
Training Your Faculty about Copyright When the Lawyer Isn't Looking

Thomas J. Tobin
Northeastern Illinois University
t-tobin@neiu.edu

Abstract

Introduction: We Should Run Like It Is Godzilla

At one point in the spy-caper parody film *Goldmember*, Austin Powers and his friends are chasing the movie's villain through Japan. Their car gets stuck inside a giant foam dinosaur, which then drives through a crowded square. Panicked citizens scream and run. The scene then focuses on two Japanese men in business suits:

Man 1 [Brian Tee]: Run! It's Godzilla!

Man 2 [Masi Oka]: It looks like Godzilla, but due to international copyright laws, it's not.

Man 1: Still, we should run like it is Godzilla!

Man 2 [to the camera]: Though it isn't.

Both: Aaaaaaaaaaaaaaaaaaaaaaaaaaaaaaa! (Godzilla Scene, 2006)

This scene (see <http://www.youtube.com/watch?v=Fu62k4K4sQ4> to watch a fan-uploaded copy) elicits a laugh from viewers because in everyday life, we seldom think about intellectual property and copyright, let alone interrupt moments of terror to do so. U.S. copyright law is clear about the protections afforded to owners of intellectual property—like the writers and movie-makers who own the character Godzilla—when such property is used for commercial purposes.

However, what should faculty members in higher-education institutions do when they want to show scenes from *Goldmember* to their students during classroom sessions, or as part of online courses? Copyright law is less specific about the "fair use" exception for scholarly purposes (17 US Code § 107). Jonathan Band recently wrote about the relationship between specific exceptions in copyright law and fair-use provisions:

The Copyright Act generally does not explain the relationship between the specific exceptions and fair use. The one departure from this silence occurs in 17 USC § 108, which provides exceptions for libraries and archives. Section 108(f)(4) states that nothing in section 108 "in any way affects the right of fair use as provided by section 107." This savings clause has been understood to mean that the exceptions enumerated in section 108 do not restrict the availability of fair use to libraries and archives. In other words, libraries and archives can still rely on fair use to engage in activities not explicitly permitted under section 108. (Band, 2012)

Band's point is that "fair use" extends beyond specific exceptions from copyright based on the type of entity involved in the use of copyrighted content.

Are you confused yet? Further complicating the situation is the fact that the original U.S. copyright statutes were adopted in the 1970s, before many present-day forms of communication and data storage, especially the Internet, existed.

Administrators in higher-education institutions are faced with an often-conflicting landscape of laws, court cases, adopted practices, rules of thumb, and folk wisdom related to copyright concerns on their campuses. Ask any ten faculty members on your campus, and you will likely receive ten different responses about what constitutes fair use, who owns content created for courses, and what intellectual-property rights apply to faculty members and the institution (Kordsmeier, Gatlin-Watts, and Arn, 2000). Part of the challenge for higher-education administrators is that a deep understanding of copyright requires much more study and training than most faculty members are able to spare beyond their subject areas. Based on the questions I've received at many of my copyright workshops and lectures since 2000, faculty members are often hungry for clear and simple guidance in three key areas:

- use of copyrighted materials for teaching purposes,
- ownership of content created by faculty members, and
- the rights of individuals and institutions under various intellectual-property ownership-agreement structures.

This article will guide higher-education administrators in adopting policies and practices for their campuses that are easy to remember and apply, and that

- provide rule-of-thumb ways to define fair use of copyrighted content,
- highlight alternative means of providing access to copyrighted content, and
- suggest the most common models of ownership and rights associated with intellectual property and multimedia content created by faculty members.

Part 1: Use of Copyrighted Materials for Teaching Purposes

Meet Professor Pool

Gene Pool is a professor in the biology department at a state university on the west coast. As part of his course on marine biology, Dr. Pool wants to show his students an entire 2-hour documentary, Nick Hope's *Reef Life of the Andaman*. Gene has a DVD copy of the program that he bought in 2006. He's recently learned that Bubble Vision, the company that produced the video, in October 2012 added new footage and posted the full 2-hour video of the second edition on its YouTube channel (Hope, 2012). The DVD remains available for sale on their web site for \$24.95. Gene went to his dean, Minnie Strator, confused on a number of fronts.

- Can Gene download the video from YouTube so he has a copy to show his students that doesn't rely on having a live Internet connection (which can be spotty in certain classrooms on campus)?
- Is it okay to copy just one scene from the longer video and include it in Gene's course environment in the campus learning management system (LMS)?
- Since there's a new edition, is the first edition no longer covered under copyright?
- Why would the company post the whole video for free and still expect to sell DVD copies?

Before we address Gene and Minnie's dilemma, take a few minutes for a short quiz.

A Short Quiz

1. Which of the following choices is an example of copying?

- a) Linking to a file on YouTube.

- b) Sharing the web address of a file on YouTube.
- c) Saving a video file from YouTube onto your own computer.
- d) Providing the key words for finding a video on YouTube.

2. Which of the following are NOT protected by copyright?

- a) Works created by the federal government.
- b) Works that display the copyright symbol ©.
- c) Works that are published on the Internet.
- d) Student-written papers in your class.

3. Which of these works is protected by copyright?

- a) Your spouse's unpublished personal journal.
- b) A movie from 1930 whose copyright has not been renewed.
- c) Software code where the creator expressly gives up all rights to the work.
- d) The latest report from the U.S. Congressional Budget Office.

Answers 1. c), 2. a), 3. a)

What is a Copy?

