient outreach to researchers should occur such that they have an understanding of when they are actually utilizing library- or institution-licensed resources and databases. With that understanding comes awareness of the need to discern (1) whether the license curbs uses that would otherwise qualify as fair use, and (2) whether that license permits text and data mining and the creation of a collection. Scholars should also understand that web scraping in violation of a database license agreement might, if done on campus, also impedes access to the database for other campus users. Here, again, librarian contact or information provision is key.
- Via website. Before compiling a corpus via a website, a researcher should consider whether the same content is available through her institution's licensed databases, as the license agreements may expressly allow CTA even if the "vanilla" usage terms of a website bearing that same content do not. If, however, a researcher is indeed using materials on the open web and not through an institutionally licensed resource, useful literacies include:
  - understanding the scope of and permissible uses defined by a website's "terms of service" or "terms of use," or any other "browsewrap" or "clickwrap" licenses they may be deemed to have entered into by using the site for their intended purpose;
  - understanding of formal web services for legal access to web content—before researchers consider building or using a web scraper, they should investigate whether or not the platform of interest offers an Application Programming Interface (API) or other programmatic or bulk access point to the content they need; and

- ▶ consideration of best practices concerning programmatic access, including the limitations and prohibitions documented in a site's robots.txt and "robots" <meta> tag—researchers should be cognizant that large download requests can impact server performance negatively and bear financial costs for content providers.
- Via archives, museum, or library special collection. All researchers, CTA, and consumptive readers alike should be aware of any use or republishing restrictions they may be asked to accept when acquiring copies of materials from library special collections, archives, or museums. This is separate from any underlying copyright attached to the materials themselves. Before signing any agreements with memory institutions, researchers should therefore consider what uses they intend to make of the content and be prepared to ask the institution—in writing—for permission to store or publish the content in ways that satisfy those intended uses. Researchers should keep records of any permissions obtained.

### *Corpus Publishing*

CTA researchers' end goals may be not only to publish scholarship with their findings but also publish the raw, annotated, or coded content itself. Publishing the content or the database they have created helps other scholars test their own algorithms and provides raw material upon which to conduct their own research and tests. Yet, it is often in the republishing of the corpus content that the limits of fair use are reached or the bounds of license agreements are exceeded. CTA researchers should thus separately undertake a fair use analysis if they intend to publish excerpts or whole content from the corpora they assemble.

Once again, the same license agreements and browswraps can infuse additional parameters for what may be included as republished content. Typically, academic libraries negotiate agreements that allow for quoting or excerpting materials within the bounds of fair use—so, potentially, the researcher's intended republication may very well fall within the contours

of what the license agreement allows. Visibility into what agreements an institution has signed once again remains important.

## From Workflows to Skill Sets

Reflecting upon our digital humanities scholar studying post-WWII poetry, in the light of the literacies unmasked by our workflow, we recognize this as a call to action. Working at the intersection of copyright law, database licensing, and public service, academic libraries are increasingly well-equipped to support CTA scholars throughout the research lifecycle. We encourage coordinated efforts by professional library organizations in the US to help institutions operationalize literacy workflows, such as the one outlined above, so that CTA scholars may build requisite skill sets to support their research.

As we have indicated throughout, core literacies would help CTA researchers to recognize, among other things, that copyright fair use jurisprudence affects how a corpus might appear, whether a researcher can create a corpus from scratch, and whether she may subsequently share it; contract law (including agreements that researchers may not have personally signed or agreed to) can supplant these fair use rights; community ethics may influence best practices for content aggregation; and, finally, that there may be other considerations for CTA researchers in the use, creation, and publishing of corpora—such as questions of privacy and publicity rights or matters invoking indigenous knowledge that are beyond the scope of what we cover here.

Perhaps the key literacy, therefore, is for CTA researchers to understand the need for a workflow itself and to explore a tailored approach in consultation with their librarians. Achieving this fundamental literacy necessitates outreach and education on the issues identified here to bring a scholar to the stage at which she could apply statistical computing methods on a robust and lawfully assembled corpus.

## Endnotes

1. The authors would like to thank the following scholars for their careful review and valuable feedback on earlier drafts of this chapter: Eleanor Dickson, HTRC Digital Humanities Specialist at the University of Illinois at Urbana-Champaign; Michael Wolfe, Scholarly Communications Officer, UC Davis Library; and David J. Hansen, Director of Copyright and Scholarly Communications, Duke University Library.
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3. Marti A. Hearst, "What is Text Mining?," last modified October 17, 2003, <http://people.ischool.berkeley.edu/~hearst/text-mining.html>; Martin Truyens and Patrick Van Eecke, "Legal Aspects of Text Mining," *Computer Law & Security Review* 30, no. 2 (April 2014): 153.
4. Truyens and Van Eecke, "Legal Aspects of Text Mining"; Jonathan Clark, *Text Mining & Scholarly Publishing* (Loosdrecht, Netherlands: Publishing Research Consortium, 2012), [https://www.stm-assoc.org/2012\\_01\\_01\\_PRC\\_Clark\\_Text\\_Mining\\_and\\_Scholarly\\_Publishing.pdf](https://www.stm-assoc.org/2012_01_01_PRC_Clark_Text_Mining_and_Scholarly_Publishing.pdf); Intellectual Property Office, *Exceptions to Copyright: Research*, last modified November 18, 2014, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/375954/Research.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/375954/Research.pdf).
5. Michael L. Black, "The World Wide Web as Complex Data Set: Expanding the Digital Humanities into the Twentieth Century and Beyond Through Internet Research," *International Journal of Humanities and Arts Computing* 10, no. 1 (March 2016), <https://doi.org/10.3366/ijhac.2016.0162>; Laura Quilter, "Copyright Futures in the Digital Humanities," presentation at the UMass Digital Humanities Initiative, Amherst, MA, March 11, 2013, [https://works.bepress.com/laura\\_quilter/27/](https://works.bepress.com/laura_quilter/27/); Ryan Mitchell, *Web Scraping With Python: Collecting Data from the Modern Web* (Sebastopol, CA: O'Reilly Media, 2015), chap. 14, pt. C, "The Legalities and Ethics of Web Scraping."
6. U.S. Const. Art. 1, § 8.; see also *Authors Guild v. Google*, 804 F.3d 202, 209 (2nd Cir. 2015).
7. 804 F.3d at 209.
8. Copyright Act of 1976, 17 U.S.C. § 107.
9. *Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009) (quoting *Stewart v. Abend*, 495 U.S. 2017, 237 (1990)).
10. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).
11. *Campbell* at 591; 562 F.3d at 643.
12. 510 U.S. at 578–79.
13. 562 F.3d at 639.
14. James Grimmelman, "Copyright for Literate Robots," *Iowa Law Review* 101 (2016): 659; Pierre N. Leval, "Toward a Fair Use Standard," *Harvard Law Review* 103, no. 5 (March 1990): 1111, <https://doi.org/10.2307/1341457>.
15. 510 U.S. at 579.
16. 562 F.3d 630 (quoting *Bond v. Blum*, 317 F.3d 385, 396 (4th Cir. 2003)).
17. 562 F.3d at 643 (quoting *NXIVM Corp. v. The Ross Institute*, 364 F.3d 471, 482 (2nd Cir. 2004)).
18. 510 U.S. at 592; 562 F.3d at 643.
19. 804 F.3d at 209.
20. For additional review of various cases that treat copyright and text mining, see Krista

- L. Cox, “Research Libraries and New Technologies, Promoting Access to Information, Learning, and Innovation for Today and the Future,” *I/S: Journal of Law and Policy for the Information Society* 13, no. 1 (2016), <http://hdl.handle.net/1811/81137>.
21. HathiTrust “is a partnership of major research institutions” committed to “contributing to research, scholarship, and the common good by collaboratively collecting, organizing, preserving, communicating, and sharing the record of human knowledge.” HathiTrust’s Digital Library “is a digital preservation repository and highly functional access platform. It provides long-term preservation and access services for public domain and in copyright content from a variety of sources, including Google, the Internet Archive, Microsoft, and in-house partner institution initiatives.” See <https://www.hathitrust.org/about>.
  22. HathiTrust has since released additional options, like a secure computing environment, through the HathiTrust Research Center tools (discussed above), that allow even more robust CTA to be performed—including visualizations, tables, quotations, or other transformations from the copyrighted materials in the archive.
  23. 755 F.3d at 91.
  24. *Ibid.* at 96.
  25. *Ibid.* at 97.
  26. *Ibid.* at 100.
  27. *Ibid.* at 98–99.
  28. *Cert. den’d* (No. 15-849) 136 S. Ct. 1658 (Apr. 18, 2016).
  29. Matthew L. Jockers, Matthew Sag, and Jason Schultz, “Don’t Let Copyright Block Data Mining,” *Nature* 490 (October 2012): 30, <https://doi.org/10.1038/490029a>.
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  31. “Data for Research,” JSTOR, accessed September 10, 2017, <https://dfr.jstor.org/>.
  32. Boris Capitanu et al, “The HathiTrust Research Center Extracted Feature Dataset (1.0)” (dataset), HathiTrust Research Center, <http://dx.doi.org/10.13012/J8X63JT3>.
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  35. For a discussion of the ways in which the lack of bibliographic metadata in Google Books renders the search tool unsuitable for many scholarly purposes, see Geoffrey Nunberg, “Google’s Book Search: A Disaster for Scholars,” *Chronicle of Higher Education*, August 31, 2009, <http://www.chronicle.com/article/Googles-Book-Search-A/48245/>.
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  38. “Chronicling America,” Library of Congress, accessed October 13, 2017, <http://chroniclingamerica.loc.gov/>.
  39. This question was on the radar, too, for the Association of Research Libraries in its *Code of Best Practices in Fair Use for Academic & Research Libraries*, which was

- released in 2014, prior to HathiTrust 2014 and Google Books 2015. The *Code of Best Practices* urges libraries creating copyright-protected corpora to limit access to researchers only under non-consumptive terms. (Washington DC: Association of Research Libraries, 2012), <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>.
40. Brief of Digital Humanities and Law Scholars as *Amici Curiae*, Authors Guild v. HathiTrust, No. 12-4547-cv (2d Cir., June 4, 2013), 24.
  41. Brief of Digital Humanities and Law Scholars, at 27.
  42. See also *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003) (fair use for search engine to include thumbnails and in-line linking to images hosted on photographer website); *Perfect 10 v. Amazon*, 508 F.3d 1146 (9th Cir. 2007) (Google search engine's use of copyrighted images in the form of thumbnails and in-line linking to full images is transformative fair use); *Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006) (Google's cached copies of copyrighted website content used for web page or archival content comparisons, or identification of search query terms, is fair use).
  43. The judge who authored *Google Books 2015* would seem to agree with this determination. In 1990, Pierre Leval wrote: "If [a] secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society." "Toward a Fair Use Standard," 1111.
  44. 29 F.Supp.3d at 399.
  45. 510 U.S. at 579; HathiTrust 2014.
  46. 2018 U.S. App. LEXIS 4786, at \*8.
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  49. See, e.g., *Bowers v. Baystate Techs.*, 320 F.3d 1317, 1325–1326 (Fed. Cir. 2003); Melville B. Nimmer and David Nimmer, *Nimmer on Copyright*, § 1.01[B][2] (New York: Matthew Bender, 2018).
  50. See, e.g., Leslie A. Williams et al., "Negotiating a Text Mining License for Faculty Researchers," *Information Technology and Libraries* 33, no. 3 (September 2014).
  51. "License Information," University of British Columbia, Library, accessed on October 12, 2017, <https://licenses.library.ubc.ca/>.
  52. Emailing [tdm-access@berkeley.edu](mailto:tdm-access@berkeley.edu) reaches all library staff involved in supporting CTA research, including, for instance, the e-resources librarian, e-learning librarian, scholarly communication officer, digital humanities librarian, and more.
  53. Further, open-source code to scrape websites is easy to find. As of this writing, there are over 24,000 results for a search for "scraper" on the code repository, GitHub.com, for example. Popular guides often explain technical methods to collect and organize text from websites. See e.g., Mitchell, *Web Scraping with Python*; Simon Munzert et al., *Automated Data Collection with R: A Practical Guide to Web Scraping and Text Mining* (Chichester, West Sussex, UK: Wiley, 2014), Wiley Online Library.
  54. "Terms of Service," *New York Times*, accessed on October 17, 2017, <https://www.nytimes.com/content/help/rights/terms/terms-of-service.html>.

55. See, e.g., *E.K.D. ex rel. Dawes v. Facebook*, 885 F.Supp. 2d 894 (S.D. IL. 2012) (applying California law); *Snap-on Business Solutions v. O'Neil & Assoc.*, 708 F.Supp. 2d 669 (N.D. Ohio 2010) (apparently applying Ohio law); see also Allison S. Brehm and Cathy D. Lee, "Click Here to Accept the Terms of Service," *Communications Lawyer* (American Bar Association) 31, no. 1 (January 2015), [https://www.americanbar.org/publications/communications\\_lawyer/2015/january/click\\_here.html](https://www.americanbar.org/publications/communications_lawyer/2015/january/click_here.html).
56. *Be In v. Google*, 2013 WL 5568706, at \*6 (N.D. Cal. Oct. 9, 2013); "Validity, Construction, and Application of Browsewrap Agreements," 95 A.L.R. 6th 57.
57. 95 A.L.R. 6th 57.
58. If a researcher engages in her own subscription to a particular web resource, she may very well be asked to enter into a clickwrap agreement, expressly assenting to be bound by the web provider's terms.
59. See, e.g., 2013 WL 5568706, at \*7 (N.D. Cal., 2013) ("Most courts upholding the enforceability of browsewrap agreements have done so in circumstances where notice to the defendant was firmly established in the factual record."); *Specht v. Netscape Communications*, 306 F.3d 17 (2nd Cir. 2002) (applying CA and NY law) ("a reasonably prudent offeree in plaintiffs' position would not have known or learned, prior to acting on the invitation to download, of the reference to [the] license terms hidden below the 'Download' button on the next screen").
60. See, e.g., *Long v. Provide Commerce*, 200 Cal. Rptr. 3d 117, 125–26, (Cal. App. 2016) ("Here, the Terms of Use hyperlinks—their placement, color, size and other qualities relative to the ProFlowers.com Web site's overall design—are simply too inconspicuous to" warrant assent to an agreement.); Cf. *Cairo v. Crossmedia Services*, No. 04–04825, 2005 WL 756610 (N.D. Cal., Apr. 1, 2005) (every page on the website at issue had a text notice that read: "By continuing past this page and/or using this site, you agree to abide by the Terms of Use for this site, which prohibit commercial use of any information on this site.").
61. 2013 WL 5568706, at \*7 (N.D. Cal., 2013) ("At least one court has found that actions seeking to enforce website terms of use as an enforceable browsewrap contract must allege more than the mere existence of a link at the bottom of a page." [citing *Cvent, Inc. v. Eventbrite*, 739 F.Supp. 2d 927, 936 (E.D. Va. 2010); *Nguyen v. Barnes & Noble*, 12–CV–0812, 2012 WL 3711081 (C.D. Cal. Aug. 28, 2012) (refusing to enforce arbitration agreement where notice of browsewrap agreement was predicated merely on a link at the bottom of the website)]).
62. See, e.g., the "Conditions of Use and Licensing Restrictions for Electronic Resources," University of California, Berkeley, Library, accessed October 17, 2017, <http://www.lib.berkeley.edu/about/conditions-of-use-for-electronic-resources>.
63. For an overview of how courts have applied the Computer Fraud & Abuse Act, see Buckman, Annotation, "Validity, Construction, and Application of Computer Fraud and Abuse Act (18 U.S.C.A. § 1030)."
64. Black, "The World Wide Web," 98.
65. "The New York Times Developers," *New York Times*, accessed on October 16, 2017, <https://developer.nytimes.com/>.
66. *Rightsstatements.org* is one project aimed at expanding ways in which cultural heritage institutions can describe both copyright status and reuse rights for their digital items and materials—thus removing often unintended binary language constricting researchers' usage rights. For a discussion of alternative approaches, institutions concerned about whether their archives agreements are overreaching should also see Kenneth D. Crews,

- “Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching,” *Fordham Intellectual Property, Media & Entertainment Law Journal* 22 (July 1, 2012), <https://ssrn.com/abstract=2120210>.
67. Munzert et al., *Automated Data Collection with R*, 280.
  68. Black, “The World Wide Web.”
  69. See, e.g., “Text Mining & Computational Analysis,” University of California, Berkeley, Library, accessed on September 10, 2017, <https://guides.lib.berkeley.edu/text-mining>; “Text and Data Mining,” University of Chicago, Library, accessed on September 10, 2017, <http://guides.lib.uchicago.edu/textmining>.
  70. For a closer consideration of challenges related to publication dates as represented in bibliographic metadata for large-scale corpora analysis, see David Bamman et al., “Estimating the Date of First Publication in a Large-Scale Digital Library,” in *Proceedings of ACM/IEEE Joint Conference on Digital Libraries, Toronto, Canada, June 2017 (JCDL'17)* (Piscataway, NJ: IEEE, 2017), <https://doi.org/10.1109/JCDL.2017.7991569>.

