Fair Use, Creative Commons, and Other Copyright Issues in Research and Teaching: Navigating the Minefield of Myths and Misconceptions

Mike Dunford
3L Student
William S. Richardson
School of Law

This presentation is made freely available under the terms of the CreativeCommons Attribution-NonCommercial-ShareAlike license.

http://creativecommons.org/licenses/by-nc-sa/4.0/
“Only one thing is impossible for God: to find any sense in any copyright law on the planet.”

–Mark Twain
Overview

❖ The very short short course on intellectual property
❖ What copyright is, and why it’s good to look at what rights you are keeping and what you are assigning.
❖ Copyright issues in research/publishing
❖ Open Access (Gold and Green)
❖ Creative Commons
Overview

- Copyright issues in teaching
  - Classroom Use
  - Fair Use
- Questions
I am not a lawyer and this is not legal advice.

We’re going to discuss the general state of the law, general issues, and (maybe) hypothetical situations.

Not specific advice.

Did I mention that I am not a lawyer and this is not legal advice?
What is property?

In law, property is often defined as a person’s rights with respect to a thing.

We often use the metaphor of a “bundle of sticks,” where each “stick” in the “bundle” is a different right.
Property

- Sometimes new rights may be added to the bundle.
- Sometimes rights may be taken from the bundle.
- Sometimes you can give away (or sell) some property rights while keeping others.
“Intellectual Property” is a broad term that covers a range of types of knowledge, governed by different laws.

- Trade Secrets (State Law)
- Patents (Title 35, U.S.C.)
- Copyright (Title 17, U.S.C.)
These areas have lots of differences.

Maybe more differences than similarities.

Not a lot of overlap.

Grouped together because of key similarities.
Intellectual Property

- Similarities are pretty important.
- All have property-like aspects.
- All are intangible.
- All are forms of knowledge.
- All are therefore non-rivalrous property.
Copyright - Key Statutes

- Title 17, United States Code
- § 102 - Subject Matter
- § 106 - Exclusive Rights (the bundle of sticks)
- § 107 - Fair Use
- § 110 - Classroom Use
Copyright - Quiz

❖ What do you have to do to obtain a copyright on a work you create?

❖ Do I own the copyright to this powerpoint?

❖ If yes, when does my right to exclusively use this powerpoint end?

❖ Can you infringe a copyright by paraphrasing someone else’s work?
Subject Matter

- 17 U.S.C. § 102:

  “Copyright protection subsists...in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”
17 U.S.C. § 102:

“Copyright protection subsists...in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”
Ownership

- The copyright generally starts with the author.
- The author is usually the actual author.

Exceptions/Complications:
- Work for Hire
- Multiple Authors
Ownership

- Work for Hire

  Simplified version: if employee is creating works for employer within scope of employment, it’s a work for hire and copyright vests with the employer.

  Theoretically, this could cover all faculty research publications.

  But consensus is that faculty are an exception.
Ownership

- Multiple Authors
- “Collective work” covers things like edited volumes, where contributions of individual authors can be separated out.
- Works like any other work - you have copyright in your part.
Ownership

- Multiple Authors
- Joint Work

Most co-authored papers fall into this category.
Intent to create single, inseparable work.

“Joint Tenancy”
Rights

❖ 17 U.S.C. § 106:

❖ “Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:”
Rights

- Perform
- Display
- Distribute
- Reproduce
- Create derivative works
Assigning Rights

- One of the rights that comes with property is the right to dispose of the property.
- Can be in full, or in part.
- Usually done through contract.
Assigning Rights

- UH Faculty Contract has IP section.
- There is also University Open Access policy.
- Federal contracts (including grants) give federal government certain rights in material produced under grant.
- Commonly phrased as “a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes.”
Assigning Rights

❖ Publishing contracts vary.
❖ Lots of journals, especially for-profit, want whole copyright.
❖ This typically includes all rights, which can put you in the position of needing to pay to license your own work for use in your own teaching.
Assigning Rights

- The default rights for some journals may not be compatible with obligations under grants and university policies.
- As of now, this is an unsettled area of law.
- Given potential for author carelessness, may get settled sooner or later.
Specific Issues in Publishing

❖ Open Access
❖ Gold OA
❖ Green OA
❖ Creative Commons
❖ Use of material in publications
Open access was largely born out of anger at the academic publishing business model.