The questions in the quiz, as well as Gene Pool's questions for Minnie Strator, highlight two elements of copyright law that are in conflict: protecting original works and the ability to make copies. At its core, the concept of copyright applies to the right of the originator of a work to restrict others from making copies of the work. However, the definition of what constitutes a copy has evolved rapidly since the 1970s when the copyright law was first adopted. Initially, a copy was easy to define: a physical reproduction of the original content. Copies were also easy to identify because of their physical form, including photocopies, reprints, cassette tapes, phonograph records, posters, and musical scores. Higher-education faculty members and administrators could easily tell whether copies had been made—and thus whether copyright considerations needed to be observed.

The advent of computer data files expanded the definition of "a copy" significantly. One can now make exact duplicates of word-processing files, sound clips, movies, and software programs. The ease of copying data separately from a physical format has led to a culture of "information freedom" in which a) the trail of content ownership is easily muddled or erased, b) copying entire works requires vanishingly diminishing effort, and c) there is a popular misconception that public access equals the abrogation of ownership rights: if it's out there, it must be free to use.

A last confusion: the answer to Gene Pool's question about downloading a YouTube video can get knotty. Faculty members are often unsure about how to decide questions about copying, embedding, and linking to intangible resources like Internet videos (Sweeney, 2006). In order to display the marine-biology video from YouTube, Gene's computer has to create a temporary copy of the video as the file is streamed from YouTube's servers. Gene's computer (indeed, any end-use device like a tablet or smart phone) does not hold on to such temporary copies, though; when new content comes in, it over-writes older content.

Fortunately, these concerns can be put aside if we define copies as intentional reproductions of all or part of original works, where the copies are located in a different place than the original works. This definition is easy to remember, covers physical and digital reproduction, and will come in very handy about twenty paragraphs from now.

What Is and Isn't Copyrighted

Questions 2 and 3 in the short quiz help to put some scope to what is and isn't covered by copyright. The assumption behind copyright is that everything—all created work—is initially covered by copyright, and only items specifically exempted are not covered. That is why students own the copyright for the papers and projects they create for course assignments, and why unpublished works like diaries are covered by copyright, and why even works that do not display the copyright symbol and have not been registered formally with the U.S. Copyright Office are still covered under copyright. Basically, if you create it, it's covered by copyright.

Copyright was intended, though, to allow creators of works to enjoy the benefit of their labors, and copyright law allows copyright to expire after a period of years. Also, works created under certain circumstances are also "born" without copyright (that is, they are considered in the public domain):

- those created by the federal government.
- works more than 70 years old (after the life of the author), where copyright has not been renewed.
- situations in which the creator expressly gives up some or all rights to the work.
- works created by multiple/corporate authors where the content is "un-own-able" (e.g., works created by the Red Cross, entries on Wikipedia, and open educational resources).

This last category is the least specific, so a good rule of thumb for administrators and faculty members is to remember the Three Os: "official, old, or open = okay to use freely."

Fair Use Criteria

More than works where copyright does not apply, higher-education administrators are concerned about the scholarly use of works that are covered by copyright. The fair-use exception for scholarly purposes (17 US Code § 107) broadly outlines how faculty members can use copyrighted materials, and there is even a separate section that allows faculty members to show entire works (e.g., screen a whole movie, show an entire painting) in the classroom—but not via distance-education (17 US Code § 110). The language in the fair-use section of the law is notoriously open to interpretation (see U.S. Copyright Office, 2012, for an attempt to clarify things that serves only to raise more questions). I have asked many administrators and faculty members to share their understanding of fair use. Here are some of their responses:

- "I can use anything I want because I'm an academic."
- "I just make sure I'm not using more than 10% of any given item."
- "If I don't copy more than one chapter, I'm safe."
- "I make copies of everything, but just for myself, as backups in case I can't get to them in the future."
- "I don't use more than ten seconds of a song or audio clip."
- "I think we're allowed to use whatever we want, so long as we aren't charging students for it."
- "That's what the librarians are for. They bail me out if there's an issue about copyright."

Each of these understandings contains at least some incorrect or misguided information, and in some cases, the faculty member or administrator is liable to end up in trouble, especially the person who sees fair use as being able to "use anything I want." Perhaps more insidious is the "ten percent" rule of thumb—a commonly-held idea about the limits of fair use—which doesn't actually appear anywhere in the copyright law, and may be more or less restrictive than given situations warrant. What is needed is a simple test for use cases, one that keeps faculty members on the "right side" of copyright fair use in most situations.

In order to allow higher-education administrators and faculty members to make informed decisions about fair use, I have adapted the criteria listed in the fair-use section of copyright law, according to the mnemonic PANE:

- **Purpose:** Are you copying the content for "criticism, comment, news reporting, teaching, scholarship, or research?"
- **Amount:** How much of the whole item are you using? Prefer to copy a representative sample rather than an entire item.
- **Nature of the Work:** Is the content factual or creative? Is it being copied for a one-time purpose or to be used repeatedly?
- **Economic Impact:** Will your copying of the material deprive the owner of revenue or profits?

Faculty members can examine each of the PANE criteria according to their proposed use of a copyrighted work. Those uses that apply to all four PANE criteria will be most defensible as fair uses of copyrighted works in academic settings.

Purpose is the easiest of the PANE criteria to meet. Faculty members who wish to use works for their courses are almost automatically using the desired item for "criticism, comment, news reporting, teaching, scholarship, or research." A note of caution for this criterion, however: using copyrighted works as decorations (even in course-related documents) or to support advertising purposes (e.g., using a copyrighted image on a flyer advertising a lecture) tends to fall outside of the scope of fair use.

