COPYRIGHT IN HIGHER EDUCATION

Clarke Iakovakis, Scholarly Services Librarian, Edmon Low Library
Oklahoma State University

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OUTLINE

• What is Copyright?
• Using Copyrighted Works
• Author Rights
SECTION 1:
WHAT IS COPYRIGHT?
INTELLECTUAL PROPERTY

- Copyright
- Patents
- Trade secrets
- Trademarks
WHAT IS THE PURPOSE OF COPYRIGHT?

Congress shall have the power

“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”

- US Constitution, Article I, Section 8, Clause 8
WHAT IS THE PURPOSE OF COPYRIGHT?

To promote the **Progress of Science and useful Arts**

by **securing** to Authors and Inventors the **exclusive Right** to their respective Writings and Discoveries

for **limited** Times

**Incentivize creativity**

**Granting monopoly rights**

Eventually allow people to *use* the work to create more works
WHAT IS COPYRIGHT?

A bundle of rights to:

- Make copies
- Publicly distribute copies
- Make derivative works
- Publicly perform or display the work
- License any of the above to third parties

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WHO HERE OWNS A COPYRIGHT?

Everyone!
WHAT IS PROTECTED BY COPYRIGHT?

Original work of authorship
With a modicum of creativity
Fixed in a tangible medium of expression
HOW DO WE GET COPYRIGHT?

Copyright exists from the moment of creation

No need to use ©, no “magic words,”
No need to register or formally publish

Copyright just happens

Therefore you must assume a work is copyrighted unless otherwise indicated
WHAT IS NOT PROTECTABLE?

- Functional/Utilitarian
- Facts
- Ideas
- Titles & slogans
- Data
- Methods (patent)
- Scientific discoveries

- Works created by federal agencies
- Work where copyright is not claimed
- Work no longer protected due to time limitations

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FREE AS AIR – THE PUBLIC DOMAIN

- Ideas, facts
- Works of the federal gov’t
- Titles, short phrases
- Works published before 1923
- Works published without notice prior to 1989
- Works not renewed prior to 1963
SECTION 2: USING COPYRIGHTED WORKS
HOW IS IT POSSIBLE TO USE COPYRIGHTED WORKS? (LEGALLY)

Use can mean many different things:

• Make photocopies
• Publicly distribute copies
• Make derivative works
• Publicly perform or display the work
**HOW IS IT POSSIBLE TO USE COPYRIGHTED WORKS?**

- Permissions
- Statutory exemptions
- Fair use
PERMISSIONS

• Terms of use
• Creative commons license
• etc.

Example CC licenses

Example copyright notice for studio film
STATUTORY EXEMPTIONS

- First Sale Doctrine
- Section 108
- Public Performance and Display for Educational Purposes (Section 110)
- Technology, Education, and Copyright Harmonization Act of 2002 (TEACH Act)
TEACH ACT

__ My institution is a nonprofit accredited educational institution or a government agency
__ It has a policy on the use of copyrighted materials
__ It provides accurate information to faculty, students and staff about copyright
__ Its systems will not interfere with technological controls within the materials I want to use
__ The materials I want to use are specifically for students in my class
__ Only those students will have access to the materials
__ The materials will be provided at my direction during the relevant lesson
__ The materials are directly related and of material assistance to my teaching content
__ My class is part of the regular offerings of my institution
__ I will include a notice that the materials are protected by copyright
__ I will use technology that reasonably limits the students' ability to retain or further distribute the materials
__ I will make the materials available to the students only for a period of time that is relevant to the context of the class session
__ I will store the materials on a secure server and transmit them only as permitted by this law
__ I will not make copies other than the one I need to make the transmission

University of Texas. TEACH Act Checklist. https://guides.lib.utexas.edu/copyright/teachactchecklist. Licensed under CC BY-NC
Requirements (cont)

__ The materials are of the proper type and amount the law authorizes

- Entire performances of nondramatic literary and musical works
- Reasonable and limited parts of a dramatic literary, musical, or audiovisual work
- Displays of other works, such as images, in amounts similar to typical displays in face-to-face teaching