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# Whose Stuff is it Anyway? Adopting Strategies for US Orphan Works

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## Introduction: Saving Orphan Works and American Culture

The US Copyright Office in the Library of Congress defines orphan works as “copyrighted works whose owners are difficult or even impossible to locate.”<sup>1</sup> Libraries and archives seek to preserve orphan works for future generations, but these materials are in a precarious state because they cannot be used legally without the risk of incurring statutory fines for copyright infringement.<sup>2</sup> This chapter reviews the history of copyright law in the United States and how the extension of the copyright term created and continues to intensify the orphan works problem. Orphan works legislation can provide an effective solution, but to date, Congressional attempts to pass an orphan works bill have been unsuccessful. Portions of US history and cultural memory are at risk, and the American public must fight to reclaim orphan works and restore their place in American cultural memory.

## The Orphan Works Problem

Using copyrighted works without permission from the rights holder can result in large statutory damages or the payment of the copyright owner’s

actual damages plus the surrender of the infringer's profit and, in the case of willful infringement, a statutory fine of up to \$150,000 per work.<sup>3</sup> The fear of infringement may prevent innocuous users from engaging with orphan works. The ambiguous ownership status of orphan works hinders the use of rich historical and cultural content and makes it difficult for subsequent authors to use these works for new creative endeavors.<sup>4</sup>

Mass digitization initiatives enable libraries, museums, and archives to preserve cultural history for future generations, but finding rights holders is effectively impossible for many reasons: (1) the original copyright owner may have passed on and there is no way to identify the owner's descendants; (2) the publisher of the work is now defunct and records about the author become lost; (3) the rights to the work have been transferred multiple times and it is impossible to determine the identity of the current owner; and (4) the work (often a photo) was published without notice, so the author is unknown.

Current copyright law exacerbates these issues because extended copyright terms increase the amount of time that a work remains under copyright protection,<sup>5</sup> and when the owners cannot be found, the works become orphans. Corporate entities have a vested financial interest in protecting their content for longer periods of time, and their efforts to lobby the US Congress and influence the US Copyright Office have produced a copyright policy that supports corporate economic interests<sup>6</sup> while denying public access to orphan works.

## Copyright Law in the United States

The first Copyright Act in the United States was enacted on May 31, 1790, and provided copyright protection for books, maps, and charts.<sup>7</sup> The legislation was intended to create a system that would support the progress of teaching and learning yet still allow authors to reap economic benefits from their creative endeavors for "limited periods of time."<sup>8</sup> Under the Copyright Act of 1790, authors were granted an exclusive copyright (right to copy) for fourteen years with the option to renew for an additional fourteen years.<sup>9</sup> Therefore, authors could have obtained exclusive rights to their work for up to twenty-eight years before the works would pass to the public, i.e., into the public domain, where anyone could copy and distribute the materials freely.

Congress made the first major revision to the original Copyright Act in 1831, and prints and musical compositions were added to the class of protected works.<sup>10</sup> The copyright term was extended to twenty-eight years with an option to renew for an additional fourteen years.<sup>11</sup> This legislative change enabled authors to retain the exclusive right to their work for up to forty-two years.

Although the Copyright Act protected US authors, it failed to recognize the copyrighted works of citizens from other countries until 1891.<sup>12</sup> This lack of reciprocity was not limited to the United States, and several countries sought to address the problem by harmonizing copyright terms across international borders. Their solution was the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), an international treaty established in Berne Switzerland in 1886.<sup>13</sup> Berne mandated that its signatory countries acknowledge the copyright laws of all parties to the convention. For example, a French citizen's copyright would have to be recognized by England and, therefore, English publishers could not copy and sell French works without permission from the author. This practice helped to minimize illegal copying and distribution across international borders and establish consistency among Berne signatories.

The treaty also established a minimum copyright term by requiring that, except for photographic and cinematographic works, copyright protection would last for the life of the author plus fifty years.<sup>14</sup> The United States would not join the Berne Union for another century, and Berne's copyright term, life of the author plus fifty years, was not adopted until 1978, despite the lobbying of famous US authors.

On December 6, 1906, author Samuel Clemens, commonly known as Mark Twain, testified during Congressional hearings held for what would become the Copyright Act of 1909. Clemens was a frequent critic of illegal copying and advocated for authors rights. He was concerned that a forty-two-year copyright term was not long enough for authors to reap financial rewards for their labor. Like many artists who would follow, Clemens believed that the copyright term should last in perpetuity; however, he was willing to adopt a moderate position to ensure the financial security of his daughters, who during those times would have been unable to support themselves.

I like that bill, and I like that extension from the present limit of copyright life of forty-two years to the author's life and fifty years after. I think that will satisfy any reasonable author, because it will take care of his children. Let the grandchildren take care of themselves. "Sufficient unto the day." That would satisfy me very well. That would take care of my daughters, and after that I am not particular.<sup>15</sup>

Clemens' perspective had great influence on the public perception of copyright law, and Congress sought to protect financial incentives for authors and balance their economic rights while sustaining a robust public domain to satisfy the Constitution's "Progress of Science [read 'promotion of knowledge']" mandate.<sup>16</sup> Thus, the Copyright Act of 1909 increased the copyright term for authors but strengthened procedures that required authors' active participation in securing the copyright to their works. The 1909 Act mandated that authors register their works with the US Copyright Office and place a valid copyright notice on the work.<sup>17</sup> Once these conditions were met, the author could enjoy copyright protection for twenty-eight years with a possible renewal of an additional twenty-eight years.

Some authors failed to complete these steps and either neglected to place a copyright notice on their works, renew registration for their work, or register their work at all. This process of registration, notice, and renewal complicated the road to protection but created a path for works to pass into the public domain.<sup>18</sup> As with the previous Copyright Act, some authors believed that the term of protection was too short, and the publishers' crusade to extend the term of protection continued to grow.

## And Then There Were Orphans: The Copyright Act of 1976

The Copyright Act of 1976 (Act of 1976) was a comprehensive revision that changed how works gained protection under the law. Although the United States declined to join the Berne Union in previous decades, the Act of 1976 adopted requirements aligned with Berne Convention standards to facilitate the United States' eventual participation in the Berne Convention. First, the copyright term was extended to "life of the author and fifty years after the author's death."<sup>19</sup> The renewal period for works that were copyrighted

prior to 1978 but had not yet passed into the public domain was extended from twenty-eight years to forty-seven years—for a new effective term of seventy-five years. The 1976 Act also provided a retroactive term extension for works authored by corporations (works for hire) from fifty-six years to seventy-five years from the date of publication.<sup>20</sup>

Next, the formal registration and notice requirements were eliminated, and the new Act provided immediate protection for works once they were in a fixed and tangible medium. Under the Copyright Act of 1909, authors had to formally register their works with the Copyright Office and request an additional term of protection. Under the 1976 Act, copyright protection became automatic and registration was necessary only to enforce the copyright in litigation or at the border, or to collect attorneys' fees and statutory damages. This section of the law is significant because the threat of statutory damages is the greatest deterrent to the use of orphan works.<sup>21</sup>

The new system was much easier for authors—they merely created the content and copyright protection was granted without the registration formalities required by previous Copyright Acts. Nonetheless, some authors continued to register their work with the United States Copyright Office for the reasons stated above.<sup>22</sup> Without mandatory registration, it became increasingly difficult to identify authors of some copyrighted content, and the number of works that were already difficult to identify because of copyright transfers, defunct publishing houses, and the inability to identify the owner's estate grew exponentially. The substantial changes to the Copyright Act of 1976 were necessary for the United States' eventual accession to the Berne Convention in 1989,<sup>23</sup> but the extended copyright term and elimination of the formal registration requirement created the orphan works problem.<sup>24</sup>

## Copyright Amendments and the Diminished Public Domain

The Copyright Amendment Act of 1992 eliminated the registration renewal requirement for works copyrighted between January 1, 1964, and December 31, 1977. This amendment applied only to those works that

were registered for a renewal period. If a rights holder had registered for copyright protection prior to January 1, 1964, but neglected to submit a renewal application for an additional twenty-eight-year term, the work passed into the public domain and no further extension was available.

The most notable and sometimes controversial amendment to the Copyright Act of 1976 is the Copyright Term Extension Act of 1998 (CTEA), also known as the Sonny Bono Copyright Act.<sup>25</sup> Musician, entertainer, and California Congressman Sonny Bono was a staunch advocate for the extension of the copyright term but passed away before the debate about an extended copyright term commenced. Upon winning Bono's Congressional seat, his widow, Mary Bono, advocated for the extension of the copyright term. Her impassioned speech to Congress is well documented, and her assertion that her late husband wanted the copyright term to last "forever less one day" echoed the sentiment of Motion Picture Association of America President Jack Valenti and has become a battle cry of copyright term extension advocates.<sup>26</sup>

One of the high-profile contenders in the copyright term extension battle was the Walt Disney Corporation. The original Mickey Mouse, *Steamboat Willie*, was first published in 1928, and without a copyright term extension, this figure would have become available for all to use in 2003. Disney was unwavering in its efforts to prevent its most notable mascot from passing into the public domain, and opponents of the copyright term extension maintained that Disney's powerful and relentless lobbying tactics practically assured the copyright term would be extended.<sup>27</sup> After many congressional hearings with testimony from both sides of the issue, the CTEA became effective on October 27, 1998.<sup>28</sup>

The CTEA extended the term for single authors to life plus seventy years and the term for corporate works was extended to the lesser of ninety-five years after publication or 120 years after creation. Older works published before 1978 were granted a retroactive extension of twenty years so that their new term was a total of ninety-five years from the original date of publication. The extension of the act protected the economic interests of powerful corporations. Disney's *Steamboat Willie* would escape the public domain for an additional twenty years through the end of 2023, but lesser known and culturally relevant works that should have been released to the public were delayed as well. Ironically, many of Disney's original

“classics,” such as *Sleeping Beauty*, *Cinderella*, and *Beauty and the Beast*, are based on public domain works,<sup>29</sup> yet Mickey Mouse was not to join the public domain realm that made Disney so wealthy. The corporation’s relentless lobbying efforts earned the CTEA a new and disdainful nickname: The Mickey Mouse Protection Act.

## US Legislative History and Failed Orphan Works Policy

The primary concern surrounding the use of orphan works is the possibility that the rights holder could surface and sue for infringement. In 2006, the United States Copyright Office presented Congress with its first report on the orphan works problem. The report provided background about the status of orphan works in the United States and recommended a limited liability solution which, in the event of infringement litigation, would limit the remedies available against good faith users of orphan works.<sup>30</sup> Months later, an orphan works bill (based on the report’s recommendations) was presented to Congress. The proposed legislation sought to restrict the damages available to an orphan works owner in cases where the infringer could verify “a reasonably diligent search in good faith to locate the copyright owner before using the work” and the infringer provided attribution to the author and the rights holder if known.<sup>31</sup>

On the surface, a diligent search requirement seemed reasonable, but potential orphan works users would need to search a variety of sources, including the United States Copyright Office registration records, publication lists, and other records of publishing and licensing history that are often not available via the internet. A thorough search would require that users invest a significant amount of time and money to establish a record of diligent searching, and after reviewing a variety of sources, they might still find themselves at risk for an infringement claim. The legislation failed to advance beyond the House Judiciary Committee, and the orphan works problem continued to grow.<sup>32</sup>

The next orphan works bill was presented in 2008 and it retained the foundations of its predecessor while adding exclusions against awarding money damages in the case of a “nonprofit educational institution,

museum, library or archive, or a public broadcasting entity provided the organization's use was educational, religious, or charitable in nature without any purpose of commercial advantage."<sup>33</sup> This version of the bill also encouraged the use of orphan works while decreasing the risk of liability by restricting potential damages to a "reasonable compensation" amount—no statutory damages would be available. If the owner of the orphan work failed to surface, then the work could be used liberally without fines or penalties.

Although the bill appeared to offer a flexible solution, professional associations representing photographers, illustrators, and textile manufacturers opposed its passage and claimed that it would likely diminish their members' right to seek money damages and injunctive relief while providing an unfair benefit to orphan works users.<sup>34</sup> Congress tabled discussions of the 2008 bill and turned its attention to passing legislation for the \$700 billion bailout that was necessary to bolster the US financial system. Without a legislative solution, it remains difficult to use orphan works without fear of copyright infringement and substantial money damage awards.