Amount is also an easy-to-determine criterion. Determine the scope of the whole work that is owned by a creator: a book chapter can be considered a whole work if other chapters are written by other authors, for example. Then, use a token or representative sample of the work. This is where the ubiquitous "ten percent" guideline can get one into trouble, in both directions. Ten percent of a poem or song might not be enough to help make a point about it in class. Use more than ten percent, but still not the whole thing. Ten percent of a book might be able to stand on its own as an entire logical argument from an author. Quote judiciously. Although a "representative amount" seems like a nebulous criterion, this is the one part of fair use that is most defensible according to the needs of the faculty member claiming fair use of a work.

Nature of the Work is the criterion for which many faculty members may not be able to check the metaphorical box. Most faculty members, once they find content that adds to the conversation in their courses, wish to use that content repeatedly. The example from past generations of the never-changing prof-pack of photocopied articles has now been replaced by the tale of the online course environment in which the professor uploads a copy of the same video clip from a 2003 *Saturday Night Live* skit semester after semester, even though the cultural references in the example are starting to feel dated. The original copyright law is ambiguously worded; it talks about "the nature of the copyrighted work," which, in these days of perfect electronic copies of computer files, makes it difficult to use the "nature of the work" as a criterion. Thus, for this criterion, ask whether the use of the work will be for a limited time, or whether the use will be on a permanent or semi-permanent basis. If the work becomes an integral part of the delivery of the course, the case for fair use is less defensible. Further, fair use is more defensible for the use of content that is itself primarily factual—using an economic report or a documentary film clip is more defensible than using a critical essay or a popular song.

Economic Impact is typically simple to determine. If the faculty member is providing the work to help students to avoid paying for it, then this criterion is failed. For example, a professor in the computer-science department might distribute to the class CD-ROMs containing needed programs, so that students need not purchase their own copies. Even charging the students for the cost of materials and copying still shades away from fair use; when in doubt about economic impact, err on the side of caution. A second example is illustrative, here. Including a photocopied poem in your "prof-pack" every semester is likely not going to deprive the poet or publisher of economic gain. Nor is creating a PDF scan of a poem to distribute to your class one time. However, creating a PDF scan of a poem to avoid students having to buy the entire book in which it appears would likely fail the economic-impact criterion.

From a Right to a Defense

Notice that the PANE criteria aren't hard and fast distinctions between allowed and prohibited uses of copyrighted content. As the character of Captain Barbosa says about the Pirate Code in the *Pirates of the Caribbean* movies, the fair-use criteria are "more what you'd call 'guidelines' than actual rules" (Verbinski, 2003). Initially, fair use was understood to be a right that people could exercise. "The 1976 revision of the Copyright Act . . . change[d] the original nature and function of fair use. It treats fair use as a defense, rather than as an affirmative right of use" (Ghosh, et al, p. 174).

Fortunately, building a solid defense to argue that a given use of copyrighted content is a "fair use" is relatively straightforward, and the lack of a fixed standard means that each question of fair use must be determined on a case-by-case basis. The House Report on Copyright contains these heartening words:

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. (HR 94-1476, 1976, p. 65)

The scope of fair use thus seems to be pretty broad. Before looking at some more good news, we must talk briefly about two limiting factors: the DMCA and the TEACH Act.

A Word on the Digital Millennium Copyright Act and the TEACH Act

In 1998, the Digital Millennium Copyright Act (DMCA) was enacted in order to clarify whether it was permissible to make copies of digital works for various reasons (U. S. Copyright Office, 1998). For higher-education purposes, the most significant outcomes from the DMCA were 1) to make temporary caching of digital work (such as the temporary copy of a video file that is created on a user's computer when the content is streamed from an Internet location) permissible, and 2) to create special rules limiting the liability of educational institutions for copyright infringement by their faculty members, provided the institutions take steps to ensure that their staff and faculty members are educated about copyright compliance.

In 2002, the Technology, Education and Copyright Harmonization (TEACH) Act was enacted in order to update Section 110 and 112 of the copyright law, which contained exemptions for faculty to display entire works in the classroom, but limit transmitting entire works via networks (Harper, 2007a). The TEACH Act expanded faculty members' ability to create and display digital copies of content in their online classroom environments (Russell, 2002). The University of North Carolina Charlotte library staff created a TEACH Toolkit in 2003, which remains the most concise explanation of the reason that the TEACH Act was created:

TEACH is not a separate or additional copyright law; it simply replaces an already existing section. TEACH, or more accurately, Section 110(2) [of the original copyright law], is triggered whenever the performance or display of a copyrighted work is transmitted. Nowhere in TEACH will you find the phrase "distance education" or "online courses." Nevertheless, it can apply to what we refer to as distance education or online courses because transmission of works is exactly what is occurring. Additionally, referring to 110(2) as "TEACH," even though the act is many years old, is an easy shorthand, similar to using "fair use" for Section 107. . . Thus, any time a performance (music, movies, etc.) or display (image, text, etc.) is transmitted (cable television, over the web), the TEACH exception might be an option for our faculty. The many requirements of TEACH may prevent its use, but other solutions may be available (UNC Charlotte, 2003).

More recently, some copyright holders have sought to limit the scope of educational use of intangible content for distance education. In several cases, U.S. courts have upheld the rights of institutions to use digital content in distance-education courses via copying, streaming, and transformation of the content, so long as access to the content is restricted only to the intended audience, such as students who must key in user names and passwords to gain access to the LMS or media service (see Cheverie, 2011; Cheverie, 2013, and Enghagen, 2012).

For the purposes of this "when the lawyer isn't looking" treatment, remember that the DMCA and TEACH Act closed gaps in applying copyright to digital media, and that it's usually permitted to use digital media if the use is not publicly accessible and available only to those involved in the learning environment.

