

Copyright or Copy Wrong: How to Tell Them Apart

by KATHLEEN A. WALLACE

The digital world is making copyright law increasingly complex. Many faculty members are uncertain about what they are allowed to post on Blackboard or copy for class. As authors, they may also wonder about rights to their own creative works.

On June 9, 2009, Sarah McCleskey, head of access services at Hofstra's Axinn Library, and I attended a one-day workshop titled *Copyright or Copy Wrong: How to Tell Them Apart*, sponsored by the New England Chapter of the Association of College and Research Libraries. Focused on digital copyright, the program included presentations by Kevin L. Smith, J.D., a scholarly communications officer at Duke University's Perkins Library, and Steven McDonald, J.D., general counsel for Rhode Island School of Design.

Some highlights:

Copyright Basics

Copyright protects a number of rights, including the right to reproduce a work, to make derivative works, to distribute copies of the work, and to perform or display a work. If an author has transferred copyrights to a publisher, she is not allowed to make or distribute copies of her own work, unless the transfer agreement specifically allows it.

As Steven McDonald pointed out, buying a work does not mean acquiring the copyright to that work (unless the copyright owner expressly transfers the copyright to the purchaser). A library may lend, resell, or give away a work it has purchased, but it may not reproduce the work. However, college libraries and faculty can invoke the "fair use" doctrine (see below) as a basis for allowing some limited reproduction of works for educational purposes, such as course packs and library reserve. In addition, the library may license some use rights. The Copyright Clearance Center manages the permissions and collection of fees for such reproductions on behalf of copyright holders (largely publishers). One concern raised at the conference was that the increasing robustness and efficiency of the permissions market may be shrinking the scope of "fair use."

Use of Copyrighted Material

Performance and Display

In face-to-face teaching activities, copyrighted works may be displayed or performed (e.g., a film may be shown, a play performed, a poem recited or displayed by means of projection) without seeking permission from the copyright owner, but this exception does not include the right to distribute copies of the works that are displayed or performed.

The Technology, Education, and Copyright Harmonization (TEACH) Act of 2002 provides the right to perform and display in distance education as well. However, there are additional restrictions and requirements imposed on performance and display in a "digital" classroom, and the display of an entire audiovisual work (such as a feature film or documentary) is never allowed under the TEACH Act. Other restrictions have to do with limiting the capability of downstream reproduction and distribution.

Faculty who are involved in distance education, as well as faculty who use features of Blackboard or any online course management system in their teaching, need to familiarize themselves with the requirements of the TEACH Act. In addition to consulting with Hofstra professionals, there are online resources that may be helpful in this regard, e.g., TEACH Act Toolkit, <http://www.lib.ncsu.edu/dspc/legislative/teachkit/>

Fair Use

The "fair use" doctrine identifies four factors that must be balanced in assessing whether a use of copyrighted material is "fair" and not an infringement of copyright. Just because a use is "educational" does not automatically mean that the use is "fair." One must also consider the nature of the work, the amount of the work being used, and the effect of the use on the potential market or value of the copyrighted work.

"Fair use" does not define a right, but provides a set of guidelines for defense of a use of copyrighted material. Its guidelines are also not hard and fast rules as to whether a particular use of copyrighted material qualifies as "fair." Educational institutions have different interpretations of what "fair



use" allows and thus different policies. Hofstra's policy can be found at: hofstra.edu/pdf/about/Policy/policy_ereserves.pdf. Hofstra was part of an agreement with the American Association of Publishers, regarding use of copyrighted material; see <http://publishers.org/main/PressCenter/Archives/CollegeCopyrightGuidelinesRelease.htm>

The "fair use" doctrine is used to assess whether certain kinds of distribution and transformation (e.g., criticism, commentary) are allowed without seeking permission from the copyright holder. Traditional analyses of "fair use" have focused on the purpose (is it educational?) and on issues such as how many copies are made, how widely distributed they are, and whether the distribution is spontaneous or repeated. Transformative uses can be fairly traditional (e.g., the right to quotation in the context of criticism and commentary), but may also concern matters such as student work that uses copyrighted work in something like a mash-up. In his presentation, Kevin Smith pointed out that mash-ups of all sorts (see, for example, <http://www.thru-you.com/#/videos/>) and other digital reuses are testing the boundaries of "fair use."