__ The materials are not among those the law specifically excludes from its coverage:

- Materials specifically marketed for classroom use for digital distance education
- Copies I know or should know are illegal
- Textbooks, coursepacks, electronic reserves and similar materials typically purchased individually by the students for independent review outside the classroom or class session

__ If I am using an analog original, I checked before digitizing it to be sure:

- I copied only the amount that I am authorized to transmit
- There is no digital copy of the work available except with technological protections that prevent my using it for the class in the way the statute authorizes
Fair use is flexible to help fairly balance copyright and free speech by University of Minnesota Libraries is licensed under CC BY NC
FAIR USE ASKS:

“Would allowing the use go further towards promoting the goals of copyright law than disallowing the use?”

“To promote the Progress of Science and useful Arts”
FOUR FACTORS OF FAIR USE

• Purpose and character of the use
• Nature of the copyrighted work
• Amount and substantiality of the portion used
• Effect on the potential market for the work

Strongly favors fair use

Somewhat favors fair use

Neutral

Somewhat weighs against fair use

Strongly weighs against fair use

Adapted from University of Minnesota, "Thinking Through Fair Use." 
https://www.lib.umn.edu/copyright/fairthoughts. Licensed under CC BY-NC.
**FACTOR 1: PURPOSE OF THE USE**

**Favors fair use**
- Education, scholarship, research, news reporting
- Non-profit use
- Transformative use (creates a new work with a new purpose), including parody and transformative technologies

**Weighs against fair use**
- Commercial activity
- Profiting from use
- Decorative or other non-critical, non-commentary use

Adapted from University of Minnesota, "Thinking Through Fair Use."
https://www.lib.umn.edu/copyright/fairthoughts. Licensed under CC BY-NC.
FACTOR 2: NATURE OF THE COPYRIGHTED WORK

Favors fair use

- Factual or non-fiction source
- Published source

Weighs against fair use

- Creative, artistic, or fiction source
- Unpublished source

Adapted from University of Minnesota, "Thinking Through Fair Use." https://www.lib.umn.edu/copyright/fairthoughts. Licensed under CC BY-NC.
# FACTOR 3: AMOUNT & SUBSTANTIALITY OF USE

## Favors fair use
- Proportionally small excerpt or clip
- Portion used is peripheral to the entire work
- Only as much as absolutely necessary

## Weighs against fair use
- Entire work, or proportionally large excerpt
- Portion used is “heart of the work”

<table>
<thead>
<tr>
<th>Strongly favors fair use</th>
<th>Somewhat favors fair use</th>
<th>Neutral</th>
<th>Somewhat weighs against fair use</th>
<th>Strongly weighs against fair use</th>
</tr>
</thead>
</table>

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https://www.lib.umn.edu/copyright/fairthoughts. Licensed under CC BY-NC.
FACTOR 4: EFFECT ON MARKET OF WORK

**Favors fair use**
- Only one or few copies made
- One-time or limited use
- Use stimulates market for original work
- No impact on market for original work
- No way to pay or seek permission for your use

**Weighs against fair use**
- Use directly substitutes sale of original work
- Many copies made
- Repeated or long-term use
- Impairs market for original work
- Easily obtained and affordable license or permission

Strongly favors fair use

Somewhat favors fair use

Neutral

Somewhat weighs against fair use

Strongly weighs against fair use

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FAIR USE ANALYSIS
COPYRIGHT ANALYSIS

(Don’t start with fair use)

1. Is it protected by copyright in the first place?
2. How do I want to use it? (Which owner’s right is implicated in the first place?)
3. Are permissions already given?
4. Does a statutory exception apply?
5. How likely is it to constitute fair use?
TAKE HOME POINTS

• Fair use is necessary to achieve the constitutional goal of copyright law
• Fair use analysis requires critical thinking; no “one size fits all” answer
• Be proactive
COURSE RESERVES

• 1976 Guidelines for Classroom Copying
  - Written by a House committee, intended as a “safe harbor”
  - 1 chapter if 10 chapters or less
  - 10% of the work if 10 chapters or more
  - No “consumables” (worksheets, exams)