Creative Commons & Other Special-Rights Licenses

Copyright law initially allowed for creators to specifically give up some of their rights through the use of special licenses. Until recently, such licenses were used mostly by large companies, since the terms of licenses has to be created explicitly for the specific circumstances surrounding individual copyrighted works.

In 2002, the Creative Commons organization created four standardized, some-rights-reserved license categories that could be applied by creators to their works in order to allow less-restrictive uses than are allowed by copyright:



Attribution: Licensees may copy, distribute, display and perform the work and make derivative works based on it only if they give the author or licensor the credit by these.



Noncommercial: Licensees may copy, distribute, display, and perform the work and make derivative works based on it only for non-commercial purposes.



No Derivative Works: Licensees may copy, distribute, display and perform only verbatim copies of the work, not derivative based on it.



Share-Alike: Licensees may distribute derivative works only under a license identical to the license that governs the original work. (Creative Commons, 2013)

Faculty members can look specifically for works created under Creative Commons licenses in order to be able to expand beyond the boundaries of the fair-use criteria. For example, many Internet search engines and content sites (e.g., Google, Flickr) have advanced-search limiters to allow searches only within Creative-Commons-license content.

Institutional Licensing

Most higher-education institutions have negotiated broad use licenses with major copyright holders, typically through the library collections. Library databases today often include resources beyond journal articles and e-books, including films, music, computer software, and interactive multimedia. Also, many institutions have agreements with publishers to provide access to copyrighted supplemental materials when textbooks are adopted. Faculty and administrators should investigate whether alternatives to copyrighted items are available under existing institutional licenses, or even if the copyrighted works themselves are included in institutional license agreements. When he was creating an online-course version of a course he had taught for many years, a faculty member at my own university asked me to help him find an alternative to a DVD he customarily showed to his face-to-face course: a documentary about forced sterilization of mentally-retarded individuals in the early 20th century, entitled *The Lynchburg Story*. A little sleuthing showed us that the entire documentary video, along with a full text transcript, was already available to faculty members and students via our university library's subscription to the *Filmmakers Library Online* database, which contains the Alexander Street Press video collection.

Seeking Permission Beyond Fair Use

Even when the intended use goes beyond the limits of fair use, and when alternative access is not available, requesting permission from the copyright holder to use the work in a specific way is a viable strategy. Several institutions have created boilerplate-language permission-request letters that can be used by faculty members (e.g., Columbia University, 2010). Once permission is granted, faculty members can use the work according to the requested parameters, so long as they provide attribution for the work (e.g., placing a copyright notice with the work, or citing the work's creator in the course lecture content).

Many works that appear on the Internet do not have clear creator attributions; even though it may be difficult or impossible to ascertain who created a work, faculty members are still obliged to make a good-faith effort to find the creator or copyright holder in order to request permission for uses beyond the fair-use provisions (Hanlon & Ramirez, 2011). Faculty members also have a responsibility to avoid the use of works that they know or suspect to have been created in violation of copyright in the first place, so that full-length upload to YouTube by "JoePesciFan800" of the 1990 film *Goodfellas* is probably still off limits.

Now Ignore Everything You've Just Read

Remember our definition of copies? We called them "intentional reproductions of all or part of original works, where the copies are located in a different place than the original works." One of the key differences for copyright between digital and traditional works is that digital works can often be consumed remotely without having to make permanent copies, while works on physical media need to be copied in order to be consumed. Think of a paper book: in order to read it, one needs to obtain a physical copy of it.

Now, think of the same content in e-book format: one could download a copy to one's tablet device in order to read it, or one could go online and read the text directly from a web site that contains the entire text. The web-site version requires that your computer make a temporary copy of the text, but those unintentional temporary-cache copies don't "count" as copies, thanks to the DMCA and TEACH Act. Likewise, it is possible to embed a streaming video from, say, YouTube, into a learning-management-system web page so that the video plays directly from within the web page, all without the video being copied onto the LMS server (Fineberg, 2009). It is possible to serve up all kinds of content—still images, audio recordings, videos, text, interactive simulations—from their original Internet locations. So long as their Internet connections remain stable, students viewing a faculty member's online-course page will have a difficult time telling which pieces of content are hosted on the institution's computer servers and which pieces of content are "passing through" to them via streaming or embedding.

Thus, the first question that faculty members must ask—even before they start to apply the PANE criteria of fair use, and before they investigate whether there are institutional license agreements, and before they request permission from copyright holders—is this:

Have you actually made a copy?

In other words, have you downloaded a separate file that now resides in a different place from the original digital work, like on your hard drive, an institutional server, or a portable drive? If the answer is no, then copyright does not apply. Period. Future copyright law may one day close this gap, but today, if no copy has been made, then faculty members may use a work in its entirety, for as many semesters as they like, for whatever reasons.

Make sure that documentation of the "pass-through" method being used is readily available; in fact, it is a good practice to place attributions within course materials to show which items are being embedded or streamed from other locations. Attributions also help in case the streaming or embedded code malfunctions: citations can link learners to the original location of the content, so they can consume it directly from the source. When linking to or embedding content, faculty members are obliged to ensure that the content is being shared by its owner or by someone who is using the content in an ethical manner.