The United States Copyright Office released its latest report titled "Orphan Works and Mass Digitization" on June 4, 2015. The highly anticipated document concedes the "legal cloud" surrounding the orphan works problem and recognizes that a substantial part of world culture is embodied in unusable copyrighted works and may therefore "fall into a so-called 'Twentieth Century Black Hole.'"<sup>35</sup> Despite these acknowledgments, the report dismisses recommendations to incorporate fair use into the orphan works solution because "the informed and scholarly views of some commenters as to the application of fair use in specific orphan works situations do not yet have as their basis any controlling case law."<sup>36</sup>

The Copyright Office's recommendations double down on previous failed legislative initiatives while adding a rigorous and inflexible notice of use requirement that would make users define both the parameters of their orphan works search and their intended use for the content. The Copyright Office states that its intention was to create and maintain a "Notice of Use Archive" where potential users would be required to submit documentation disclosing: "(A) the type of work being used; (B) a description of the work; (C) a summary of the search conducted; (D) the owner, author, recognized title, and other available identifying element of the

work to the extent the infringer knows such information with a reasonable degree of certainty; (E) the source of the work, including the library or archive in which the work was found, the publication in which the work originally appeared, and the website from which the work was taken (including the URL and the date the site was accessed); (F) a certification that the infringer performed a qualifying search in good faith to locate the owner of the infringed copyright; and (G) the name of the infringer and how the work will be used.<sup>37</sup>

The combination of requiring users to perform a diligent search and submit a full blueprint of potential use could prove discouraging for many. The time and resources necessary to meet the notice of use requirement might be achievable for some institutions and corporate users, but individuals would find it difficult to comply with such stringent terms.<sup>38</sup> These tedious and exhaustive requirements serve only to discourage the use of orphan works and keep the content in a hostage state. The Association of Research Libraries contends that the Copyright Office lacks both the staffing and technological infrastructure to create and maintain the Notice of Use Archive required to support and execute these recommendations,<sup>39</sup> and users would find only frustration in their attempts to locate the owners of orphan works content.

Although Congress has been unable to pass orphan works legislation, fair use arguments prevailed in the Authors Guild's lawsuits against Google Books and the HathiTrust. In 2004, Google, Inc. began to tackle the concept of a universal digital library and partnered with several libraries to digitize millions of books.<sup>40</sup> The Association of American Publishers sued for copyright infringement, and after nearly ten years of litigation and proposed settlements, the Second Circuit held that the Google Books project was highly beneficial to the public. Mass digitization is a transformative use of the original works because digitization made the works searchable (an important tool for libraries and archives) and accessible to print-disabled users.<sup>41</sup>

The HathiTrust is "a partnership of major research libraries working together to ensure that the cultural record is preserved and accessible long into the future."<sup>42</sup> These libraries partnered with Google to provide the texts for the mass digitization project that started as the Google Library Project and would eventually become Google Books. The partnership agreed to send portions of their collections to Google for digiti-

zation.<sup>43</sup> Once the titles were digitized and each library received its copy, the libraries planned to work together and post their newly digitized collections to a single platform, the HathiTrust Digital Library (HDL). This plan prompted the Authors Guild to file a complaint for copyright infringement against the HathiTrust in the US District Court for the Southern District of New York on September 20, 2011. On October 10, 2012, the district court held that the libraries' mass digitization project with Google qualified for fair use protection.<sup>44</sup>

On appeal, the Second Circuit affirmed that the creation of the full-text database and making the text available in a digital format for print-disabled users is protected under fair use. However, the June 2015 Copyright Office report asserts that "fair use jurisprudence is, because of its flexibility and fact-specific nature, a less concrete foundation for the beneficial use of orphan works than legislation and is always subject to change."<sup>45</sup> This position dismisses the judiciary's resounding support of the fair use doctrine in *Google Books* and *HathiTrust* and refuses to acknowledge that fair use presents an ideal solution for the orphan works problem.

In the absence of a legislative orphan works solution, the Association of Research Libraries developed the Code of Best Practice for Fair Use, and a cooperative of library, legal, and media scholars created the Statement of Best Practices in Fair Use of Orphan Works for Libraries & Archives.<sup>46</sup> These community of practice guides provide valuable tools to help archives, libraries, and memory institutions address orphan works collection through application of the fair use doctrine. In its push for continued support of a limited liability solution, the Copyright Office neglected to fully consider how the flexible nature of fair use can provide users a manageable course to rescue orphan works from their current obscurity.

## Solutions for Reclaiming Orphan Works

Memory institutions such as libraries, museums, and archives approach the orphan works problem from a vastly different perspective than the rights holders. Librarians, scholars, and some internet forums seek to preserve the cultural richness of orphan works and make them accessible to the public while content creators attempt to extend and protect finan-

cial interests. In Europe, these positions are not seen as irreconcilable. For example, in October 2014, the United Kingdom (UK) passed orphan works legislation under the European Union (EU) Directive—a mandate that formalized the EU’s intent to save the cultural history that could be lost because of the orphan works problem.<sup>47</sup>

The UK’s Intellectual Property Office (IPO) is the government unit tasked with managing copyright, patent, and trademark, and its online orphan works licensing system enables the use of orphan works for individuals and institutions. Prior to submitting an orphan works license application, users must perform a diligent search to locate rights holders, but unlike proposed US legislation, the UK search provision is fluid and far less burdensome for users.<sup>48</sup> Upon receiving a license application to use an orphan work, the IPO may grant a non-exclusive orphan works license for commercial and non-commercial uses. Use of the license is limited to the UK for a period of seven years and licensees must pay a fee to license the work and provide attribution to any known rights holders.

The IPO may refuse to issue a license if the applicant fails to perform a diligent search for the rights holder, the proposed use of the work is derogatory in nature, or the issuance of the license counters the best interests of the public. Rights holders have the right to contact the IPO and request the suspension of any orphan works license not yet issued or apply to the IPO to claim the licensing fees for content that has already been licensed. Once a rights holder has been identified, no additional licenses may be issued for the work, and users must request permission for use directly from the rights holder.

The UK scheme provides the means for users to access and license orphan works for a seven-year period while allowing rights holders the opportunity to stop the use of their content before a license is issued or collect the fees paid to the IPO for orphan works that have already been licensed. This solution addresses public access concerns and while allowing rights holders to realize an economic benefit for their work. In either case, the status of the rights holder is determined and recorded in the registry and the work can be claimed by its owner or continue to be licensed under the UK system. The US should consider following the EU by adopting a public-interest based legislative approach.

## The Greatest Lobby: The American Public

The solution to the orphan works problem lies in a successful legislative process, but gaining widespread support can prove difficult unless the public understands the value of orphan works and their role in the preservation of cultural memory. When the CTEA was passed in 1998, 41 percent of adults in the US used the internet.<sup>49</sup> Since then, the internet has become a standard means of communication and smartphones with internet access are commonplace. In this digital age, information moves with a swipe of one's finger, and trending topics that are not typically addressed by the mainstream media can grab public interest and an influential platform on social media. The most powerful lobby in the country is an engaged American public, and an orphan works reclamation project is ripe for citizens' grass-roots internet attention.<sup>50</sup>

An example of such a movement is demonstrated through the widespread opposition to the Stop Online Piracy Act (SOPA) protest of 2012.<sup>51</sup> SOPA was proposed legislation that sought to restrict copyright infringement by limiting access to any website that hosted or connected users to pirated copyrighted content.<sup>52</sup> Proponents of the bill claimed that they sought to protect the rights of intellectual property owners, but critics noted that under SOPA, the mere accusation of copyright infringement could shut a website down indefinitely. The legislation's opponents cited censorship concerns and the possibility of government overreach and limiting the public's access to information. Media giants such as Wikipedia and Reddit coordinated an online protest on January 18, 2012, and blacked out their websites.<sup>53</sup> Other information providers followed suit and SOPA was suspended indefinitely.

The SOPA protests garnered great support from internet users, primarily because Wikipedia, Reddit, and other web services littered the internet with explanations of how SOPA would restrict the public's internet use and potentially diminish access to online content.<sup>54</sup> This same argument can be applied to the constant push for copyright term extensions. Once people become aware of how copyright laws affect their everyday lives, they rally against legislation that keeps them from enjoying information that should already be available for public access.

It is highly unlikely that Congress will roll back the copyright term and repeal existing rights, and if the Copyright Office continues to push failed

legislative initiatives, effective orphan works legislation may not become a reality.<sup>55</sup> In this digital age, people are accustomed to the rapid flow of information, so creating a balanced orphan works policy will expand the public domain and provide royalties for orphan works owners who claim their works. But librarians, legal scholars, and media outlets such as Google, Wikipedia, Reddit, and others can help provide information to the public, clarify what a robust public domain can mean to society, and enlist public support. These groups can advocate via the internet to stop further extensions of the copyright term in the United States and develop a viable orphan works system that provides a home for the deteriorating content that remains lost in the orphan works debate.

The answer to the question, “Whose stuff is it anyway?” becomes obvious: the stuff is our cultural heritage and it is everyone’s responsibility to ensure that the law can preserve and protect it.

## Endnotes

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3. This section of the 1976 Copyright Act establishes the remedies for copyright infringement and the amount of actual and statutory damages the rights holder is entitled to recover. However, in a case where the infringer has made a diligent search for the owner, it is highly unlikely that a court would award willful infringement damages. See 17 U.S.C. § 504(b)-(c) (2012).
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15. Senate and House Committees on Patents, *Copyright Hearings to Amend and Consolidate the Acts Respecting Copyright*, Hearings on S. 6330 and H. R. 19853. 57th Cong., 2d sess., 1907, 117.
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17. A copyright notice typically includes the author's name, copyright symbol, or the word "copyright" and the publication year. See 37 C.F.R. § 202.2 Copyright Notice.
18. William M. Landes and Richard A. Posner, *Economic Structure of Intellectual Property Law* (Cambridge, MA and London, England: The Belknap Press of Harvard University Press, 2003), 237. Only 3 percent of authors renewed their copyright registration, allowing many copyrighted works to expire and create a robust public domain.
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20. The Copyright Act of 1976 expanded authors' rights, provided greater protection for corporate interests, and brought the United States' copyright laws in line with the standards of Berne, but only prospectively. Older works covered by the seventy-five-year term were not protected consistently with the Berne Convention.
21. Pursuant to 17 U.S.C. § 504, a copyright owner is entitled to actual damages incurred by copyright infringement, but instead may elect to recover statutory damages between \$750 and \$30,000 per work, at the discretion of the court. A determination of willful copyright infringement could incur damages up to \$150,000 per work.
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37. *Ibid.*
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**INTERNATIONAL ISSUES**





## CHAPTER 19

# The International Copyright Regime—Just Enough to Make You Cringe

*Bing Wang*

Rapid technology development has resulted in an exponential growth in digital content creation. With massive content being created and shared globally, would it be easier if there were international copyright laws that protect one's work throughout the world? Unfortunately, there is no such thing as an international copyright law.<sup>1</sup> Each country has its own national laws that govern copyright, which often do not conform to US copyright laws. The differences between US copyright laws and foreign national copyright laws can present a challenge not only for authors who create and share content beyond US borders but also for consumers who use non-US-originated materials.

In an effort to harmonize copyright protection and enforcement globally, most countries have entered into multiple international treaties and conventions to allow their work to claim copyright protection in foreign countries and to offer protection to foreign works domestically. However, levels of copyright protection vary even among countries who are bound by the same international treaties and conventions.

For a foundational understanding of copyright protection outside the US, this chapter offers a concise overview of the international copyright

system. Part I introduces major international treaties and conventions to which the US is a member and the organizations that administer these treaties. Then, starting from the perspectives of US copyright authors and owners, part II discusses how copyright protection can be obtained in foreign countries through these major treaties. Part II also explores the challenges in enforcing copyrights in a foreign country. Furthermore, part III, from a US copyright user's perspective, surveys the general limitations and exceptions allowed by treaties adopted by the US. Additional resources are also recommended for locating specific information and further understanding of this topic.

## Part I. Copyright-related International Treaties and Conventions

When discussing international law, the term “treaty” and the term “convention” are often used interchangeably. Sometimes, rules accepted by multiple countries are also referred to as “international agreements.” The Vienna Convention on the Law of Treaties defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”<sup>2</sup> Treaties and conventions may be bilateral between two parties or multilateral among multiple parties. A bilateral treaty is effective when both party nations agree to be bound by the treaty while a multilateral treaty becomes effective and binds its member states only when it “enters into force.”<sup>3</sup> Different treaties and conventions define the terms for entering into force in distinct ways.<sup>4</sup>

As of June 2018, the US is a member of ten multilateral international treaties and conventions and has entered into bilateral agreements with forty-one countries regarding international copyright interests.<sup>5</sup> All forty-one countries that have bilateral copyright relationships with the US are also bound by at least one of the ten multilateral treaties and conventions, which are summarized in table 19.1. Three world organizations administer one or more of these multilateral treaties and conventions. The first one is the World Intellectual Property Organization (WIPO), which has been a specialized agency of the United Nation (UN) since 1974.<sup>6</sup>

WIPO administers the majority of copyright treaties and conventions and “provides a global policy forum...to address evolving intellectual property (IP) issues.”<sup>7</sup> WIPO member states meet annually to “negotiate the changes and new rules needed to ensure that the international IP system keeps pace with the changing world.”<sup>8</sup> Each member state sends their delegates to attend these meetings, where they may present proposals for discussion and votes.<sup>9</sup> In addition, ad hoc committees of experts are in place to formulate recommendations on specific issues and topics.<sup>10</sup> For example, the Standing Committee on Copyright and Related Rights (SCCR) is currently engaged in discussing copyright limitations and exceptions throughout the world.<sup>11</sup>

The second world organization is the United Nations Educational, Scientific and Culture Organization (UNESCO), which is also a specialized agency of the UN. UNESCO “helps countries adopt international standards and manages programmes that foster the free flow of ideas and knowledge sharing.”<sup>12</sup> Under the theme “Protecting Our Heritage and Fostering Creativity,”<sup>13</sup> UNESCO offers copyright information, training, and research to raise copyright awareness and to engage with the international community to set policies.<sup>14</sup> Every two years, member states of UNESCO meet at a General Conference to determine future policy directions for the organization.<sup>15</sup>

The third world organization is the World Trade Organization (WTO) and it serves as “the only global international organization dealing with the rules of trade between nations.”<sup>16</sup> Specifically, WTO’s intellectual property agreements regulate “rules for trade and investment in ideas and creativity.”<sup>17</sup> Similar to WIPO and UNESCO, WTO also brings governments and organizations together for policy negotiations.<sup>18</sup> WTO, however, has enforcement power as it monitors how rules are implemented within each country and settles disputes among countries.<sup>19</sup>

Among the above ten multilateral treaties and conventions involving international intellectual property rights, the Berne Convention and the Universal Copyright Convention (UCC) are two principal international copyright conventions, while TRIPS is considered as “the most comprehensive international agreement on intellectual property” to date.<sup>20</sup> The Berne Convention was first adopted in 1886 and has gone through eight revisions since.<sup>21</sup> The most recent amendment became effective in

1979.<sup>22</sup> The UCC was first adopted through the Geneva Convention in 1952,<sup>23</sup> then was revised through the Paris Convention in 1971.<sup>24</sup> Today, a country joining the convention must adhere to UCC Paris.<sup>25</sup> The TRIPS Agreement was negotiated during the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994 and went into effect in 1995.<sup>26</sup> Over time, UCC Geneva and UCC Paris both have become less important because (1) they contain much less substantive protection than the Berne Convention, and (2) almost all of the UCC member states are also members of the Berne Convention.<sup>27</sup> However, the TRIPS Agreement has been an important addition to the Berne Convention because TRIPS not only requires its member countries to comply with the substantive obligations prescribed in the Berne Convention but also introduces additional obligations in areas that were not sufficiently addressed in Berne.<sup>28</sup> Therefore, the remainder of this chapter focuses on the Berne Convention and the TRIPS Agreement.

