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Copyright and Fair Use: Protecting and Sharing Your Work and Classroom

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Protecting Your IP: Copyright is YOURS

Faculty Handbook (p. 169-170)

IV GUIDELINES FOR FACULTY ACTIVITIES

2) Ownership of Copyrights will vest with the faculty in all other cases.

Protecting Your Copyright

- In order to be protected by a copyright
 - “**original**” --has not been previously copyright protected.
 - “**fixed**” --Pen to paper; musical notes to sheet; material to digital file, etc.
 - “On the web” raises rights issues (TOS/EULA)
 - In general, contract law trumps IP law

Protecting Your Copyright: Three Levels of Protection

- Level One: You put the work to form.
- Level Two: You use proper symbolization.
- Level Three: You register the work (and display the proper symbolization).

Protecting Your Copyright

Level One: You put the work to form

Once “fixed”: “THIS IS MINE AND YOU ARE INFRINGING” !

You cannot get into court with this.

Protecting Your Copyright

Level Two: You use proper symbolization/notification.

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Maybe you can get an injunction ... maybe not.

But now the accused is willfully informed.

Protecting Your Copyright

Level Three: You register the work
(and have displayed the symbolization)

<http://copyright.gov/>

If online, \$35.00 per item.

After registration takes effect, you can **SUE** infringers for an **injunction AND damages AND fees.**

BUT... only for infringements that happen **AFTER** your registration.

Who owns/controls the copyright?

- The author (you).
- Multiple authors of “the whole” or of “parts”
 - Get a contract!
- Others: Authors may assign rights.

Who owns/controls the copyright?

Employers (might)

- Work output may be assigned to the employer as part of the contractual terms of employment.
 - BU negates this by specifying faculty rights.
- Work for hire? Special project and pay, by contract. Rights to employer, unless specified in the contract.
- Grant-supported/externally funded work. Rights to the funding agency, unless specified in the contract.

A wide range of rights are protected

1. **Reproduction Right:** all copying
2. **Modification Right:** the derivative works right to modify the work to create a new work.
 - a. The derivative right is **HOTLY** contested
 - b. Courts have often recognized transformative fair use that compromises/trumps derivative rights.
4. **Distribution Right:** sale, rental, lease, or lend.
5. **Public Performance Right**
6. **Public Display Right**

Duration

- Life of the author plus 70 years.
- Corporate or “works for hire”: 95 years from “publication” or 120 years from creation, whichever expires first.
- No registration renewal in the US now
 - There used to be
- Is it in the public domain? (copyright expiration)

<http://copyright.cornell.edu/resources/publicdomain.cfm>

Exceptions

- Ideas
- Federal (and some state) materials.
 - Subcontractors might retain rights over portions of their work.
- Facts cannot be copyrighted--unique ways they are arrayed can be.
- Independent/Same-time creation.
- Timely registration is key and can trump independent creation.

More Exceptions

- First Sale Doctrine (before digital and about non-digital material):
 - once I buy it, I can rent it, display it, resell it.
 - First sale is largely overturned in digital content and by the *DMCA* and by TOS and EULAs.
- Copying for broadcast/transmission.
- Fair Use (we shall return to Fair Use)

More Exceptions

Want to “share”? Believe in open publishing? Want to participate in the “cut and paste” culture.

Creative Commons enables the rights owner to indicate **which** uses are allowed and **with what** (if any) required remunerations/considerations/notifications.

Copyrights (and laws) stay in place: You just make a contractual indication of exceptions.

There are a wide variety of CC licenses, found here:

<https://creativecommons.org/choose/>

Infringement and Punishment

- After (claimed) infringement:
 - Only courts can issue valid Cease and Desist orders (injunctions).
 - Copyright holders with claims can issue C&D threats
 - These joined to proper symbolization make the infringement “willful” and raise the penalties.
 - Courts can issue C&D orders (injunctions), levy fines, recover damages, impound illegal copies, imprison violators.

DMCA Take Downs

- Procedures, external to courts (initially) for infringements on WWW.
- Rights owner files proper paperwork with ISP/host.
- Site operator **MUST** take the material down (for up to 10 days) while the matter is adjudicated.
- The poster can complain; the ISP decides. Then litigation might occur.
- **If one accepts 3rd party content, one has to designate and train a *DMCA* agent and follow the take down protocols or there's no *DMCA* "safe harbor."**
- Under the safe harbor, ISPs/web services providers are not liable for infringements by 3rd parties (those posters might still be liable).

Liabilities for Infringement

– Penalties could include:

- Fines not less than \$750 or more than \$30,000 for each infringement (checked your iPod lately?).
- Fines up to \$150,000 for willful infringement (checked your kid's iPod lately?).
- Actual damages and any profits made by infringement.

An Alternative System: Compulsory Licensing for Music

- Music combines copyright and a licensing/royalty systems
 - All copying requires permission and (usually) royalty.
 - Recording (a cover song) doesn't require permission
 - Once creator records/performs it, others may also record or perform it, eventually paying royalties based on sales. Notification required.
 - “Public” performances require royalties, usually paid by venues.
 - Generally personal/private (in the shower, car, at home or in a private office) performances don't require payment or permission.
 - Inclusion in mediated instances requires special clearances and royalties.
 - There are multiple rights: licenses must be obtained for EACH of the rights used.