Rights for Authors

Faculty authors do not always realize that they may not retain the right to freely use their own works, even in an educational

continued on page 9

she could decide when to offer more opportunities to work through the complexities. Her acknowledgment of the complexity, combined with her patience with and positive reinforcement of student responses and questions, created an atmosphere where her students felt comfortable in contributing ideas. Student responses, in turn, allowed Professor Farmer to assess accurately students' understanding and to recalibrate when necessary.

Professor Farmer's enthusiasm and interest in the topic were evident throughout the lecture. She connected students to the current research in the field several times, referring to articles in *Science*, the premier journal in the field, and the research of a colleague in the department on faults in New York City. When she shared the evolving science of measuring the magnitude of earthquakes, her diagrams and discussion gave real clarity to how far the field has come. Apparently, it used to be the

case that magnitude was measured by talking to people who felt an earthquake and then mapping, based on their comments. Of course, the Richter scale was quite an advancement, as has been "moment" magnitude, now the most accurate scale used to estimate magnitudes for large earthquakes.

At the end of the class, Professor Farmer called on a student who had done a bit of research on a seismic event in the news – a rift that had opened in Africa. Professor Farmer knew that the student might be ready to report that day and, in preparation, she had assembled six different photos of the rift in Africa as part of her PowerPoint to help the class visualize the student's topic. Her gentle back-up help to his presentation made it likely that others would avail themselves of this extra credit opportunity.

Another aspect of Professor Farmer's teaching is her continuing commitment to improve understanding for students. She is a member

of ROOT (Reflecting On Our Teaching), a group of Hofstra faculty members who have developed research questions about their own teaching and are conducting investigations to address them. Professor Farmer is looking at whether developing a three-dimensional animated simulation of an earthquake would be a more effective tool for student understanding than the current slides and brief simulation with shifting blocks that she currently uses. To that end, Professor Farmer plans to compare student results on a quiz in both semesters, without and with the 3-D earthquake animation. I will go back the next time she teaches the course to witness the lecture aided by the 3-D animation. As a latecomer to the study of earthquakes, I must say I'm looking forward to it!

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Copyright or Copy Wrong: How to Tell Them Apart continued from page 7

context. It all depends on the terms of the agreement they have made with the publisher. Faculty need to be aware of their own copyright agreements and to carefully consider what rights they transfer when they sign publication agreements.

Digital Rights Management (DRM)

Prior to digital media, when a library subscribed to a journal, it purchased and owned print, "hard" copies of the journal, which it retained in perpetuity, even after it may have canceled a subscription. However, with digital, online publication of journals, when a library subscribes to a journal, it may be purchasing only a license to access the journal. Thus, depending on the publisher's terms, a license to access could be for some specified time period (e.g., for as long as the library maintains a subscription, or for some defined period of time after a subscription is terminated). While many publishers currently provide what's known as "perpetual access," that is, no time restriction on access to the issues subscribed to, some do not. As libraries move increasingly to online only journals, and possibly, eventually books, this could become an important matter in terms of retaining holdings of back issues if subscriptions or licensing fees are terminated. Faculty authors may want to inquire when they submit an article for publication what

the journal publisher's policies are and consider carefully whether to publish in journals with restrictive policies.

For More Information

Kevin Smith also runs a well-respected and informative blog, "Scholarly Communications @ Duke: Duke's source for advice and information about copyright and publication issues" (<http://library.duke.edu/blogs/scholcomm/>).

The Axinn Library's Copyright Information Center provides answers to many common

questions about copyright, including guidelines for posting content on Blackboard and Electronic Reserve, instructions for creating Blackboard links to licensed electronic journals to avoid copyright problems, and a "fair use" checklist to help you decide when you may copy materials for class. The center can be reached through the Library Web site at hofstra.edu/library/library_copyright.html

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Photo by Ed. Center

One of the rights accorded to the owner of copyright is the right to reproduce or to authorize others to reproduce the work in copies or phonorecords. This right is subject to certain limitations found in sections 107 through 118 of the copyright act (title 17, U.S. Code). One of the more important limitations is the doctrine of "fair use." Although fair use was not mentioned in the previous copyright law, the doctrine has developed through a substantial number of court decisions over the years. This doctrine has been codified in section 107 of the copyright law.