### *Acronyms and abbreviations used in table 19.1:*

- The Berne Convention: Berne Convention for the Protection of Literary and Artistic Works
- Phonograms: Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms
- SAT: Brussels Convention Relating to the Distribution of Programmed-Carrying Signals Transmitted by Satellite
- The TRIPS Agreement: Agreement on Trade-Related Aspects of Intellectual Property Rights
- VIP: Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled
- UCC Geneva: Universal Copyright Convention, Geneva
- UCC Paris: Universal Copyright Convention, Paris
- UNESCO: United Nations Educational, Scientific and Culture Organization
- WCT: WIPO Copyright Treaty
- WIPO: World Intellectual Property Organization
- WPPT: WIPO Performances and Phonograms
- WTO: World Trade Organization

**Table 19.1.** Multilateral international copyright treaties to which the US is a member.<sup>29</sup>

<b>Managing Organization</b>	<b>Treaty Name</b>	<b>Date of Last Revision</b>	<b>Total Member Nations</b>	<b>Key Points</b>
WIPO	The Berne Convention	1979	176	<ul style="list-style-type: none"> <li>• Deals with the protection of works and the rights of their authors</li> <li>• Adopts the “national treatment” principle</li> <li>• Prescribes minimum standards for protection, e.g., minimum term of protection is life of author plus 50 years</li> <li>• Requires no formalities as a condition of protection</li> <li>• Permits limitations and exceptions to reproduction right under the “three-step test”</li> </ul>
	Phonograms	1971	79	<ul style="list-style-type: none"> <li>• Secures protection for producers of phonograms</li> <li>• Prohibits unauthorized duplication of phonograms</li> <li>• Sets out minimum term of protection as 20 years from first fixation or publication</li> <li>• Permits non-voluntary licenses for reproduction for the purposes of teaching and scientific research</li> </ul>
	SAT	1974	38	<ul style="list-style-type: none"> <li>• Requires sufficient measures to prevent illegal distribution of program-carrying signals transmitted by satellites</li> <li>• Allows exceptions with short excerpts or quotations</li> <li>• Leaves term of protection to be prescribed by its member states</li> </ul>

<b>Table 19.1.</b> Multilateral international copyright treaties to which the US is a member. <sup>29</sup>				
<b>Managing Organization</b>	<b>Treaty Name</b>	<b>Date of Last Revision</b>	<b>Total Member Nations</b>	<b>Key Points</b>
WIPO	WCT	1996	98	<ul style="list-style-type: none"> <li>• Requires all member states to comply with the substantive provisions of the Berne Convention</li> <li>• Expands the Berne Convention's reach to member states that are not bound by the Berne Convention</li> <li>• Expands the Berne Convention's protection to the digital environment</li> <li>• Expands copyright protection to computer programs and databases</li> <li>• Expands author rights to include distribution rights, rental rights, and broader communication rights</li> <li>• Permits limitations and exceptions to reproduction rights under the "three-step test"</li> </ul>
	WPPT	1996	98	<ul style="list-style-type: none"> <li>• Secures protection of performers and producers of phonograms in the digital environment</li> <li>• Grants economic rights to reproduce, distribute, rent, and makes available to the public of fixed performances and phonograms</li> <li>• For live performances, grants performers rights of broadcasting, communicating to the public, and fixation</li> <li>• Allows extension of existing limitations and exceptions prescribed in the Berne Convention or creation of new ones under the "three-step test"</li> <li>• Prescribes minimum term of protection as 50 years</li> </ul>

**Table 19.1.** Multilateral international copyright treaties to which the US is a member.<sup>29</sup>

Managing Organization	Treaty Name	Date of Last Revision	Total Member Nations	Key Points
WIPO	BTAP	As of January 2019, this treaty has not been entered into force yet.		<ul style="list-style-type: none"> <li>• Extends more rights to performers for their performances fixed in audiovisual fixations, such as motion pictures</li> </ul>
	VIP	2013	47	<ul style="list-style-type: none"> <li>• Creates a set of mandatory limitations and exceptions for the benefits of the blind, visually impaired, and otherwise print disabled (VIPs)</li> <li>• Only applies to works in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media including audio books</li> <li>• Each member state has the freedom to implement the treaty but must satisfy the same “three-step test” prescribed under WCT and WPPT</li> </ul>
UNESCO	UCC Geneva	1952	100	<ul style="list-style-type: none"> <li>• Follows the Berne Convention’s “national treatment” principle</li> <li>• Prescribes norms of copyright and neighboring rights</li> <li>• Permits formalities as a precondition for claim copyright protection</li> <li>• Prescribes minimum term of protection as life of author plus 25 years</li> <li>• Permits exceptions if they do not conflict with the spirit and provisions of the convention</li> </ul>
	UCC Paris	1971	65	

**Table 19.1.** Multilateral international copyright treaties to which the US is a member.<sup>29</sup>

Managing Organization	Treaty Name	Date of Last Revision	Total Member Nations	Key Points
WTO	The TRIPS Agreement	2017	164	<p>Adopts Articles 1-21 of the Berne Convention, except moral rights</p> <p>Besides observing the Berne's Convention's "national treatment" principle, adds the "most-favored-nation treatment" principle</p> <p>Adds a set of enforcement provisions including civil, criminal, customs, and other provisional measures</p> <p>Allows disputes among countries to be brought in front of the dispute settlement body</p> <p>Permits limitations and exceptions to author's exclusive rights under the "three-step test"</p>

## Part II. Protection Afforded and Rights Enforcement in Berne/TRIPS

Copyright laws are territorial in nature and generally applicable only within the borders of a country that passes the laws.<sup>30</sup> Through international conventions and treaties, however, US-originated works are protected within a foreign jurisdiction. Both the Berne Convention and the TRIPS Agreement set norms and minimum obligations for member states to adopt into their national laws.<sup>31</sup> With the exception of the provisions on moral rights, the TRIPS Agreement incorporates the substantive provisions of the Berne Convention<sup>32</sup> and binds all WTO member countries, regardless of whether they are members of the Berne Convention or not. Understanding these substantive obligations will help one learn the level of protection that US-originated works and their authors could receive in nations that have copyright relations with the US through the Berne Convention and/or the TRIPS Agreement.

## *Protected Subject Matter*

To obtain copyright protection in the 175 foreign countries that are Berne Convention members, a US work must be “in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.”<sup>33</sup> Protected works are defined very broadly in the Berne Convention and are illustrated in a long but non-exclusive list of examples.<sup>34</sup> Additionally, the TRIPS Agreement extends copyright protection to computer programs and databases and other compilations of data or other material.<sup>35</sup>

Each Berne Convention country has the discretion to decide whether a work should be fixed in some material form as a pre-condition for obtaining copyright protection.<sup>36</sup> US copyrightable works satisfy this requirement if a country chooses to have such a requirement because US copyright law requires works protected to be fixed in a tangible medium.<sup>37</sup> Berne Convention members can also choose to exclude certain categories of works from protection, such as legislative and administrative works, applied art, industrial models, and political speeches, lectures, and public addresses.<sup>38</sup>

## *Protection Eligibility*

There are two ways US-originated works could qualify for copyright protection in other Berne Convention member countries: (1) the work is authored by US citizens or US residents, or (2) the work is not authored by US citizens or residents but was first published in the US or was published in the US within thirty days after being published elsewhere.<sup>39</sup>

## *Protection Duration*

As a general rule, US-originated works and their authors can get a minimum term of protection—the life of the author plus fifty years—in other Berne Convention countries.<sup>40</sup> However, for photographic works and works of applied art, the minimum term is twenty-five years from the date of creation.<sup>41</sup> Berne Convention countries have the discretion to extend the term.<sup>42</sup> For example, the US has a longer term of copyright protection: life of the author plus seventy years.<sup>43</sup> This means that a US work that is still

protected under US copyright law may have entered the public domain in another country that has a shorter copyright protection term length. It is also noteworthy that the US works published before March 1, 1989, without copyright notice may have entered the public domain in the US for failure to comply with the formality requirement.<sup>44</sup> Certain foreign works published before March 1, 1989, without copyright notice, however, may be still under US copyright protection resulting from Congress' effort in 1994 to implement US obligations under the TRIPS Agreement.<sup>45</sup>

### *Protected Rights*

Under the Berne Convention, a US author's rights are guaranteed in other Berne Convention countries based on three principles:

1. National treatment. US-originated works and their authors shall have the same level of protection in other Berne Convention countries as they give to their domestic works and authors.<sup>46</sup>
2. Automatic protection. US-originated works and their authors shall enjoy and exercise their rights in other Berne Convention countries without having to comply with any formality requirements.<sup>47</sup> All Berne Convention members can mandate formality requirements to their domestic works.<sup>48</sup>
3. Independence of protection. US-originated works and their authors shall also enjoy and exercise their rights in other Berne Convention countries, regardless whether the works are copyrightable under US laws.<sup>49</sup>

Subject to certain limitations or exceptions, two categories of protective rights are enumerated in the Berne Convention: economic rights that help copyright owners to control and exploit their work and moral rights that protect copyright authors' reputation. Currently, all Berne Convention countries recognize the following economic rights of authors: translation, reproduction, public performance, communication to the public of a performance, public recitation, adaption, arrangement, and other alternation, etc.<sup>50</sup> Moral rights are defined by the Berne Convention as "the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or

reputation.”<sup>51</sup> When joining the Berne Convention in 1988, the US clearly rejected moral rights.<sup>52</sup> Two years after becoming a member of the Berne Convention, the US passed the Visual Artists Rights Act of 1990 (VARA), which confers moral rights under limited circumstances to visual artists only.<sup>53</sup> Although the TRIPS Agreement does not recognize moral rights, it adds rental rights for computer programs and cinematographic works and rights for performers and producers of phonograms.<sup>54</sup>

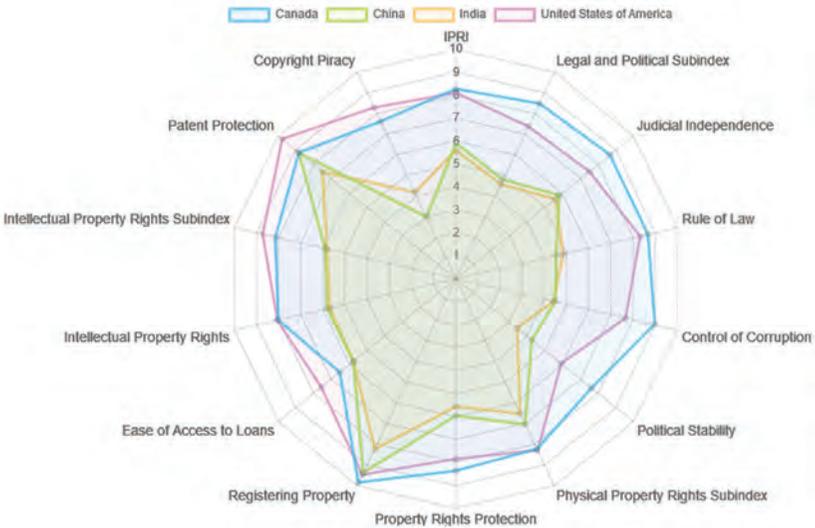
### *Rights Enforcement*

As mentioned earlier, a US author is protected in 175 foreign countries that are Berne Convention members. However, enforcing copyright in these foreign jurisdictions can be very challenging. When infringement occurs in a foreign country, a US author would have to bring a suit in the foreign courts and prosecute under the terms of the foreign jurisdictions’ copyright laws.

The Berne Convention states that “the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.”<sup>55</sup> Adding to the Berne Convention, the TRIPS Agreement gives more guidance on what each member state should have in its enforcement system at the minimum level.<sup>56</sup> Specifically, the agreement mandates certain general obligations relating to all intellectual property rights enforcement procedures to permit effective action against infringement, to guarantee due process, and not to create extra burdens on the member states.<sup>57</sup> The TRIPS Agreement also includes a set of provisions dealing with civil and administrative procedures and remedies, provisional measures, and special requirements related to border measures and criminal procedures.<sup>58</sup>

Three resources can potentially provide some helpful information for those in search of copyright enforcement in foreign jurisdictions. WIPO’s country profiles can be used for official intellectual property authorities of each country and their contact information.<sup>59</sup> WIPO Lex can also be used to access laws and regulations of the member countries of WIPO, the UN, and the WTO.<sup>60</sup> Additionally, STOPfakes.gov offers country-specific resources on protecting and enforcing intellectual property rights in specific markets.<sup>61</sup>

Keep in mind that both the Berne Convention and the TRIPS Agreement set the minimum obligations which their member countries need to fulfill. As a result, not all countries provide the same level of intellectual property rights protection. One can compare the status of intellectual property rights between the US and other countries on the International Property Rights Index (IPRI) website.<sup>62</sup> The comparison tool available on the same website can also be used to generate a radar chart to show the differences among countries.<sup>63</sup> Created by this comparison tool, figure 19.1 illustrates the copyright piracy differences, inter alia, among the US, Canada, India, and China. China has the highest risk among the four countries. Overall, both the US and Canada have much higher intellectual property rights status than China and India.



**Figure 19.1.** Copyright piracy differences among US, Canada, India, and China. Chart was created by using the Comparison tool available at <https://www.internationalpropertyrightsindex.org/countries>, accessed on January 13, 2019. Direct link to the chart is <https://www.internationalpropertyrightsindex.org/compare/country?id=78,109,80,107>.

## Part III. Exceptions and Limitations

From a copyright user perspective, we all now have great exposure and access to content originating both within the US and from other jurisdictions. The US, by being a member to multilateral international copy-

right treaties, provides copyright protection to non-US works and their authors at the same level provided to US works and authors. When using non-US-copyrighted works, one could attempt to obtain permission to use the work, but the process can be very burdensome. It is therefore important to understand the circumstances where use is allowed without permission of the author or copyright owner. Generally, copyright limitations and exceptions are permitted under certain circumstances to balance the interests of rights holders and users of copyrighted works. These limitations and exceptions “vary from country to country due to particular social, economic and historical conditions.”<sup>64</sup> Both the Berne Convention and the TRIPS Agreement acknowledge this diversity by prescribing a “three-step test” to regulate the adoption of exceptions and limitations in each member state.

The Berne Convention Article 9(2) states, “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”<sup>65</sup> The TRIPS Agreement Article 13 reads, “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”<sup>66</sup>

In almost identical terms, both treaties command that in order to enact an exception or limitation to the convention or treaty, the three steps must be followed by member nations. First, limitations and exceptions should be confined to “certain special cases.” Second, the limitations exceptions shall not “conflict with a normal exploitation of a work.” Third, the limitations and exceptions shall not “unreasonably prejudice the legitimate interests of the author.” It is worth noting that the Berne Convention’s three-step test only applies to exceptions and limitations to the right of reproduction, while the TRIPS Agreement three-step test applies to all of the exclusive rights of authors.