An Alternative System: Compulsory Licensing for Music

- **Public Performing Right**
- **Reproduction Right**
- **Mechanical License:** On top of the right to copy the record the right to reproduce and distribute a specific composition at an agreed upon fee per unit manufactured and sold.
- **Digital Performance Right in Sound Recordings Act of 1995:** authorized a compensatory system for digital sound recordings.
- **Synchronization License:** Music Publishers issue licenses as copyright owner or his agent, usually to a producer, granting the right to synchronize the musical composition in timed relation with audio-visual images on film or videotape. **There is NO blanket sync license agency/agent/process.**

Let's be real careful with this part:

- **There is NO blanket sync license agency/agent/process.**

A place may have one or the other sort of “blanket” license. For example, BU pays so that the band can play songs on the quad or at a game or graduation, teachers can play songs in class, the clarion can toll, etc.

But the license that allows all that does NOT allow putting a song to a video and posting it to the web or putting a song into a movie or TV show, even if the song is covered under the blanket license.

Sync licenses are sold in one way: From/by the publisher, per use. (with one exception)

The one major exception to Sync. License restrictions/arrangements

- “Media Libraries”
 - Media professionals have them for production.
 - We have collections in library, ITMS, GCC labs, etc.
- TOS specify acceptable uses.
- Students need to remember that just because one employer/school paid a blanket fee or acquired rights to a media library, the next one might not have---free/unlimited use might be curtailed.
- **Don’t use material until you are sure what you have and what rights you’ve acquired.**

Moving From Protecting Your Material to Protecting Your Classes (and uses)

- These are pretty obvious:
 - Don't infringe.
 - Your students should not infringe.
 - You and your students have to be able to be creative, within the law.

Protecting Your Material and Protecting Your Classes (and uses)

- BU does not have a specific IP policy for students.
- I maintain that means the status quo for students is the common law, and the common law says the same thing as does our faculty policy: Students own their IP, including copyright.
- Not everyone agrees.
- I encourage you to respect your students' rights just as you would have them respect yours.

Protecting Your Material and Protecting Your Classes (and uses)

- How can you use materials that are protected by copyright?
 - Buy, rent, library loan, the materials.
 - Or, use protected materials and then appeal to **Fair Use** (the most broad used, and perhaps, most broadly abused) exemption from copyright law.

Fair Use

- **Fair Use:** *Fair use is a defensive affirmation.*
 - Applied mostly to copyright; some (but less) to trademarks.
 - **NOT** to patents, trade secrets, or the personal torts (defamation, rights of publicity, privacy).
 - **Users are at risk with this “protection”:** One has to risk infringement first, then a court decides about a fair use defense. The accused infringer is required to prove that the use was fair.
 - **Still, without vibrant Fair Use exemptions, education would be VERY difficult.**

Fair Use

– **Four Factors** (the fair use tests)

1. Does your use undermine the **Purpose and Character** of the original? If it does, it's probably not fair use.
2. What is the **Nature of the “fair” use**:
 - The most altruistic your use, the more fair.
3. **Amount** of the copyrighted work **used**:
 - The less copied the better. There IS NO ABSOLUTE LEGAL STANDARD (% guidelines are guidelines, not law)
 - “Tiny amount” doesn't matter with music (and most recorded stuff): Want to copy it? License it.
4. **Effect** of taking the work:
 - As your copying diminishes their market, it probably becomes less and less fair.

Fair Use

– **Examples:**

- **Teaching** **News Reporting**
- **Criticism** **Scholarship**
- **Comment** **Research**

– **These are examples, not guarantees. The 4 factors prevail.**

Some important Fair Use considerations:

- Can you meet the 4 factors?
- Is this for-credit, with registration, IN-CLASS, use?
- Is your use locked down to prevent re-use?
- Have you tried to acquire the materials, without copyright infringement, and failed in ways that justify your fair use?
- **Have you acquired the materials legally? If not, fair use is off the table.**
- Can you limit the number of times you need to repeat this infringement? The more often you do this, the less fair it seems.
- **If it's online, all bets are off. We are very unclear about how fair use works online (both due to the ease of copying digital materials AND intrusion of contract law via TOS and EULAs).**
- Have you made these considerations clear to your students and have you required them to comply too?
- **Students comply carefully: if they infringe, they give you materials (that might contain fair uses), you give those directly back, the materials go no further.**

Protecting Your Material and Protecting Your Classes (and uses), Online

Answers to the question “So what about online materials and practices,” are so complex as to require another day/session.

If we have time and there are no other questions, we can chat about it.

**THANKS FOR ATTENDING AND FOR
HAVING PATIENCE WITH ME.
FEEL FREE TO CONTACT ME WITH QUESTIONS.**

**I AM NOT A LAWYER AND
I DON'T GIVE LEGAL ADVICE.**

**SOMETIMES I CAN EXPLAIN THINGS
SUCH THAT YOU DON'T HIRE A LAWYER;
OTHER TIMES, I KNOW TO
SEND YOU TO ONE.**

Additional Resources

- **IM 350: Intellectual Property Law and New Media, Spring, 2015, syllabus.**
 - After each class, I post full lecture notes.

<http://interactivemedia.bradley.edu/ell/im350/sp2015/im350sp2015.html>

- **Free for a fee blog (on IP in media issues)**

<http://www.freeforafee.com/>

- **Lamoureux, Edward Lee / Baron, Steven L. / Stewart, Claire.**
Intellectual Property Law and Interactive Media: Free for a Fee, Peter Lang, Pub., Digital Formations - Volume 39, 2009.

<http://www.peterlang.com/index.cfm?event=cmp.ccc.seitenstruktur.details&seiten&seitentyp=produkt&pk=56522&concordeid=68160>

The 2nd Edition of this book, and an accompanying case studies volume, will be printed this spring.

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