Section 107 contains a list of the various purposes for which the reproduction of a particular work may be considered "fair," such as criticism, comment, news reporting, teaching, scholarship, and research. Section 107 also sets out four factors to be considered in determining whether or not a particular use is fair:

1. the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. 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 distinction between "fair use" and infringement may be unclear and not easily defined. There is no specific number of words, lines, or notes that may safely be taken without permission. Acknowledging the source of the copyrighted material does not substitute for obtaining permission.

The 1961 Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law cites examples of activities that courts have regarded as fair use: "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported."

Copyright protects the particular way an author has expressed himself; it does not extend to any ideas, systems, or factual information conveyed in the work.

The safest course is always to get permission from the copyright owner before using copyrighted material. The Copyright Office cannot give this permission.

When it is impracticable to obtain permission, use of copyrighted material should be avoided unless the doctrine of "fair use" would clearly apply to the situation. The Copyright Office can neither determine if a certain use may be considered "fair" nor advise on possible copyright violations. If there is any doubt, it is advisable to consult an attorney.

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FAIR USE CHECKLIST

CHECKLIST FOR DETERMINING WHETHER FAIR USE APPLIES TO MATERIALS SUBMITTED FOR PLACEMENT ON ELECTRONIC RESERVE

The following "fair use" checklist should be used by professors in determining whether submitted materials may be placed on electronic reserves without obtaining permission from the copyright owner. Please fill out all applicable boxes in the four sections below to determine whether or not the material has favorable "fair use" treatment and may, therefore, be placed on electronic reserve. If the majority of boxes checked are under the "favorable fair use" column, then you may conclude that "fair use" applies. If less than half of the boxes checked are under the "favorable fair use" column, then permission from the copyright owner should be obtained. Where there is an even split or if there is uncertainty as to the treatment of the work with respect to "fair use", you may contact the Dean of the Library for further guidance.

Favors Fair Use	Disfavors Fair Use
1. <u>Purpose and character of the use</u>	
<input type="checkbox"/> Educational (teaching, research)	<input type="checkbox"/> Commercial, entertainment
<input type="checkbox"/> Transformative use (work used to serve new purpose e.g. comment, criticism, parody)	<input type="checkbox"/> Exact whole copy
<input type="checkbox"/> Non profit use	<input type="checkbox"/> For profit use
2. <u>Nature of the copyrighted work</u>	
<input type="checkbox"/> Factual, nonfiction, news	<input type="checkbox"/> Creative (art, music, fiction)
<input type="checkbox"/> Published Work	<input type="checkbox"/> Unpublished Work
3. <u>Amount reproduced/copied</u>	
<input type="checkbox"/> Small quantity of work	<input type="checkbox"/> Large portion of work
<input type="checkbox"/> Portion used is not "the heart" of the work	<input type="checkbox"/> Portion used is central to the entire work
<input type="checkbox"/> Amount is appropriate to education purpose	<input type="checkbox"/> Material includes more than is educationally necessary
4. <u>Effect on the market</u>	
<input type="checkbox"/> One-time use	<input type="checkbox"/> Repeated use
<input type="checkbox"/> Work owned by library or instructor	<input type="checkbox"/> Material obtained through loan or other method
<input type="checkbox"/> No longer in print	<input type="checkbox"/> Work currently available for purchase or licensing
<input type="checkbox"/> Restricted Access	<input type="checkbox"/> Publicly available
<input type="checkbox"/> Only a few copies made	<input type="checkbox"/> Many copies made
<input type="checkbox"/> Absence of reasonable mechanism for obtaining permission	<input type="checkbox"/> Reasonably available mechanism for obtaining permission

To be filled out by professor requesting the submission of the material for placement on electronic reserve: I have reviewed the material submitted for placement on electronic reserve and have concluded from the checklist, that (please check only one):

- The material is protected under "fair use" and should be placed on electronic reserve
- Permission must be obtained from the copyright owner before the material is placed on electronic reserve

Name: _____ Signature: _____ Date: _____

Class: _____ Title of work: _____

Portion to be used (pages): _____

To be filled out by library personnel (please check only one):

- I have reviewed the submitted material and above checklist and approve of the material being placed on electronic reserve
- At this time, the material cannot be placed on electronic reserve. Permission must be obtained from the copyright owner

Name of library personnel: _____ Signature: _____ Date: _____

Revised for use by Hofstra University from the "Checklist for Fair Use," a project of the IUPUI Copyright Management Center; www.copyright.iupui.edu.