Again, both treaties give their member countries the discretion to adopt appropriate limitations and exceptions through national legislation. Consequently, the limitations and exceptions vary from country to country. Over the years, WIPO has been surveying and summarizing different lim-

itations and exceptions in many countries through a series of studies.<sup>67</sup> The majority of these studies focus on limitations and exceptions applicable in educational and cultural heritage-related activities of member nations.

Under the US Copyright Act of 1976, limitations and exceptions have been codified in chapter 1 of volume 17 of the US Code.<sup>68</sup> When making a determination regarding whether a potential use of copyrightable works, both domestic and foreign, is statutorily permissible, one can refer to table 19.2, which highlights some commonly used copyright limitations permitted under US law.

<b>Table 19.2.</b> Commonly used limitations on exclusive rights under the US Copyright Act of 1976.			
<b>Section Number</b>	<b>Common Name</b>	<b>Exempted Person or Entity</b>	<b>Allowed Activities</b>
§107	Fair Use	Individuals or organizations	<ul style="list-style-type: none"> <li>• Case-by-case assessment, potentially permitting:</li> <li>• reproduction</li> <li>• distribution</li> <li>• performance</li> <li>• display</li> </ul>
§108	Libraries and Archives Exception	Libraries or archives	<ul style="list-style-type: none"> <li>• reproduction</li> <li>• distribution</li> </ul>
§109	First Sale	Lawful owner of a copy	<ul style="list-style-type: none"> <li>• distribution</li> </ul>
§110(1)	Classroom Use Exemption	Instructors or pupils of a nonprofit educational institution	<ul style="list-style-type: none"> <li>• performance or display, during face-to-face teaching</li> </ul>
§110(2)	The TEACH Act	Non-profit, accredited educational institutions	<ul style="list-style-type: none"> <li>• performance or display, during mediated instruction like distance learning programs</li> </ul>
§117	Back-up Copying Exception	Lawful owner of a copy of a computer program	<ul style="list-style-type: none"> <li>• reproduction</li> <li>• distribution</li> <li>• adaptation</li> </ul>
§121	Exception for the Blind	Authorized entities	<ul style="list-style-type: none"> <li>• reproduction</li> <li>• distribution</li> </ul>

Among the commonly referenced copyright limitations, the fair use doctrine is the broadest and most flexible limitation on a copyright owner's rights. Section 107 of volume 17 of the US Code provides general guidelines for permissible uses of copyrighted works and allows the courts to apply a four-factor balancing test to evaluate individual cases.<sup>69</sup> Whether a use is considered as fair under this limitation is highly case sensitive. For any potential fair use analysis, one can compare case facts with the facts in issued opinions for a prediction on whether the potential use would be considered fair. Additionally, the US Copyright Office Fair Use Index offers a list of fair use cases and is searchable by category and type of use.<sup>70</sup>

## Summary

The copyright law of each country only reaches to its borders. A US author can only obtain copyright protection for its work in a foreign nation if both the US and the foreign nation have agreed by way of a multilateral or bilateral instrument. As of June 2018, the US has entered into bilateral agreements with forty-one countries. These bilateral agreements are listed in *Treaties in Force*, which is published annually by the US Department of State.<sup>71</sup> The US is also a member of ten multilateral international treaties and conventions. These treaties do not standardize independent national laws but rather set minimum obligations for their member nations. Each country has flexibility in prescribing its own rules on copyright protection afforded and rights enforcement. The result, therefore, is varying levels of protection for copyright country-to-country, which presents great challenges to those wishing to enforce copyright in multiple different jurisdictions.

Country-specific copyright-related information can be located in resources recommended at the end of section II of this chapter. Recent developments on this topic, in general, are often available on WIPO's website. Current international copyright harmonization work is being carried out by SCCR, which is composed of all member states of WIPO and/or of the Berne Convention, certain member states of the UN, and a number of intergovernmental and non-governmental organizations.<sup>72</sup> Finally, for a deeper understanding of this topic, please refer to *International Copyright: Principles, Law, and Practice* by Goldstein and Hugenholtz.<sup>73</sup>

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# From Fair Dealing to Fair Use: How Universities Have Adapted to the Changing Copyright Landscape in Canada

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## Introduction

On Wednesday July 12, 2017, the Federal Court of Canada released the decision in *The Canadian Copyright Licensing Agency (“Access Copyright”) v. York University*<sup>1</sup> case. This case, which was an overwhelming victory for Access Copyright and a loss for York, was also a loss for all individuals advocating for stronger user rights in Canada, particularly for those working in the educational sector.

Previous to the release of that crucial court decision, Canadian educational institutions were managing copyright in an environment that had undergone “copyright reforms that were among the most user-friendly

in the world, emphasizing user rights and featuring an expansion of fair dealing, a host of new consumer exceptions, innovative new technology-focused exceptions, limitations on liability for non-commercial infringement, and notable safeguards for user privacy in internet service provider liability rules.”<sup>2</sup> Working in conjunction with a Supreme Court that had also demonstrated clear support for the rights of users in copyright law, these reforms had radically transformed the way that Canadian English-speaking educational institutions manage copyright. In the wake of the *Access Copyright v. York* case, however, the copyright law landscape has changed dramatically—especially for such educational institutions.

The first half of this chapter provides a synopsis of the major legislative, jurisprudential, and policy changes that have had an impact on higher education in Canada over the past ten years, with a focus on how these changes have transformed the way that copyright is managed in higher education. The second half focuses on the role that libraries have played in this management, as Canadian universities and colleges have frequently turned to their libraries for help with navigating—and managing—this new copyright landscape. Finally, the chapter concludes with a few thoughts about the future of copyright management in higher education in Canada as institutions determine paths forward in the aftermath of the *Access Copyright v. York* case.

## Section 1: A Brief History of Copyright and Higher Education in Canada

The fair dealing exception to Canadian Copyright law is the central concept that has defined the relationship between copyright and higher education over the past fifteen years. In Canada, fair dealing permits the copying and use of copyrighted materials without permission as long as a two-part test is passed. Fair dealing can be thought of as the Canadian equivalent of fair use, although there are significant differences between the two exceptions.

While fair dealing has been part of Canadian copyright law since 1921, it was “not considered more than a fairly long-shot defense to allegations of infringements”<sup>3</sup> before 2002. One example is the *Michelin & Cie v. CAW* decision in 1997, which held that the use of copyrighted material (in

this case the Michelin Man) in a leaflet for a union drive was infringing, rejecting the fair dealing and freedom of expression arguments advanced by the union.<sup>4</sup>

For quite some time, there was a significant disconnect between the theory of fair dealing and the practice of the doctrine, so for much of its history, Canadian fair dealing existed as an unused vestigial presence in the Copyright Act. In the absence of fair dealing in practice, the void was largely filled by copyright collective societies. Canada has at least thirty-four such collective societies.<sup>5</sup> Some, like Re:Sound<sup>6</sup> and SOCAN,<sup>7</sup> deal with the public performance rights for copyrighted musical works. Others, like Access Copyright, deal with published works. While the collectives were not, strictly speaking, statutorily created, they nevertheless operate under guidelines set out in Section 70.1 of the Copyright Act.<sup>8</sup> The collectives operate in multiple ways. They can grant transactional licenses for limited uses, but their primary dealings pertain to the granting of blanket licenses through tariffs. The latter is how most educational institutions dealt with the issue of copying on campus prior to the advent of strengthened fair dealing, with Copibec handling permissions for Quebec and Access Copyright handling permissions for the rest of Canada. The tariffs would be set by the Canadian Copyright Board calculated based on a per-student basis, and then the fee would be determined based upon an institution's full-time equivalent (FTE) student numbers. Additional per-page fees would be charged for material reproduced for printed course packs.

Canadian courts began to shift toward strong user rights starting in 2002 with the *Théberge v. Galerie d'Art du Petit Champlain*<sup>9</sup> Supreme Court decision followed by the *CCH v. Law Society of Upper Canada*<sup>10</sup> Supreme Court decision in 2013. The *Théberge* case revolved around whether transferring artwork from posters to canvas constituted copyright infringement. The court found that these relocations were not copies but rather modifications as the ink was directly lifted and transferred. The court also stated that there needs to be a balance between the rights of users and creators to benefit the public interest.<sup>11</sup>

The 2004 Supreme Court *CCH v. Law Society of Upper Canada* case is the most important fair dealing decision in Canada. It is difficult to over-emphasize the impact *CCH v. Law Society* had on the way educational

institutions in Canada use copyrighted works. That case, in which a group of publishers objected to the interlibrary loan and photocopy services offered to the members and patrons of the Great Library managed by the Law Society of Upper Canada, truly established fair dealing as a user's right in Canada. The language of the court was also important, explicitly stating that user's rights like fair dealing should be interpreted in a "large and liberal"<sup>12</sup> way—a specific phrase that has provided room for much of the subsequent growth of fair dealing—as "large and liberal" has been taken to mean that any ambiguity should be weighted in favor of user's rights.

The *CCH* case also set forth the six-factor fair dealing test which remains the basis for a fair dealing analysis today. As mentioned above, fair dealing is a two-part test. First, the dealing must fall under one of the purposes enumerated in the statute (research, private study, education, parody, satire, criticism or review, and news reporting).<sup>13</sup> If this test is met, then the following six factors can be analyzed, including

1. the purpose of the use of the copyrighted work;
2. the character of the dealing;
3. the amount of the work taken;
4. the availability of alternatives;
5. the nature of the work; and
6. the effect of the dealing on the work.<sup>14</sup>

This case set out the criteria needed for Canadian institutions to transition from a sector dependent on collective licensing for the vast majority of the copies made for educational purposes in higher education to one that could rely on fair dealing for much of the copying on campus.

Since *CCH* was a library case, it would be easy to assume that the facts in that case would translate well to the use of copyrighted materials in both libraries and in educational institutions. However, this shift was so momentous that it took educational institutions almost a decade to adopt a balanced approach to the law in their policies and procedures.

Until 2010, higher education continued to license with Access Copyright for campus copies of educational materials. During this period, Access

Copyright offered a blanket license that allowed institutions to make limited print copies of works for a variety of uses, including using copies as classroom handouts or providing copies of works to other institutions through an interlibrary loan service. The cost of the license varied over the years with the final years of the agreement costing \$3.38 per FTE student from 2007 to 2010.<sup>15</sup> This license did not cover digital copying, so institutions at this point either purchased transactional licenses for any digital copies used or disregarded copyright law and allowed faculty to provide digital copies to students without digital copying guidelines. It is important to note that fair dealing was not always totally ignored, as some institutions had fair dealing guidelines. For example, Guelph University had guidelines that allowed for one copy of under 10 percent of a work to be copied in print under fair dealing. These guidelines did not allow digital copying, as Guelph purchased individual licenses for any digital copies used for educational purposes.

The lack of coverage available under the blanket license for digital copies was a huge (and ever-growing) gap for Access Copyright's licensing efforts, and they moved to fill this gap by offering new and much more expensive licensing options to cover this new form of copying, which was quickly becoming the default format for providing course readings to students. Access Copyright had to find a way to include digital copying in their license offerings, so they submitted a tariff application in 2010 for 2011 to 2013 to the Copyright Board of Canada to cover both print and digital educational copying in higher education in Canada.

Access Copyright was familiar with the tariff process at this point, having one successful tariff approved for public elementary, middle, and high schools across all provinces in Canada except for Quebec. This tariff, which would go on to be challenged at the Supreme Court level, set a rate of \$5.16 per FTE student for the period of 2005 to 2009. According to Howard Knopf in a blog post on Monday, July 27, 2009, this amount “essentially divides the amount sought by Access Copyright and the amount proposed by the Educators of \$2.43 per FTE more or less down the middle.... With almost 4 million FTEs, and an increase of almost \$3 per FTE over the previous negotiated rate”<sup>16</sup> and retroactive payments due for the entire length of the tariff (the tariff was approved in 2009), Access Copyright was poised for a significant financial windfall from this sector.

The proposed post-secondary tariff that Access Copyright submitted to the board in 2010 was very controversial, as it upped the fee to \$45 per FTE student at the university level and \$35 for other educational institutions, including community colleges.<sup>17</sup> This represented a “more than 1300% increase over the current basic charge,”<sup>18</sup> essentially for the ability to make digital copies of works in Access Copyright’s repertoire. The cost of the tariff was just one of the many controversies surrounding the proposal, as the proposal included problematic auditing procedures and terms that could easily be seen as overreaching. For example, the definition of “copy” in the proposal included both copies made by “displaying a copy” and “posting a link or hyperlink.”<sup>19</sup> These two methods are both generally considered to be non-compensable under Canadian copyright law.

The Copyright Board is slow-moving and there was no chance the board would certify a tariff before the beginning of 2011. This was a problem as the previous copying agreements between Access Copyright and post-secondary institutions were set to expire at the end of 2010. The board, therefore, had to move quickly to certify an “interim tariff” that would cover the time between January 2011 and the certification. This interim tariff had very similar terms to the original negotiated license for the post-secondary sector. It was assumed that all post-secondary institutions would pay the interim tariff for the short term, paying the difference in cost when the final tariff was approved retroactively.

The certification of the interim tariff was unexpected and occurred directly before the holiday break on December 2010. As this was the first time the post-secondary sector had experienced the tariff process for this type of copying, a quick decision had to be made. Many institutions chose to sign the interim tariff and continue to pay fees to Access Copyright, while others chose to rely primarily on transactional licenses for making copies of course readings and to stop paying blanket fees completely. Some institutions did use fair dealing to make copies of copyrighted works for educational use, but there was no standard approach or policy being used across the higher education sector.

As the year went on and universities expanded their copyright-related educational support and services, more and more universities decided to exit the interim tariff and operate in a blanket license free environment. During this time, the educational sector, including public junior, inter-

mediate and senior schools, community colleges and universities, banded together and created a standard approach for using the fair dealing exception to “communicate and reproduce, in paper or electronic form, short excerpts from a copyright-protected work”<sup>20</sup> to students for educational purposes. This policy, which was almost universally adopted in some form by all Canadian institutions, defined a short excerpt as up to 10 percent of a copyright-protected work or one chapter from a book, whichever is greater.<sup>21</sup> These guidelines were officially released on October 9, 2012.