For links and embedded content, a word is necessary that goes beyond the law into the realm of ethical behavior. Knowingly linking to unauthorized Internet copies

of original works, while perhaps technically legal, fails the "sniff test." This does not mean that faculty members cannot link to or embed content from people who are not the copyright holders, just that faculty members should make a good-faith determination about whether desired content has itself been copied and shared ethically. For example, the YouTube video of the Godzilla scene from *Goldmember* cited at the beginning of this article was uploaded by an individual fan, not by the distributor, New Line Cinema. Because no copy has been made of the YouTube video, and because the video is not represented in this article as being from the distributor, linking to the Godzilla scene on YouTube can be defended for the purposes of scholarship or classroom use.

Checking in with Professor Pool

Minnie Strator knew that Dr. Pool could display the entire 1-hour DVD to his face-to-face students, thanks to the exception granted in Section 110 of the copyright law. She also told Gene Pool that he could use the "embed code" from the production company's YouTube version of the marine-biology video, thus avoiding having to apply the fair-use criteria to the video for his distance-education students, since he was not making a copy of the video.

Strator also suggested that Pool use the university library's request form to ask them to order a physical DVD copy for the collection. Although doing so would not be required by law, it would be a good strategy to have a physical copy that could be placed on in-library course reserve. Gene Pool was relieved to know that he would be able to share the full documentary with all of his students, and he was grateful to be able to replace his "use ten percent of the source" understanding of fair use with more helpful criteria.

As Gene was getting ready to leave Minnie's office, a new thought struck him. He asked Minnie whether he or the university owned the lecture notes and course podcasts that Gene had created, digitized, and shared in his online course environments. Minnie responded that the tradition for their university held that faculty members owned their intellectual creations, so while Gene didn't own the common syllabus (created by the curriculum committee), he did own his lectures and podcasts and other content, just as in previous years Gene had owned the content of his research projects, experiments, and essays that he had authored. Gene asked where he could see that ownership written out explicitly, and Minnie Strator said that she would have to check with others at the university and get back to Gene.

After Dr. Pool left her office, Strator worried that the tradition of faculty-member ownership was just that: tradition. She thought especially about the university's online courses, and the fact that most tenure-line faculty members were already teaching their full loads. If faculty members owned the content in their online-course environments, could the university copy those materials as a "base structure" and assign them to other instructors? Would the university need to go through the whole training-and-development cycle—which took up to four months—for every new adjunct instructor who would be assigned to teach a new online-course section?

Questions like these, Minnie Strator thought ruefully, were part of the reason that administrators kept bottles of antacids handy.

Part 2: Ownership of Content Created by Faculty Members

The most common questions about copyright in higher education have to do with a) how faculty members may use the copyrighted content created by others, and b) who owns the content created by faculty members. Ginger Harper's "Copyright Crash Course" on the University of Texas Libraries web site is especially clear-eyed about the intellectual-property issues facing higher-education administrators:

17 USC Section 201(a) vests ownership of copyright in a work with the author of the work. Section 201(b) provides that the employer or other person for whom a work-for-hire is prepared will be considered the author for copyright purposes. Works-for-hire are works created by employees within the scope of their employment, or by others pursuant to written contract, if the work created falls into one of the nine categories set out in the definition of work-for-hire in Section 101.

Universities have for the most part altered the statutory scheme either through tradition or through policies that permit faculty ownership of their scholarly writings and educational materials. It is unclear whether the law would compel the conclusion that faculty writings are works within the scope of employment, but resolving the issue seemed of little consequence until recently. . . . [T]his policy has contributed to the escalating prices universities must now pay to buy back the scholarly works their own and federal taxpayer funds helped to create.

The allocation of ownership interests in the end products of university research is just one policy consideration. Today there are more subtly nuanced variations on the once-straightforward theme of ownership of works created on our campuses:

- Scholarly works implemented in software
- Multimedia courseware
- Web enhanced face-to-face teaching and distance learning
- The changing nature of authorship (joint and collaborative electronic works) (Harper, 2007b)

By explicitly allowing faculty members to retain ownership of the content that they create as employees of institutions of higher education, colleges and universities have inadvertently created a situation where competing claims of ownership for intellectual property can be made, especially where faculty members have created course-related materials (e.g., lecture notes, videos, audio podcasts) with assistance from other institutional staff whose work outputs often do fall under the work-for-hire criteria in copyright law. Before we dive too deeply into the work-for-hire debate, we should start with the rights that faculty members who create content always retain.

General Rights of Faculty Creators

Regardless of ownership categories or agreements, for all content created by faculty members for use in courses or an LMS, faculty creators retain the rights

- to take credit for creative contributions,
- to reproduce the work for their own instructional purposes,
- to incorporate the work in future scholarly works authored by the instructor,
- of first refusal in making new versions, and
- to be consulted in good faith on reuse and revisions to the content.

Institutions also traditionally disclaim ownership rights in scholarly works (e.g., conference papers, publications, and content created in the pursuit of instructors' research agendas) and computer programs developed by instructors, as we saw in Minnie Strator's conversation with Gene Pool.

Note, too, that our focus is wholly on the rights of institutions and the rights of faculty members. Administrative staff and other institutional employees who may be employed in order to support faculty members in the creation of course materials almost always fall under the "work for hire" provisions of copyright law (see below for a fuller explanation).

Part 3: Ownership-Rights Agreements

For administrators in higher education, a leading concern regarding distance-education courses is assignability. In order to meet the demand for new programs, courses, and sections, deans and department chairs need as much flexibility in creating, scheduling, and assigning courses as possible. For face-to-face offerings, intellectual property is seldom a concern in these processes. The institution provides a minimum structure: usually a common syllabus (or set of requirements for

elements that must appear in the syllabus), a common set of learning outcomes or objectives, and perhaps a textbook in common across all sections of a course. All instructors who teach a given course are expected to create the remaining course experience for students. Indeed, course delivery is traditionally what tenure-line and adjunct faculty members are paid for, the former in terms of a course load and the latter on a course-by-course basis. Instructors create materials like tests, lecture notes, handouts, and multimedia as part of the course delivery, and administrators feel confident assigning instructors to newly-created sections of courses, even on short notice, because face-to-face instruction can often be constructed "on the fly," based largely on the expertise, notes, and memory of the assigned instructors.