This, as we know, consists largely of researchers, reviewers, and editors producing work for free,

after which the publishers sell it back to us at “whatever the market can bear” rates (or higher)

Because we need access to research to do more research.
Open Access

- I have my own opinions on the reasonableness of the anger at the academic publishers.
- My opinion may differ from the opinion of Reed Elsevier (RUK, current market cap $17 bn)
- And Thomson Reuters (TRI, current market cap $28 bn)
Open Access

- Gold Open Access
- Refers to Open Access at the point of publication
- Can be open access from start
  - Pure OA journals
  - Mixed, author-choice journals
- Can be open access after embargo
Open Access

- Gold OA issues are (comparatively) simple.
- Read contracts and know who gets what rights.
- Pure Gold OA journals typically allow retention of more author rights.
Open Access

- Green Open Access
- Generally refers to open access through paper repositories.
- SSRN and arXiv are examples of Green OA repositories.
Open Access

- Ability to participate (or not) in Green OA largely depends on your contractual obligations.
- UH mandates depository in Scholarspace archive.
- “Each Faculty member grants to the University of Hawai‘i at Manoa a nonexclusive, irrevocable, paid-up, worldwide license to exercise any and all rights under copyright relating to each of his or her scholarly articles, in any medium, provided that the articles are not sold for a profit, and to authorize others to do the same.”
Open Access

- This is very much a developing area.
- Substantial social, legal, political, and social justice issues remain unresolved.
- Stay tuned.
Creative Commons

- Creative Commons (www.creativecommons.org) is a project for allowing authors to announce what rights they are reserving in their works.
- Creative Commons is not an alternative to traditional copyright.
- It is a license to use works.
Creative Commons

- Website has a range of standardized licenses that allow the author to specify what rights are being retained, and what users can do with the work.
- Can be applied to any form of copyrighted work.
- Range from very restrictive licenses to licenses that essentially dedicate work to public domain. (CC0)
Example: I put a lot of my pictures up with the Attribution-NonCommercial-NoDerivatives 4.0 International license.

This means that I am fine with any and all non-commercial uses, but you have to use it in the form I’ve selected, and you have to give me credit.
The program works fairly well for making more work available to the public.

There are issues.

To my knowledge, as of Tuesday, the licenses have not been tested in U.S. courts.

At least one court has, however, included CC-licensed images in a published decision. See, *Miccosukee Tribe of Indians of Florida v. United States*, 697 F. Supp. 2d 1324 (S.D. Fla. 2010)
In general, I’m operating under the assumption that most copyright issues in teaching arise from the use of other people’s material.

Just remember - your own work may be someone else’s material, depending on the rights you’ve assigned to your publisher.
Issues in Teaching

❖ “Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:” 17 U.S.C. § 106
Issues in Teaching

❖ “Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:” 17 U.S.C. § 106
Two of these statutory exceptions can apply in the classroom setting:

- Classroom Use (17 U.S.C. § 110)
- Fair Use (17 U.S.C. § 107)
Classroom Use

❖ “the following are not infringements of copyright:
❖ (1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;”
Classroom Use

❖ Context is important for classroom use.
❖ So is place.
❖ Must be in classroom.
❖ Course packets, online materials probably not covered.
Fair Use

- Can commercial use be fair use?
- Is non-commercial use always fair use?
- Is educational use usually fair use?
- Do you have to give credit to owner?
The United States Court of Appeals for the Second Circuit has referred to the fair use doctrine as, "the most troublesome in the whole law of copyright."

That was in 1939.

*Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

Matters have not improved.
Fair Use

- Fair use was common law doctrine that Congress passed into law in the 1976 Copyright Act.
- 17 U.S.C. § 107
- Does not provide bright line rule for fair use.
- Gives court instructions to weigh factors.
“...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, 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.
What does this mean as a practical matter?

Fair use can never be definitively determined without litigation.

Believe it or not, most lawyers don’t consider litigation to be a good thing.

It should be avoided if at all possible.
Fair Use

- If possible, trying to get permission is rarely a bad idea.
- If no permission, or costs too much?
- Always a good idea to think about the factors.
- Always a good idea to consider how much you need to use the material.
- Always a good idea to consider how much risk you are willing to accept.
Unfortunately, the state of the law is such that I can’t give you anything more specific than that.

If you find that frustrating, you are not alone.
Mahalo.
Questions?