While these guidelines were being developed, two Canadian universities—the University of Toronto and Western University—chose to band together to sign a blanket license with Access Copyright. This license cost \$27.50 per FTE student, much lower than the \$45 that Access Copyright proposed in their tariff application but high nevertheless. This license also included similarly problematic definitions and terms to those identified in the tariff proposal.<sup>22</sup> Using this agreement as a model, the university sector then negotiated a model license with similar terms to the University of Toronto and Western agreement. Universities then had to decide either to adopt the model license with Access Copyright or to stay out of the licensing agreement and to manage copyright compliance themselves. This decision had to be made quickly while the sector was waiting on both a significant update to Canadian copyright law and the release of five major Supreme Court decisions pertaining to copyright law. In the end, about half of the public universities in Canada ended up signing the model license.<sup>23</sup>

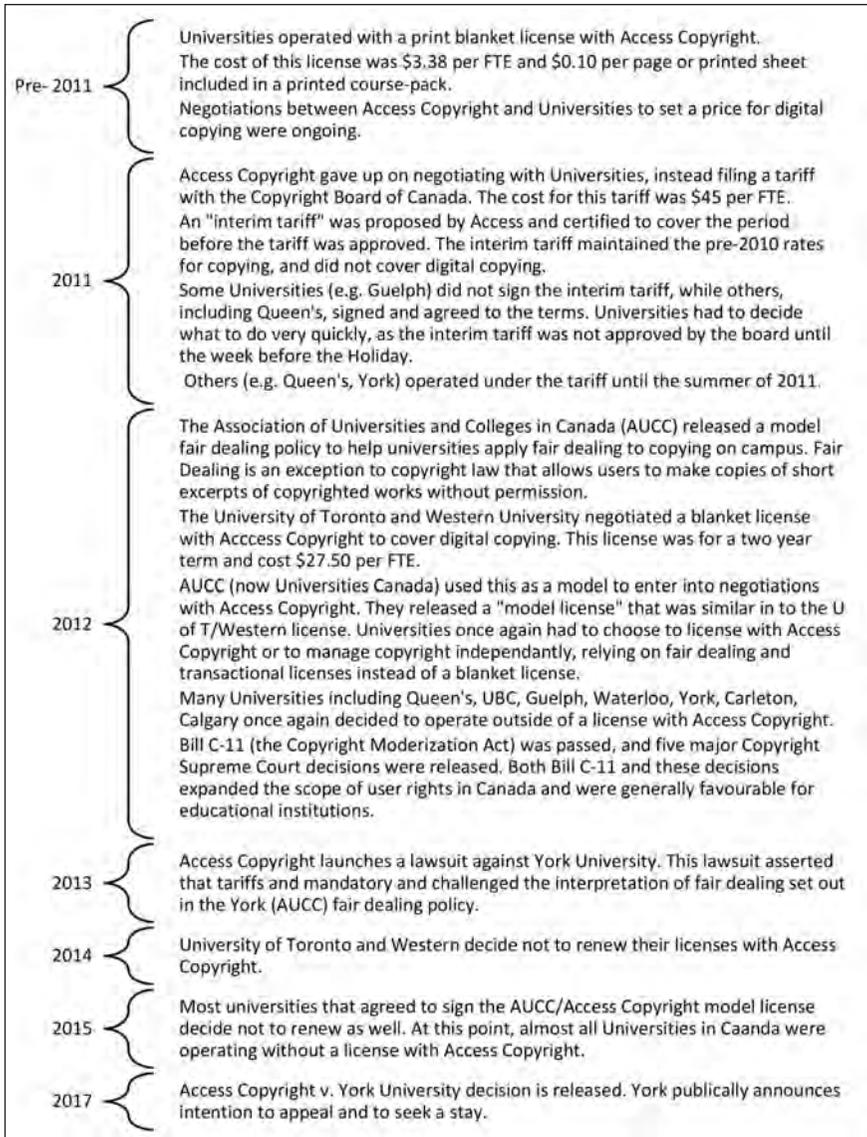
The Canadian government had been trying to update the Copyright Act for some time, with Bill C-32, the Copyright Modernization Act, having been tabled in parliament on June 6, 2010. The text of the proposed legislation included the addition of education as a fair dealing exception.<sup>24</sup> As it was, the bill died when an election was called in March of 2011. However, the minority Conservative government won a majority in May and the bill was revived early in the new parliamentary session on September 29, 2011.<sup>25</sup> It is with this context in mind that it is easy to see why Access Copyright was eager to sign up post-secondary institutions to a tariff before the proposed changes in the legislation came to pass. Conversely, it also helps to understand why post-secondary institutions were guardedly confident about wading into the heretofore uncharted territory of fair dealing.

Although institutions were confident that the *CCH* case provided adequate cover under which to move to a fair dealing model, there was still enough ambiguity in the Copyright Act fair dealing exceptions to give pause. While “research and private study” as an exception could probably be reasonably inferred to include education, there was still enough ambiguity to cause uneasiness. However, with the passage of the long-overdue Copyright Modernization Act (SC 2012, c. 20) in 2012,<sup>26</sup> there were suddenly far greater grounds for the widespread use of fair dealing. As with previous versions of the Copyright Modernization Act, the amendments to the Copyright Act explicitly included “education” as a permitted fair dealing exception. The act received Royal Assent on June 29, 2012, and, while this alone would have made 2012 a momentous year for fair dealing in higher education, just a few weeks later there was another significant landmark.

On July 12, 2012, the so-called “copyright pentalogy” was released by the Supreme Court. The pentalogy was a cluster of five major decisions pertaining to copyright that were all released on the same day. Each case had its own merits, but for fair dealing in education, there were two particularly notable decisions: *Society of Composers, Authors, and Music Publishers of Canada (SOCAN) v. Bell Canada* and *Alberta (Education) v. Access Copyright*.

SOCAN reiterated the findings and six-point test from *CCH* and re-affirmed the “large and liberal interpretation” that is to be afforded to “research” as a means of fair dealing. The main takeaway from the case was that it clarified and arguably expanded the understanding of what constitutes fair dealing and how it should be assessed.

*Alberta (Education)* dealt with the photocopying of copyrighted excerpts by teachers for distribution to their students. The lower courts found that copying works for instructional purposes were not synonymous with the “research and private study” as outlined as a fair dealing purpose the act. However, the Supreme Court found that the “teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study,”<sup>27</sup> meaning that fair dealing would apply to copying in an instructional context. The court also noted that fair dealing had to be assessed each time a copy was made, and could not be assessed as an aggregate of all copies. This issue would reappear in the *York* case in 2017.



**Figure 20.1.** Timeline of fair dealing and higher education in Canada, 2011-2017. Author: Mark Swartz

Taken together, the Copyright Modernization Act, *SOCAN*, and (*Alberta Education*) provided the impetus for institutions to move forward with confidence that they had the legal underpinnings to adopt fair dealing in a robust way. Since 2012, Canadian educational institutions have banded

together to adopt a standard approach to the use of the fair dealing exception, the most important and flexible user right in Canadian copyright law.

The outcome of these cases, along with the statutory changes brought about by the Copyright Modernization Act and the standard approach to fair dealing adopted by most institutions, created an atmosphere in Canadian higher education that favored exercising user rights instead of purchasing blanket licenses from collectives. Over the next few years, most universities and colleges exited their blanket agreements with Access Copyright at the first possible opportunity, starting with the University of Toronto and Western University in 2014 and continuing with most other Canadian public universities at the end of 2015.

On April 8, 2013, Access Copyright launched a lawsuit against York University.<sup>28</sup> This lawsuit challenged both York's approach to fair dealing and their position that the interim tariff was not mandatory and enforceable against York. This case, which was also bifurcated (or divided) on York's request on the "basis that documentary and oral discovery would be too burdensome,"<sup>29</sup> took until July 12, 2017, for a decision to be released. This decision "delivered a complete victory for the copyright collective, rejecting York University's fair dealing approach and concluding that an interim tariff is mandatory and enforceable against the university."<sup>30</sup> York is appealing the decision to the Federal Court of Appeal, so this case is far from over, as it will almost certainly eventually be appealed to the Supreme Court of Canada.

As of late 2017, Canadians sit in a time of significant uncertainty for higher education. The 2011–2013 tariff is still outstanding, meaning that after 2013, when the interim tariff expired, there were no approved tariffs for higher education in Canada. Access Copyright would go on to submit two more tariffs over the next seven years—all similar in scope but with reduced costs for educational institutions. The decisions on these tariffs are all outstanding as well, so the nation currently sits with over seven years of outstanding tariffs (and the retroactive costs that are associated with these tariffs if the York case is upheld). In addition, both the mandate of the Copyright Board and the Copyright Act will be under review over the coming year, and Copibec (the Access Copyright equivalent in Quebec) is pursuing a class-action lawsuit against Université Laval in Quebec. Combined with the York case, these disruptions are likely to impact policies and practices in higher education for years to come.

## Section 2: Role of Librarians in Copyright Education and Compliance

When the Access Copyright Interim Tariff decision was released by the Copyright Board of Canada in 2010, most Canadian universities and colleges did not have a position solely dedicated to copyright matters and/or copyright education on their respective campuses. Tony Horava's 2010 study identified only four such positions across the country.<sup>31</sup> Since then, as Patterson's 2016 qualitative study has shown, most institutions in Canada have hired at least one copyright specialist.<sup>32</sup> While some positions are located within the general counsel's office (such as at York University), many more positions are located in the library with titles such as copyright librarian. If a non-librarian was hired to look after copyright compliance strategies and education, these positions, often named the copyright officer or manager, were generally located in the library or in a separate office attached to the library.

Graham and Winter's 2017 comparative follow-up to Horava's study also found that these positions have tended to be, with some notable exceptions, created within the library and that responsibility for copyright matters had shifted from central administrative offices and resources to units within the library.<sup>33</sup> Within libraries themselves, while Horava's study found that copyright responsibility tended to be located in the portfolio of the chief or university librarian, Graham and Winter's follow-up confirmed a shift of this responsibility into specialized roles and units within libraries. While both studies found that the scope of these new positions varies according to institutional size or setup and the existence of previous expertise or services, taken together, these studies suggest that after 2010, Canadian universities have been navigating copyright in a similar manner and that this shared approach has created the need for and, in turn, been shaped by a new cohort of specialist librarians.

Lesley Ellen Harris, in her 2015 article, "Lawyer or Librarian? Who Will Answer Your Copyright Question?,"<sup>34</sup> explains that the role of library copyright specialist has grown to encompass a novel package of responsibilities encompassing a range of copyright-related legal issues, leading to "blurred lines of responsibility"<sup>35</sup> between the traditionally demarcated roles of lawyers and librarians. According to Harris, librarian responsi-

bilities have grown to range from answering copyright-related reference questions about course materials, photocopying, and scanning to including management over more complex systems and services, such as those for centralized e-reserves or digitization programs.

In many cases, copyright specialist roles may also include support for other institutional needs that are copyright-related or copyright-adjacent, such as e-resource license advising or negotiation, or the provision of advice regarding publication contracts to faculty authors. Harris places these services on the spectrum between what had been a pre-existing role for librarians, such as “frontline” ad-hoc copyright question answering as needed, to the post-Access Copyright license copyright portfolio. This portfolio includes not only ad-hoc services but also responsibility for conducting copyright education and information literacy campaigns, assisting with or overseeing the management of compliance with institutional fair dealing guidelines, policies, or advisories and playing a direct role in risk mitigation.

The notion of librarians as the primary advisors to create policies balancing user and creator rights did not emerge out of nowhere. In fact, conceiving of the library’s role in this way stems directly from the fact that a library played the starring role in *CCH Canadian Ltd v. Law Society of Upper Canada*.<sup>36</sup> Key to the findings of the court in that case was its analysis of what the court called the Great Library’s “Access Policy,” the document through which the materials in the library’s collection were photocopied and made available upon request via the library’s photocopying service (The Law Society of Upper Canada had called this document the “Access to the Law Policy”).

At the Great Library, a reference librarian was directly responsible for administering the policy and for making decisions as to whether a prospective use of the library’s collection conformed with its provisions or not. In its analysis of the six fair dealing factors that the ruling set out, the court repeatedly mentioned the key oversight role the reference librarian at the Great Library played in assuring that the restrictions on copying laid out in the policy were followed. The court also emphasized the librarian’s ability to deny particular requests if they did not follow the policy.

In her article “The Librarians’ Role in the Interpretation of Copyright Law: Acting in the Public Interest,” Victoria Owen points out how in the

unanimous *CCH* decision, the Supreme Court noted the special status that libraries and librarians hold within the Copyright Act itself, most especially in the case of section 30.2(1). This section, which states that “it is not an infringement of copyright for a library, archive, or museum or a person acting under its authority to do anything on behalf of any person that the person may do personally under section 29 or 29.1 [the fair dealing exception],” confers on the libraries a role as intermediaries at the core of the balance within the copyright system. If Canada’s copyright system is a public policy instrument meant to foster the creation and dissemination of works, then libraries and librarians are, by statutory design and by their starring role in *CCH*, instrumental actors within that public policy framework.

### *Actually Using Exceptions*

The Supreme Court’s 2004 *CCH* decision held that fair dealing was applicable in the context of copying in libraries and that its purposes should be given a large and liberal interpretation. In response, as a 2012 article by Robert Thiessen details, Canadian libraries began relying on or considering fair dealing as a factor in the delivery of services most similar to the facts in the *CCH* case, such as inter-library loan and internal document delivery.<sup>37</sup> However, the growth of the copyright librarian as a role and the concurrent increased level of comfort with the role of librarians in implementing fair dealing as a user’s right in Canadian higher education did not begin until further statutory and jurisprudential clarifications in the Canadian copyright system took place.

The six- to over ten-year lag period between what was clearly a strengthened and balanced fair dealing doctrine set forth in *CCH* and the beginning of fair dealing’s widespread institutionalization can be understood practically as well as theoretically. Emily Hudson’s forthcoming (and eagerly anticipated) monograph will contain a close examination of what internal factors contributed to the delayed response by Canadian institutions to the strong signal sent by the Supreme Court in *CCH* that fair dealing was, among other things, “always available.”<sup>38</sup>

Lisa Di Valentino’s dissertation, “Laying the Foundation for Copyright Policy and Practice in Canadian Universities,” argues that a shift in the

way institutions considered the value of copyright had to occur before a more intentionally balanced approach could be implemented. Di Valentino defines this shift as a move away from the economic weighing of risk and markets toward a more purposive approach, which would consider these factors alongside others, such as the broad benefits of the encouragement of the “maximal use of copyrighted works in teaching, learning and research.”<sup>39</sup>

Another lens through which to answer this question is to consider copyright and intellectual property law as parts of a broader “scholarly information infrastructure”<sup>40</sup> and to view the post-*CCH* inertia on the part of Canadian universities as a facet of a larger and slower process of change. To expect a sudden shift into the widespread application of balanced fair dealing would be unrealistic given that there were other factors aside from copyright law itself that could shape or affect what was possible. This “infrastructure,” in Christine Borgmann’s sense, is not just the brick and mortar of classrooms or the fiber optic lines of the internet connecting them, but the laws, business models, general industry-wide practices, shared definitions, and values that govern and are governed by what occurs in these spaces. As Borgmann writes, the internet had quickly become the “channel of first resort for a growing array of activities”<sup>41</sup> in higher education, including the provision of access to bundles of licensed content for teaching and research. The legal issues implicated in such a large transformation in infrastructure are complex and consequential. Faced with such large changes, a single Canadian institution might be hesitant to take a more balanced approach to copyright on its own. Without a communally developed understanding of the implications of the Supreme Court’s copyright decisions, one institution’s decision to apply fair dealing in new areas might seem too risky.

Another factor in the higher education reconsideration of collective licensing and the adoption of a fair dealing approach was the increasing perception that a collective license was no longer quite as necessary as it once had been. At great expense, academic libraries have responded to the demand for electronic access to scholarly and educational resources by buying and licensing with greater frequency. For example, University of Toronto in the mid-2000s made the decision to start acquiring an electronic copy of a book, if one was available, as they had conducted a study that it better served their community.<sup>42</sup> The value of collective licensing

is challenged by the acquisition of digital licenses that allow for material to be used in teaching and for research either by using library licenses or licenses that include copyright exceptions in their language.