For course-delivery modes that include distance-education components, such as hybrid and online courses, much of what instructors might create or say "on the fly" in a face-to-face course must be written out and fixed in the structure of an LMS in advance of the course-offering time frame. Because online course components require instructors a) to fix their ideas in a permanent format such as lecture notes or multimedia presentations and b) to create such course materials ahead of the time when learners will consume them, relying on the tradition of "you created it, so you own it" presents significant assignability challenges for administrators. If individual instructors own everything but the syllabus and the textbook, then only those instructors who have already created their entire complement of online course materials can be assigned to teach sections of a given course. Worse, institutions are hamstrung in cases where instructors become ill or where demand for a course surges soon before the beginning of a semester: finding replacement instructors is dependent on getting permission from the creator who has become ill, in the first instance, and having an instructor who already has the online course content "in the can" and ready to deploy, in the second instance.

Content-Ownership Agreement Categories

It is imperative for higher-education institutions to move away from reliance on tradition and make explicit policies and agreements regarding faculty-member and institutional ownership of intellectual property. Here, we will narrow our focus to consider especially the ownership of online (that is, fixed-format) content, especially content that is housed in institutions' learning management systems (LMSes), for which institutions have oversight and control. Institutions typically distinguish among three categories of ownership of intellectual property developed by instructors for use in LMS course shells or other institution-owned repositories:

- created **without** substantial technical or financial support,
- created **with** substantial technical or financial support, and
- created as **work-for-hire**.

Some institutions prefer not to distinguish between the first two categories because "substantial technical or financial support" is simple to define yet difficult to measure. "Substantial technical or financial support" is support provided expressly for the creation of materials that are to be used in the LMS or other institution-owned repositories. Such support includes staff time devoted to assisting instructors, training requested by/for the instructor, release time, reassignment of duties, and payment directly for development of content. Such support specifically excludes staff time already scheduled for campus-wide workshops or other general assistance, training provided for general audiences, and institution-owned equipment and time used for the fulfillment of primary job duties.

Category 1: Content Created without Substantial Technical or Financial Support

The intellectual property rights for content created by faculty members without substantial technical or financial support from the institution, for use in the LMS or other institutional repository, are owned wholly by the faculty member who created the content. The content creator may use such content in LMS course shells without implying shared ownership of the content, and the faculty member retains copyright protections for the content. This state of affairs is closest to the long-standing tradition of "you created it, so you own it."

Category 2: Content Created with Substantial Technical or Financial Support

The intellectual property rights for content created by faculty members with substantial technical or financial support from the institution, for use in the LMS or other repository, are owned jointly by the institution and the faculty member who created the content. This type of agreement must spell out carefully who are considered creators and who are considered support staff. For example, in my role as a learning-technologies administrator, all of the content that I help faculty members to create is owned by the faculty member and my university. I do not personally retain any copyright stake in the ownership of those materials.

The institution and the faculty creator grant each other a royalty-free license for future use of the content. Both the institution and the instructor retain the right independently to make derivative works based on the content. Administrators may copy the content when assigning new course sections to other instructors, and many agreements stipulate that the original content creators be paid a nominal per-use stipend for each re-assignment, such as 1/10th of the payment for teaching the full course (Kromrey, 2005). Faculty creators also retain the right to have control over content that is subsequently licensed by the institution for use outside the institution.

Category 3: Content Created as Work for Hire

The intellectual property rights for content created by faculty members under work-for-hire agreements, for use in the LMS or other repository, are owned wholly by the institution. The faculty creator releases all rights to the content in return for compensation by the institution.

Work-for-hire content is produced as a result of direct written agreement, and is produced by individuals contracted specifically to produce such content. Work-for-hire also includes content specifically commissioned by the institution. Work-for-hire is considered to be outside the normal contractual duties of faculty members—as "extra work" or "overload" assigned to the faculty member. Work-for-hire is challenging to define when the core job duties of faculty members already include the creation of course materials, so defining it as "extra work" or creating a separate contract or Memorandum of Understanding (MOU) for work-for-hire assignments helps to eliminate such potential confusions.

The terms of all work-for-hire agreements are determined in writing prior to beginning the work-for-hire tasks, which are laid out in a mutually agreed-upon timeline for specific deliverables. The work-for-hire agreement must be signed by the institution and the faculty creator before work begins. A work-for-hire agreement is considered a separate and legally-binding contract.

Is It Godzilla? Or Is It Memorex?

Later in the week, Minnie Strator was having dinner with Dee Paloma and Leigh Dership, two friends who were administrators at a local two-year college. Minnie shared the outline of her conversation with Professor Pool, including his questions about using copyrighted works and about who owned Gene's online lecture materials. Dee thought for a moment, and said that the situation reminded her of an ad campaign she had seen many years ago. Memorex cassette tapes had a famous slogan: "Is it live, or is it Memorex?" To help make the case for the fidelity of recordings made with their product, Memorex hired singing star Ella Fitzgerald in the early 1970s to appear in TV commercials (see <http://www.youtube.com/watch?v=lfhugTnXJV4>), where she and a band appeared to be playing live, but were revealed to be lip-synching to a Memorex recording of their earlier performance.