• Cambridge University Press v. Georgia State University
  - GSU is prevailing party
  - Large majority of cases were found to be fair use
COURSE RESERVES

- 1976 Guidelines are a starting point, but there is no “bright-line” rule
- If a license is not available, it reduces the risk of infringement
- If a license is available, it depends on the first 3 fair use factors
COURSE RESERVES GOOD PRACTICES

- Direct students to a permanent URL if available
- Store copyrighted materials only if it is integral to the curriculum.
- Use a limited portion and only what is necessary for teaching purposes. Use legal copies only. Display copyright notice.
- Limit access to students enrolled in the course & others involved (e.g. GTAs). Disable student access after the semester.
- If material was produced primarily for digital instruction, be careful
- If the amount/nature of your use balances against fair use, consider if a license can be purchased
WHO IS THE COPYRIGHT HOLDER?

Authors are usually the copyright holders to their work

Until/unless they
- **Transfer rights** to someone else, like a publisher
- Are employed under a work-for-hire policy

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JOINT AUTHORSHIP

In academia, there is often an emphasis on the first author.

However from a copyright standpoint, as long as a contributor added some element of written work, that contributor is an equal © holder.

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WORKS FOR HIRE

Work prepared by employee within scope of his or her employment

Traditionally there is an exception for faculty in academia

But this is changing in the digital world as universities seek to own curriculum, syllabi, and course content

It is also changing in the different landscape of higher education, as universities seek to commercialize and license patents
LICENSES AND COPYRIGHT

- Licenses are contracts that allow others to exercise some right that the licensor owns
- May carry conditions and limitations

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- **No Derivative Works (ND)**: Others can only copy, distribute, display, or perform verbatim copies of your work.
- **Share Alike (SA)**: Others can distribute your work only under a license identical to the one you have chosen for your work.
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Most accommodating license

Most restrictive license

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- OSU Intellectual Property Policy (1-0202)

https://stw.sp.okstate.edu/policies/Shared%20Documents/Intellectual%20Property.pdf
OPEN ACCESS POLICIES AT UNIVERSITIES

The faculty at universities such as Harvard, MIT and the University of California System have unanimously voted to provide the university with non-exclusive rights to archive and distribute their scholarly articles.
GREEN OPEN ACCESS

Publish your article in a non-OA journal but also retain your right to “self-archive” it in an OA archive

<table>
<thead>
<tr>
<th>Publication Stage</th>
<th>Definition</th>
<th>Terms used</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-Print</td>
<td>The version of the manuscript submitted to the journal, before undergoing peer review</td>
<td>Submitted manuscript, Author's original draft, Pre-refereed print</td>
</tr>
<tr>
<td>Post-Print</td>
<td>The accepted version, after peer review but prior the final copy-editing and layout</td>
<td>Accepted manuscript, accepted author manuscript, Post-refereed print</td>
</tr>
<tr>
<td>Published article</td>
<td>An exact digital replicate of the published article</td>
<td>Version of record, Publisher's version, Published journal article</td>
</tr>
</tbody>
</table>

Most publishers now give authors the right to make the **accepted version available open access**.

Sometimes it is written into the contract, sometimes you must ask.
# Green Open Access

## Bundled vs. Unbundled Copyright

<table>
<thead>
<tr>
<th>RIGHTS PUBLISHERS WANT</th>
<th>RIGHTS PUBLISHERS NEED</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reproduction</td>
<td>Right of First Publication</td>
</tr>
<tr>
<td>Distribution</td>
<td>. . . that’s really all</td>
</tr>
<tr>
<td>Derivatives</td>
<td>Other issues can be managed with licenses</td>
</tr>
<tr>
<td>Pretty much all of them</td>
<td></td>
</tr>
</tbody>
</table>

Adapted from Association of College & Research Libraries. [ACRL Scholarly Communications Roadshow, Baylor University](https://example.com). Licensed under CC BY-NC-SA.
The top 100 journal publishers (by output volume)...

...would in 62% of cases allow immediate upload of accepted version manuscripts in institutional/subject repositories...

...and a whole 79% within a year of publication!