Libraries, and by extension the university and college communities that use them, are now part of a marketplace in which a growing portion of material is made available for direct purchase by libraries in digital format. By 2010, libraries were already enabling the “copying” and sharing of licensed electronic information on campuses, activities allowed by licenses signed directly with publishers and their representatives, bypassing the need for collective licensing for a substantial portion of scholarly material being used in the higher education community, precluding often even the need to apply fair dealing. For example, in 2010–2011, while print collection acquisitions remained flat in the Canadian Association of Research Libraries (CARL) members, the number of e-books acquired rose 21 percent and the acquisition spending on e-serials rose 30 percent.<sup>43</sup> This library collection development activity often overlapped significantly with works that a copyright collective might claim as part of its repertoire. A continuing trend in the rise of electronic resource use among users is also noted in more recent CARL statistical reports, and this use is being measured.<sup>44</sup>

Many Canadian academic libraries have worked hard to add a layer of transparency and discoverability to the license terms of their electronic resources so that students, faculty, and instructors can increasingly understand how a resource can be used in various institutional contexts. This was greatly aided by the development of an open source tool called Mondo License Grinder database by the University of British Columbia launched in 2010.<sup>45</sup> This tool can make discoverable the licensing terms of a resource at the database, collection, journal, and record level. It is especially useful as it gives clear information on how material can be used as it has a detailed License Terms of Use table. For example, it gives information describing if a resource can be used in a course management system (CMS), in e-reserves, in a course pack, as a link, or via interlibrary loan (ILL). It has been widely adopted in Ontario in the university sector as the OUR-OCUL Usage Rights Database.<sup>46</sup> One discovery that came from the process of populating the database was that the vast majority of electronic licenses academic libraries acquire allow licensees to provide direct persistent links to the licensed resource, precluding the need

for copyright collective licensing for the use of the resource in teaching or even the need for a fair dealing interpretation. Usage rights databases and discoverability tools making usage rights transparent are not as widespread as they could be throughout Canada. Graham and Winter found that one-third of the respondents to a survey felt that they did not have a good grasp of the licensing terms of their resources when they were conducting permissions analyses for course readings.<sup>47,48</sup> In terms of protecting copyright exceptions within library licenses, higher education consortial licensing organizations, such as the Canadian Research Knowledge Network and Ontario Consortium and University Libraries, have both adopted model licenses asking vendors to agree to recognize Canada's Copyright Act and its fair dealing exceptions.<sup>49</sup> Lisa Di Valentino even questions whether contracts like library licenses themselves have the power to constrain statutory rights like fair dealing.<sup>50</sup>

Copyright librarians are uniquely positioned to understand that the maximization of library licenses is one way to reduce the amount of material that could be seen as compensable to Access Copyright. One of the major developments across Canada directly influenced by the uncertain copyright landscape was the increasing reliance at many academic libraries on the use of an e-reserve service that provided copyright checking and permission services for the institution. E-reserve services leverage the use of library-purchased electronic resources by providing students with direct links to these materials and providing direct links to material freely available on the internet. By engaging in e-reserve services, libraries make most required readings available to students without even relying on fair dealing. Fair dealing is also applied to readings that qualify, however, and when licenses are required to post material they are obtained. A study of compiled e-reserve readings processed across three institutions from September 2013 to April 2014 found on average that 76.3 percent of the readings available to students were made up of library-licensed works, freely available internet material, open access works, public domain materials, and faculty and government documents.<sup>51</sup> The copyright survey of various institutions undertaken by Graham and Winters in 2015 reported that 58.3 percent of the readings made available in e-reserves were made available through library licenses.<sup>52</sup>

E-reserves is just one of the safeguards institutions use to manage copyright risk. Other safeguards include focused copyright education, such as

mandatory copyright education for new hires. Some institutions may even decide to renew a license with Access Copyright while waiting for the appeal process to be completed for the *York v. Access Copyright* case. Perhaps even further copyright reform is desirable. For example, the adoption of the fair use doctrine instead of fair dealing in Israel's new Copyright Act in 2007 has proved so far to be an effective way to support user's rights for education in that country.<sup>53</sup> In 2017–2018, the Copyright Act in Canada is undergoing a review, but it is unlikely that further liberalization of the Act will occur at this time, and there is strong opposition from publishing and creator industries against some of the 2012 modernizations.

As the appeal process in the *York v. Access Copyright* case is just beginning at the lower level of the Federal Court of Appeal—with a further appeal to the Supreme Court of Canada almost inevitable—there are still a number of years left before final clarity is achieved. While it is foolhardy to bank on any definitive outcome from the courts, Michael Geist, for one, feels that the analysis in the *York v. Access Copyright* decision is flawed:

The case is likely to be appealed as the trial judge's analysis of fair dealing is inconsistent with Supreme Court of Canada jurisprudence. The Supreme Court's emphasis on copyright balance, user's rights, and a large and liberal interpretation to fair dealing, are largely missing from the ruling. In its place, the trial judge injects claims of boosting enrolment as York's purpose of copying, cites aggregate copying for the amount of the dealing, and relies on "likely" impact for the effect of the copying on the work. None of these positions reflect Canadian copyright law as articulated in the leading decisions.<sup>54</sup>

In the meantime, the advances in fair dealing from the previous decade-and-a-half are, in most cases, still being utilized pending the outcome of the appeal process and the 2017–2018 review of the Copyright Act. That fair dealing has been entrenched in higher educational library practices is undeniable, and at this point, the remaining question is what the final contours will look like. Copyright librarians and library associations are continuing to take an active role in educating, lobbying, implementing change, and ensuring that the legacy of fair dealing will continue in Canadian academic institutions for years to come.

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# Interlibrary Loan and Copyright in Italy: A Case Study of the Bocconi University Library

*Anna Vaglio*

## Introduction

This chapter explains how an Italian university library—Bocconi Library, Milan, Italy—has complied with copyright rules despite an unstable legal environment. First, before analyzing the difficulties and solutions surrounding copyright issues, the cultural context in which Bocconi University was founded and some figures about the Library are described. Then the main characteristics of the Italian copyright framework and its impact on library activities are examined.

The framework of Italian copyright law changed many times from the creation of the Italian Kingdom in 1860 to the creation of the Italian Republic at the end of the Second World War until today, where Italian copyright fits within the European Union's copyright laws. While the titles of the law changed greatly during this time, the main idea of the law remained the same: to protect the author's exclusive right to his creative work. The users—both individual users and libraries—have limited rights within this framework and seek exceptions to these broad rights granted to authors. The rights to the digital renditions of the work are

even more strongly protected. The more the technology disintermediates the user, the more Italian law controls the entire workflow.

It is within this difficult framework that the Bocconi Library developed its services from Interlibrary Loan to Electronic Course Reserves. This chapter describes how the Bocconi Library complied with these various legal changes and acted on behalf of its library patrons and users—without working adversely to any strategic partner—while engaging in conversations with publishers and authors.

## The History of the Bocconi University Library

In 1902, a Milanese entrepreneur named Ferdinando Bocconi founded the Commercial University Luigi Bocconi. Members of the Milanese elite, the Chamber of Commerce, and local bankers were among the founders and the managers of the new university. Sixty-one students were enrolled. The London School of Economics, the Schools of Commerce in Leipzig and Geneva, and Oxford University joined in celebrating the opening.

Bocconi University established its library in 1903. Many private donors and associations contributed to building the Bocconi Library collections. The library provides its patrons with access to its digital collections (both new, including about 27,000 e-journals, 11,000 e-books, and eighty-seven databases, and old, including the *Giornale degli economisti*—the historical Bocconi journal—now in Jstor) and to articles and books, digital or printed, with remote access to some materials. The holdings include 860,000 printed books, which are the result of 100 years of economic and law studies with an international perspective. Seventy thousand of these books are accessible on the open shelves. There are about 90,000 loans per year, with more than 450,000 articles downloaded in 2016. There are about 2,000 interlibrary loan (ILL) borrowing requests and 600 ILL lending transactions per year. Additionally, the Bocconi Library is open ninety hours spread throughout seven days a week and has fifty-seven group study rooms, with a total of about 690 seats and 2,000 visitors every day.

The mission of the library sits between the university motto, “*Fervet opus*,” which roughly translates to the expression “while the iron is hot” and reflects the culture of the Milanese business environment of the early twentieth century, and the Bocconi School of management motto, “Empowering talent,” which expresses the vision of academic education today.

## Copyright in Italy

Italian copyright law has its roots in a long and complex history of countries that merged their governing systems: in 1861, seven countries joined in the Italian new state and in the 1990s, Italy joined other European countries (which today consists of twenty-eight different countries) to compose the European Union.

In 1861, “the fusion of seven states into a single sovereign entity and the establishment of independence from foreign domination and influence”<sup>1</sup> started a long process of legislative harmonization. “Almost two millennia of disunion had produced deeply rooted cultural and institutional differences across the Peninsula.”<sup>2</sup> A large part of the population of the new country was illiterate. The publishing world was lively but the context was difficult, with many obstacles to overcome.

At the beginning of the twentieth century, Italy was considered to be one of the most industrialized countries in Europe, despite the economic divide between the North and the South and between the countryside and the towns. In the North, industry investments in the publishing sector quickened the region’s development. The circulation of books and journals increased considerably, while compulsory school attendance created a better-educated public.

In the meantime, on the international stage, the Berne Convention tried to harmonize different legislative traditions and Italy acceded to the Berne Convention in 1887, together with many other European nations.<sup>3</sup> A new copyright law was much needed by Italian authors and publishers to put an end to many contradictory rules and because piracy and plagiarism were still widespread. New media (cinema and radio) needed regulations, too. The new law passed in 1925, the same year of the formalization of the Mussolini dictatorship. Unfortunately, the aim of the law

not only renewed the general framework of intellectual property but also took control of cultural life in Italy. The second law on copyright, passed during the Second World War in 1941, suffered from this same political climate.

However, since then, the copyright law has been revised many times over the years to comply with international treaties and, since 1991, with the European Directives that bind member countries to introduce complying rules in their laws. But even this second process of harmonization is long and particularly difficult regarding copyright. For example, as M. Ricolfi writes, “The effort of creating an internal single market for copyright produced additional layers of fragmentation”<sup>4</sup> in the rules.

Italian law is based on the concept of author. Even the name of the law (“Author’s Right”) expresses this concept. The author has the exclusive right to exploit his work and to be acknowledged as the creator of it. Therefore, he holds two different categories of rights: the economic and the moral (natural).

Libraries are an exception to these author’s rights. The law allows libraries to do a few activities without asking any authorization of the authors, but they have to refund them. More precisely, libraries can make analog copies of the books and journals they hold for *their services* without any commercial aim. The readers, on the other hand, are allowed to copy up to 15 percent of a copyrighted work held by the library for personal use only and by a means “not fit for circulating” copies to the public.<sup>5</sup> The library refunds the rightsholders every year through the Italian Society for authors and publishers (SIAE) on the basis of the number of students enrolled.

There are three main characteristics of Italian copyright law library provisions: the author as the creator, the readers, and the libraries as users of the work. The role of libraries is to make books and journals available to the users and to pay for their copying. No other relationship between readers and libraries is provided. Both libraries and library patrons can copy for themselves, with some limits. For the users, the limit is quantitative, while for the libraries, the limit is about dissemination—about who gets access to that copied work. For both, no commercial use is permitted with such copying and no additional parties are permitted to be involved.

Since the digital revolution has multiplied the possibilities to reproduce and to distribute texts to third parties (through the web, email, and social networks), complying with the law has become even more difficult. The legislative framework is old, the rules are stratified, and even the academic community is affected by the same “irrelevance of copyright” that G. Frosio sees “in the public mind.”<sup>6</sup> Despite these challenges, the Bocconi Library has had to offer advanced services to its users. The Bocconi community and the academic community in general do not accept limitations on their research needs. Additionally, the digital nature of the texts (granularity, flexibility) and the changing nature of the communication habits of the academic community have encouraged new approaches to library lending. The following section details the experience of the Bocconi Library with the copyright challenges of the digital age.

## Copyright at the Bocconi Library

Library services connect collections and users, providing information and numerical facts and delivering documents. Copyright impacts all of these areas.

From its foundation in 1903 until the 1980s, the users and librarians of the Bocconi Library followed exactly what Law 633/1941 article 68 established. Photocopiers did not appear to change the landscape much. The library placed a notice on every photocopier to advise users about the limit of what they could copy according to the law. Occasionally, articles not held by the library were requested on the users’ behalf from the British Library Document Supply Centre. Interlibrary loan was not a formally structured service with professional staff and a dedicated budget but only one activity among many.

In the 1990s, however, Italian libraries changed substantially. E-journals and databases penetrated the Italian academic library environment and modified the structure of collections and services. Like everywhere else, collections became complex systems of documents available in different formats with heterogeneous access rules: on one side, publishers’ licenses governed the access to the digital collections, but on the other side, traditional loan rules managed access to the print collections. The users began to search themselves for information and documents on the web,

but at the same time, they asked the libraries for efficient and timely services. Services planning and designing became a strategic point in Italian library policies.

Bocconi Library started a process of re-engineering access services and, in 1992, made interlibrary loan and document delivery services available to its users, which forced the library staff to confront some problems. First, interlibrary loan was bound to old rules: paper request forms, paper-only document delivery, non-standard ways of payment, and international ILL was only permitted through the National Library in Rome. Additionally, Italian OPACs were still too few so that ILL transactions were difficult and often unsuccessful. Turnaround time did not satisfy user's needs. At the end of 1992, about 200 books and paper articles were sent by Bocconi to other libraries and about 500 items were received. The library continued to enlarge our network by contacting academic libraries in Europe and the United States following IFLA guidelines for ILL.

A few years later, in 1997, the broad and rich collections of many Italian libraries were made available through the national OPAC.<sup>7</sup> Rapidly, Italian libraries developed new ILL services at a national and international level. They exchanged books, articles, and chapters from their paper and digital collections, through the post, or by fax. Document delivery in Italy rapidly became a structured service and could face the increasing numbers of user requests. At the same time, increased ILL activity compensated for the reduction of journal subscriptions due to the heavy growth of the cost of periodicals. But could document delivery be deemed an *internal* service, according to Article 68, Paragraph 3 of the Italian Law 633/1941?

Document delivery, in the strict and true sense of the phrase, involves two main issues: copying/scanning of materials and sending/delivering those materials to the library patrons. In fact, document delivery is the way the library manages its role of intermediary between the collections and the user. That is why *sending* is still the critical issue, more than *copying*. As a matter of fact, according to the Italian law, sending out materials is an author's right. No right of distribution can be extended to libraries and their users. The document delivery service got through using the Berne Convention's three-step test encouraging the countries who joined the Convention to "permit the reproduction...in certain special cases, provided that such reproduction does not conflict with a normal exploitation

of the work and does not unreasonably prejudice the legitimate interests of the author.”<sup>8</sup> The Berne test must be applied to exceptions to copyright protections to determine whether they are compatible with the Berne Convention. If the exception survives the three-step test, then it may stand. If not, it is incompatible with the terms of the Berne Convention. The document delivery standard procedure at Bocconi Library satisfies this test because the document is only delivered to another library when a library patron can demonstrate that the patron needs the article for research or academic study. If the requesting library does not subscribe to the journal and the library patron requests a particular journal article for research purposes, the Berne three-step test is satisfied because the delivery of the document to the library patron does not conflict with the publisher’s economic rights or the author’s moral rights because both libraries protect the integrity of the text and bibliographic data of the article.