Paloma recounted more details about the Memorex ad campaign, where ordinary people and people in the music industry were asked to say whether the sound they were hearing was Fitzgerald and her band or a recording, and no one could tell the difference. Paloma said that the Memorex commercials made a virtue out of being able to make an exact copy of the audio, but that colleges and universities today are challenged by the ability to make exact copies of digital materials.

Leigh Dership added that no one in those 1970s-era commercials asked who owned the Memorex recordings. Since it was easy to create an original audio recording

but cumbersome to make many copies, recording to cassette tapes was not considered a threat to the rights of content owners in the same way that, say, Napster and other file-sharing services are a threat to the rights of content owners in recent history.

This reminded Minnie Strator of a scene in the spy-caper parody film *Goldmember*, where Austin Powers and his friends are chasing the movie's villain through Japan. . . .

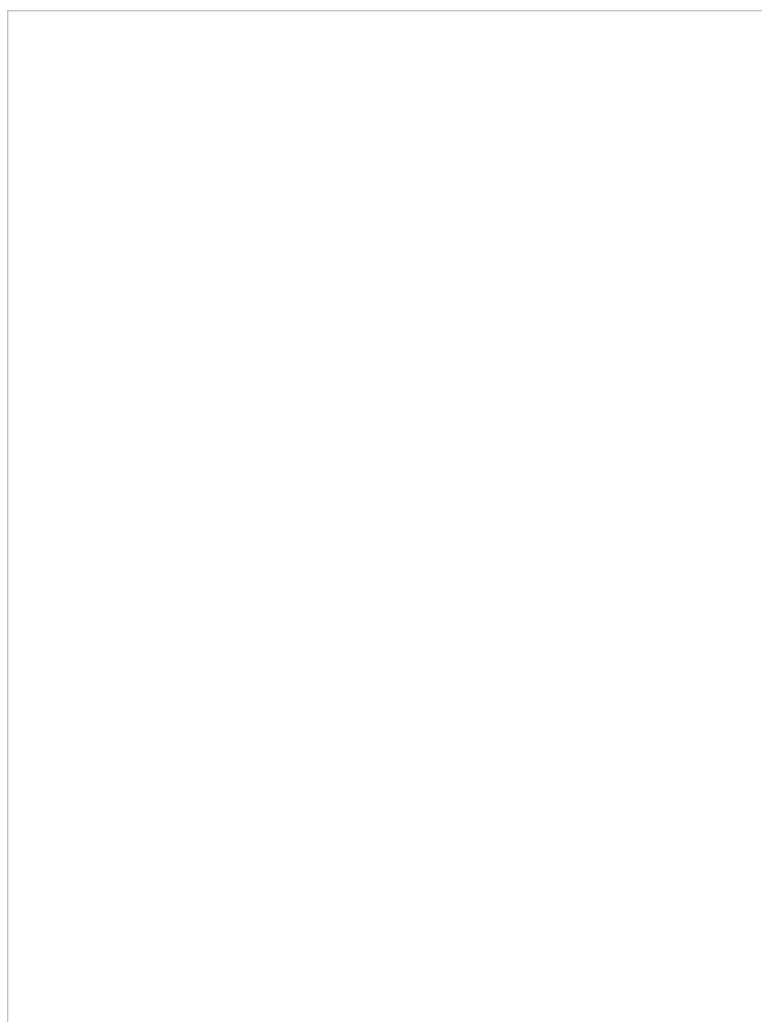
Conclusion

The general strategies shared in this article for making decisions about when and how to apply the fair-use provisions of U.S. copyright law (deciding whether a copy has been made, applying the PANE criteria) are definitely not the final word in those decision-making processes. They are intended to cover the majority of situations, and to allow faculty members and administrators to make confident judgments about content usage "when the lawyer isn't looking." Where application of these strategies fail or produce ambiguous results, it is always best to err on the side of caution, either by requesting permission from the copyright holder, or at least by consulting legal counsel for clarification.

The guidelines in this article also highlight those times when the lawyer should be looking. Especially when considering how best to create agreements between institutions and faculty members regarding ownership of content created by faculty members, it is a necessity to have institutional counsel involved. In my workshops and seminars on copyright, I hear very specific questions about the ownership of content that has been created by faculty members. An extreme example: "I was hired by my university while I was still finishing my doctoral studies. The university paid my tuition, and suggested a topic for my dissertation research, which I eventually used. Now the university says that it owns my dissertation. Is that true?" In such situations, it is definitely time to consult counsel.

However, the majority of situations where faculty members wish to use content created by others do not require a call to the institution's lawyer. Faculty members and administrators can use some simple guidelines to help them to honor their desire to share content with their students in ways that are fair to the copyright holders and fair to the faculty members. Appendix A provides a one-page U.S. copyright flow chart for faculty members to use as a quick reference . . . when the lawyer isn't looking.

Appendix A: The One-Page Copyright Flow Chart



Disclaimer

This publication is a general overview of various models and methods regarding copyrighted content and ownership of intellectual property in higher-education settings. The author is not a legal professional, and no part of this publication is intended to constitute legal advice.

References

17 US Code § 107. "Limitations on Exclusive Rights: Fair Use." <http://www.copyright.gov/title17/92chap1.html#107>.

17 US Code § 110. "Limitations on Exclusive Rights: Exemption of Certain Performances and Displays." <http://www.copyright.gov/title17/92chap1.html#110>.