GREEN OPEN ACCESS

Why the lack of uptake? Researchers...

- are unaware of their right to self-archive
- are unsure whether they have a legal right to self-archive
- fear it might put the acceptance for publication at risk
- believe that it might be a lot of work

Does a journal permit self-archiving?

Three ways to check:

1. **Review your contract.**
   Rights retention varies:
   a) Publisher takes all rights and licenses none back

---

Copyright Transfer/Publishing Agreement. In consideration of the action of the American Medical Association (AMA) in reviewing and editing this submission (manuscript, tables, figures, video, audio, and other supplemental files for publication), I hereby transfer, assign, or otherwise convey all copyright ownership, including any and all rights incidental thereto, exclusively to the AMA, in the event that such work is published by the AMA.
Does a journal permit self-archiving?

Three ways to check:

1. **Review your contract.**
   Rights retention varies:

   b) Publisher takes *some* rights and licenses *some* back

---

**C. PERMITTED USES BY CONTRIBUTOR**

1. **Submitted Version.** Wiley-Blackwell licenses back the following rights to the Contributor in the version of the Contribution as originally submitted for publication:

   a. After publication of the final article, the right to self-archive on the Contributor’s personal website or in the Contributor’s institution’s/employer’s institutional repository or archive. This right extends to both intranets and the Internet. The Contributor may not update the submission version or replace it with the published Contribution. The version posted must contain a legend as follows: This is the pre-peer reviewed version of the following article: FULL CITE, which has been published in final form at [Link to final article].

   b. The right to transmit, print and share copies with colleagues.
Does a journal permit self-archiving?

Three ways to check:

1. **Review your contract.**
   Rights retention varies:
   - **Author retains rights** and licenses some to the publisher (e.g. first publication)

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Does a journal permit self-archiving?
Three ways to check:

2. Check SHERPA-RoMEO
www.sherpa.ac.uk/romeo/
Does a journal permit self-archiving?

Three ways to check:

3. Consult with a librarian

https://info.library.okstate.edu/clarke-iakovakis

Clarke Iakovakis: Profile

Selected Presentations


Revitalizing the Curriculum Library: Analyzing the Collection, Surveying Faculty, and Forming a College of Education Advisory Group. Lightning talk co-presented at the Education and Behavioral Sciences Section (EBSS) Research Forum at the ALA Annual Conference. Chicago, IL, June 2017. Session Description. Session Materials.
Takeaways

It’s negotiable: before publishing, consider what rights you want to keep
If you have the right to self-archive, exercise that right

How???
DEPOSIT YOUR SCHOLARSHIP IN SHAREOK

• SHAREOK is the institutional repository of Oklahoma State University
• Maintained by the Edmon Low Library
• Library
  – checks for copyright compliance
  – archives the item & attaches permanent URL
  – adds metadata
  – ensures it is crawled by Google Scholar and library catalogs around the world
OSU - Faculty Papers

Sub-communities within this community
OSU - Regents Professors [0]

Collections in this community
OSU - Faculty and Staff Publications [378]
OSU - Research Data [2]

Recent Submissions
WHY POST PREPRINTS?

• Allow your research to be read more quickly
  – Many citation aggregators will identify it later on
  – You can add a disclaimer, e.g.
    • “first draft: contact me for permission to cite”

• Growing body of research indicating correlation between citation count and open access

• Most publishers do not classify preprints as “prior publication” (but check policies)
  – Some publishers encourage posting preprints

• Pre-registration (https://osf.io/prereg/)
  – writing out specific details such as data collection methods, analysis plans, and rules for data exclusion
  – make important decisions early on and have a clear record of these choices
TAKE HOME POINTS

1. We all own copyright automatically until we sign it away.
2. Try not to give away more than you need to. It’s negotiable: before publishing, think ahead of how you want to use the work, and consider what rights you want to keep.
3. If you have the right to self-archive, exercise that right.
4. Contact me for help parsing your contract for whether you have the right.
REFERENCES

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Cirasella, Jill. Open Access: Which Side Are You On? Licensed under CC BY. "Legalese" © Ian Varley, Used under CC-BY

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