Concurrently, the Bocconi Library tried to find other legal references outside of the strict limits of Law 633/1941 to justify ILL practices. For example, following the idea that the author’s right is a natural right and because of this it can be limited when it conflicts with other rights, the library can refer to society’s right to culture and to information, which is part of the Italian Constitution to justify ILL practices.<sup>9</sup> Even today, librarians refer to this article to obtain accessible books for people with print disabilities (as Italy has not signed the Marrakesh Treaty).<sup>10</sup> Library cooperation—for instance, at the beginning of the 1990s the Bocconi Library became a member of the European Business Schools Libraries Group (EBSLG) and subscribed to OCLC as net borrowers—filled any other legislative gaps, too.

In 1996, the Bocconi Library eventually left its previous tangle of domestic software and adopted an integrated information system, Aleph (Ex Libris). The Aleph ILL module gave the library the ability to better manage requests (borrowing and lending ILL requests doubled) and to start an internal document delivery service only for the faculty called InterCampus delivery. Through InterCampus delivery, professors could ask the library for a digital copy of an article from the paper collection of journals and receive it by mail within twenty-four hours. From the copyright point of view, the library digitized its paper collection exactly as the law permitted (no more than 15 percent of the issue or book). The file was sent in TIFF format (Ariel software) to the faculty member along with a notice about the correct use of the file together with a correct citation of

the item. Today, because of the scientific value of the paper journals collection, InterCampus delivery is still requested by the academic Bocconi community (about 400 transactions per year).

In the 2000s, Law 633/1941 and the author as a fundamental copyright player became more and more distant in Italy. Libraries continued to comply with the author's moral rights by providing standard bibliographic descriptions to guarantee authorship and the integrity of the original text. On the other hand, another powerful copyright player became more visible: the publishers. Was document delivery activity in conflict with the publisher's economic rights? Did exchanging articles from recent issues of academic journals compete with the publisher's rights to sell them over the internet as independent digital objects? Publishers and aggregator licenses solved the matter. Happily, an increasing number of publishers allowed document delivery in their licensing with Italian libraries. Licenses permitted Italian libraries to explicitly do what the copyright law failed to clarify. That is a primary reason why transactions between libraries increased more and more and the Bocconi Library enlarged its network of Italian libraries. In 2002, the Bocconi Library sent about 850 books and articles to other libraries and in return asked for 1,450 items from other libraries and commercial suppliers, such as the British Library Document Supply Center.

Meanwhile, "Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society" gave the library other points to consider. The Directive preamble declares that its aim is to "seek to promote learning and culture by protecting works and other subject matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching."<sup>11</sup> On one hand, the Directive considers copyright protection a fundamental tool for developing innovation in the EU because it "stimulates the development and marketing of new products."<sup>12</sup> On the other hand, the "public interest" is considered because copyright exceptions are provided. The Directive "on the harmonization of certain aspects of copyright and related rights in the information society" is not concerned about the moral rights of authors and, consequently, defines only the economic impact of piracy and counterfeit works.<sup>13</sup> Nevertheless, the Directive encouraged EU member countries to adopt exceptions for education, research, teaching, for people with disabilities, for libraries and archives,<sup>14</sup> and to reassess them "in the

light of the new electronic environment.”<sup>15</sup> As such, the Directive offered the library a possible framework for new ILL services.

In 2005, the Bocconi Library left Aleph and transferred its management system for ILL to Millennium (Innovative). The new system gave the library the opportunity to revise and modify some workflows in the circulation services (domestic and interlibrary loan) and to introduce new parameters and new circulation rules. The integration of ILL in the circulation workflows bettered its performance and gave library staff a comprehensive view of the circulation activity of Bocconi Library users. Two years later, another module of Millennium, the Electronic Course Reserves (ECR), was implemented at Bocconi Library. At first, the ECR was only inserted into texts from the library’s digital resources, such as databases and e-journals. But soon enough, articles and chapters from the library’s paper collection and from the collections of other libraries were added to the system. Document delivery staff were involved in scanning the relevant documents and clearing the necessary legal rights, making them available online. Once more, the library was searching for the appropriate legal standard in which to frame these activities. The new Article 16 of the law on “Protection for the Author’s Right and Connected Rights” (1941, April 22, n.633) confirmed that the right to make a text available to the public and the right to control when and where the public is able to access the work belongs to the author only, without exception. The Directive 2001/29/EC, on the other hand, introduced an exception allowing copying for teaching purposes; so, the library decided to ask for permissions and authorizations from the rightsholders nonetheless.<sup>16</sup>

The library was easily able to obtain permissions from foreign publishers, from authors (when they held the copyright), and from the Copyright Clearance Center. Compliance, however, became a very hard task: it was very time-consuming and, at times, it was excessively expensive. The most revealing example of this kind of excessive expense is the library’s double payment to Harvard Business School for the articles from *Harvard Business Review*. The first time the library paid the Harvard Business School was to add the *Review* as part of the library database; the second payment was to be able to use the same works in the Electronic Course Reserve (ECR) system. In the end, the library met its goal to provide a copyright compliant, innovative service—at least innovative to Italy in the middle of the year 2000. At that time, 14 percent of the Undergraduate Course adopted ECR. The current percentage has risen to 20 percent.

The rise in ECR caused some concern among Italian academic publishers. They were very worried about losing control of the use of the articles and chapters downloaded by students and about a possible drop in sales. Fortunately, the library had the opportunity to explain to publishers that ECRs could activate a positive “marketing mechanism”<sup>17</sup> and would not harm the market. In 2009, librarians from the Bocconi University Library presented the ECR service together with the Bocconi University Publisher, EGEA, at a contest held by the National Conference of Italian Universities Rectors (CRUI), the SIAE, The Italian Association of Publishers, and the main Italian Guilds of Authors. For the contest, library staff wrote a white paper about ECR addressed to other Italian universities and a “Policy on Copyright” to be published on the library website with an institutional logo titled “Copying is not a right.” A group of students also prepared a video about “Author’s Rights.” This project was among the winners of the competition, and library staff were requested to present it at the Conference “USEIT: Knowledge, Creativity and Fair Uses in Higher Education,” held in 2011 at John Cabot University in Rome.

There is still much work to be done to clarify the legal status of ECRs in Italy. The national legal framework remains uncertain and unresolved, but the library’s development of a white paper is a positive first step in an ongoing dialogue with Italian publishers.

## Copyright Ambassadors?

The library continues to improve ECR services, which began the library’s commitment to copyright rules and ethics inside the library. For instance, in 2013, The Bocconi Business School asked the library to insert all of their MBA courses in ECR. Many librarians were involved in this new and demanding task. The librarians in charge of copyright—a digital reference librarian and an acquisitions librarian—took copyright review so seriously that one of the faculty members asked which software the library had acquired to detect copyright infringement. Of course, no such software was in use; it was simply the result of well-meaning librarians wishing to comply with the law.

Similarly, in 2015, Bocconi University’s internal auditor asked the library to cooperate in the process of complying with the Law n. 231/2001 the

Responsabilità amministrativa da reato,<sup>18</sup> a law about the liability of institutions for the crimes committed by its employees in their institutional activities. The library was also asked to develop policies to address copyright concerns with teaching materials. As a result of this review, the library developed new guidelines for the faculty about copyright and teaching materials, which were published on the university website.

Finally, the chart below synthesizes the evolution of ILL and ECR services in the Bocconi University Library. You can read it as a diachronic narrative (what happened from the 1980s to now) but also as a synchronic one (which legal tools you refer to in an Italian library, even now).

	1980s	1990s	2000s	2010s
<b>Which services (about copying and delivering)</b>	DD net borrower	ILL, DD print then Ariel (borrower and supplier), ICD	ILL, EDD (paper copy to the end user), ICD, ECR (PDF)	ILL, EDD to the end user by email, ICD, ECR (PDF)
<b>Copyright players</b>	Individual user/libraries		Individual and collective users, libraries, publishers, collective societies for rights clearing	
<b>Collection characteristics</b>	Print	Print/electronic databases	Printed books/e-journals	Print/digital
<b>Affiliations, cooperation networks, projects</b>	ACNP, IFLA, AIB	EBSLG	CRUI context	231, involvement of the business school, participation to OCLC Worldcat
<b>Library Management System</b>	Domestic software	Aleph	Millennium	Sierra
<b>Legislative framework</b>	633/1941	European directives		
<b>Other rules to comply with or to balance</b>	Berne Convention, art 9.2 Italian Constitution	WIPO Copyright Treaty	European chart of rights, contracts, licenses	

Legend:

ACNP: Archivio nazionale centrale periodici (National Archive of periodicals), (<https://acnpsearch.unibo.it/>)

AIB: Associazione Italiana Biblioteche, Italian Libraries Association ([www.aib.it](http://www.aib.it))

EBSLG: European Business School Libraries Group (<http://www.ebslg.org/>)

Would Bocconi University Library have offered more innovative services to its users under Section 108 of United States Copyright Act instead of the Italian Copyright Law 633/1941? Perhaps everything would have been easier if the process described throughout this chapter had the library been located in the United States.

In the future, the Bocconi University Library will perhaps find more fields to explore, including the digitization of older portions of the library collection or the adoption of more e-learning platforms and services. The challenges facing the library would certainly be less complicated had the library been located in the United States. Perhaps Rita Matulyonite is right and the EU has something to learn from the United States regarding copyright and ILL. Regardless, the Bocconi University Library will continue to push for positive change in copyright policies to benefit its patrons and the broader academic community.

## Endnotes

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2. Toniolo, "An Overview of Italy's Economic Growth," at 6.
3. Berne Convention for the Protection of Literary and Artistic Works, Paris Act, July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention].
4. Marco Ricolfi, "Towards a EU Copyright Code? A Conceptual Framework," *Bocconi Legal Papers* (Milano: Università Bocconi, 2015), 3.
5. "Protection for the author's right and related rights" (1941, April 22nd, n. 633) Art. 68, c. 1.
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17. Rita Matulionyte, "10 Years for Google Books and Europeana: Copyright Law Lessons that the EU Could Learn from the USA," *International Journal of Law and Information Technology* 2016, 24, 44–71.
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# Author Biographies

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**Mélanie Brunet** is the copyright services librarian at the University of Ottawa, where her main responsibility is copyright education and outreach. Before returning to the higher education sector, she was a librarian in the federal public service, first at Library and Archives Canada and then at the International Development Research Centre. Prior to a career in librarianship, Mélanie taught Canadian and gender history at the University of Toronto and the Université de Saint-Boniface. She holds a PhD in history and a masters of information from the University of Toronto.

**Kyle K. Courtney** is copyright advisor and program manager for Harvard University, working out of the Harvard Library Office for Scholarly Communication. He works closely with Harvard Library to establish a culture of shared understanding of copyright issues among Harvard staff, faculty, and students. His work at Harvard also includes a role as the copyright and information policy advisor for HarvardX. His “Copyright First Responders” initiative was profiled in *Library Journal* in 2013, and he was named a National Academic Library Mover & Shaker in 2015. In 2014, he co-founded Fair Use Week, now an international celebration sponsored annually by over 100 universities, libraries, and other institutions.

**Krista Cox** is the director of public policy initiatives at ARL. In this role, she advocates for the policy priorities of the association and executes strategies to implement these priorities. She monitors legislative trends

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**Kenneth D. Crews:** is an attorney and international copyright consultant, with the firm of Gipson Hoffman & Pancione in Los Angeles, California. He has been a professor of law, business, and library and information science. Dr. Crews established the nation's first copyright office at Indiana University, and he later created a similar office at Columbia University. He has published extensively on copyright issues, and his clients include universities, libraries, museums, publishers, and other organizations in the U.S. and abroad.

**Lily Dubach** is the UCF connect librarian for the Valencia College West location of the University of Central Florida (UCF) Libraries. Prior to this position, she was the scholarly communication adjunct librarian as well as the textbook affordability and open educational resource adjunct librarian. Since 2014, she also served in other departments of the UCF Libraries such as Acquisitions & Collection Services, Research & Information Services, and Cataloging Services.

After graduating from Florida State University (FSU) in May 2017 with a master of science in information, Lily was invited to speak at FSU to discuss her experience as FSU's first research data management virtual intern. With colleagues in November 2017, she presented "Open Humanities: Strategies for Creating Open Access Course Materials in the Humanities" at the Humanities, Arts, Science, and Technology Alliance and Collaboratory Annual Conference.

**Allison Nowicki Estell** is the head librarian for access and organization at Wentworth Institute of Technology's Douglas D. Schumann Library & Learning Commons, where she oversees staff in the areas of circulation, collection maintenance, reserves, interlibrary loan, cataloging, acquisitions, and e-resource management. Previously, she worked at Simmons College, first as the library assistant for research services, and later in the position of learning commons librarian, during which time she earned her MS from Simmons College School of Library and Information

Science. Before entering the field of librarianship, Allison earned graduate degrees in law (JD, Duke University School of Law) and musicology (MPhil, Yale University), and an undergraduate degree from Middlebury College. Areas of professional interest include copyright literacy, accessibility, and lifelong learning.

**Roger Gillis** is the copyright and digital humanities librarian at Dalhousie University Libraries and a lecturer at the School of Information Management at Dalhousie, where he teaches digital collections. His expertise spans a wide variety of areas including copyright, archives, digital humanities, information literacy, scholarly communication, institutional repositories, and library-based publishing initiatives.

**Cody Hennesy** is the e-learning and information studies librarian at UC Berkeley, where he works on issues of digital literacy related to research and discovery. Cody was previously the systems and services librarian at California College of the Arts in Oakland and he has an MLIS from San Jose State University.

**Pia M. Hunter** is a law librarian and teaching assistant professor at the University of Illinois College of Law. Her research interests include online education and copyright and fair use for instruction. She holds a juris doctor and master of science in library and information science from the University of Illinois at Urbana Champaign.

**Shannon Kipphut-Smith** is scholarly communications liaison at Rice University's Fondren Library. She manages Rice's faculty open access policy and collaborates with groups across campus to address a number of diverse scholarly communications issues, including copyright and author rights, new publishing models, and increasing the visibility of research.

**Alexandra Kohn** is the head, Office of Copyright Compliance at McGill University, where she advises the library and campus at large on copyright best practices. Copyright has been a constant theme throughout her career in libraries in open access, scholarly communications, and copyright advisory roles in Italy, the UK, and Canada.

**Melanie T. Kowalski** is the copyright and scholarly communications librarian at Emory University. Working in the Emory Libraries' Scholarly Communications Office, Melanie consults with faculty, graduate students,

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