- Band, J. (2012). "The Impact of Substantial Compliance with Copyright Exceptions on Fair Use." *Journal of the Copyright Society of the USA* 59(3): 453-475.
- Cheverie, J. (2011). "UCLA Streaming Video Case Dismissed." EDUCAUSE blogs. <http://www.educause.edu/blogs/cheverij/ucla-streaming-video-case-dismissed>.
- Cheverie, J. (2013). "The HathiTrust Case and Appeal: Fair Use and Technology." EDUCAUSE blogs. <http://www.educause.edu/blogs/cheverij/hathitrust-case-and-appeal-fair-use-and-technology>.
- Columbia University. (2010). "Model Letter: Including Work in Course Management System." <http://copyright.columbia.edu/copyright/permissions/requesting-permission/model-forms/>.
- Creative Commons. (2013). "History." <http://creativecommons.org/about/history>.
- Enghagen, L. K. (2012). "Academic Institutions Go 'Three for Three' in Copyright and Fair Use Lawsuits." *Distance Education Report* 16(22): 5.
- Fineberg, T. (2009). "Copyright and Course Management Systems: Educational Use of Copyrighted Materials in the United States and the United Kingdom." *Libri* 59(4): 238-247.
- Ghosh, S., Gruner, R., Kesan, J. P., and Reis, R. I. (2007). "The Function of Fair Use." *Intellectual Property: Private Rights, the Public Interest, and the Regulation of Creative Activity*. St. Paul, MN: Thomson/West: 174-176.
- Godzilla Scene. (2002). *Austin Powers in Goldmember*. Dir. Jay Roach. New Line Cinema. *YouTube*. Uploaded 17 Oct. 2012 by alexkay94. <http://www.youtube.com/watch?v=Fu62k4K4sQ4>.
- Hanlon, A. and Ramirez, M. (2011). "Asking for Permission: A Survey of Copyright Workflows for Institutional Repositories." *portal: Libraries and the Academy* 11(2): 683-702.
- Harper, G. K. (2007). "Copyright Crash Course: The TEACH Act." University of Texas Libraries. <http://copyright.lib.utexas.edu/teachact.html>.
- Harper, G. K. (2007). "Copyright Crash Course: University Administrative Interests in Copyright." University of Texas Libraries. <http://copyright.lib.utexas.edu/admin3.html>.
- Hope, N. (2012). *Reef Life of the Andaman*. 2nd ed. Bubble Vision. [1:56:23] <http://www.youtube.com/watch?v=8ncUVddkK3Q>.
- H.R. Report No. 94-1476 (1976). USCCAN, pp. 65-74. <http://www.copyright.gov/circs/circ21.pdf>.
- Kordsmeier, W., Gatlin-Watts, R., and Arn, J. V. (2000). "University Administrators' Understanding of Multimedia Copyright Guidelines." *Educational Technology & Society* 3(1). http://www.ifets.info/journals/3_1/multimedia_copyright.html.
- Kromrey, J. (2005). "Intellectual Property and Online Courses: Policies at Major Research Universities." National Educational Computing Conference. Philadelphia, PA: June 27-30. http://htmlscript.auburn.edu/outreach/dl/pdfs/Intellectual_Property_and_Online_Courses.pdf.
- Memorex Corporation. (1972). "Is It Live or Is It Memorex?" *YouTube*. Uploaded 14 May 2012 by ukclassictelly. <http://www.youtube.com/watch?v=lfhugTnXJV4>.
- Russell, C. (2002). *New Copyright Exemptions for Distance Educators: The Technology, Education, and Copyright Harmonization (TEACH) Act*. Syracuse: ERIC Clearinghouse on Information and Technology.
- Sweeney, P. C. (2006). "Faculty, Copyright Law, and Online Course Materials." *Online Journal of Distance Learning Administration (OJDLA)* 9(1). <http://www.westga.edu/~distance/ojdl/spring91/sweeney91.htm>
- UNC Charlotte J. Murray Atkinson Library. (2003). "The Original TEACH Act Toolkit." The University of North Carolina at Charlotte. <http://copyright.uncc.edu/copyright/TEACH>.
- U.S. Copyright Office. (1998). "The Digital Millennium Copyright Act of 1998: Summary." <http://www.copyright.gov/legislation/dmca.pdf>.
- U.S. Copyright Office. (2012). "Factsheet on Fair Use." FL-102. <http://www.copyright.gov/fls/fl102.html>.
- Verbinski, G., Dir. (2003). *Pirates of the Caribbean: The Curse of the Black Pearl*. Walt Disney Pictures. Script quote at IMDB. <http://www.imdb.com/title/tt0325980/quotes>.
- Further Reading**
- Aufderheide, P. and Jaszi, P. (2011). *Reclaiming Fair Use: How to Put Balance Back in Copyright*. Chicago: U of Chicago P.
- Aulisio, G. J. (2013). "Copyright in Light of Ethics." *Reference Services Review* 41(3): 566-575.
- Averill, M. (2013). "Copyright and the Digital Economy: ALRC Discussion Paper." *Art + Law* 1(2): 2-9.
- Beebe, B. (2013). "Fair Use and Legal Futurism." *Law and Literature* 25(1): 10-19.
- Bernstein, S. (2011). "Fair Use and Copyright: The Law Is the Law." *Chronicle of Higher Education* 57(40): A19.
- Bleech, A. M. (2009). "What's the Use? Good Faith Evaluations of 'Fair Use' and Digital Millennium Copyright Act 'Takedown' Notices." *CommLaw Conspectus: Journal of Communications Law and Policy* 18(1): 241-268.
- Carsey, K. L. (2011). "Copyright Clarity: How Fair Use Supports Digital Learning, by Renee Hobbs." Review. *Composition Studies: Freshman English News* 39(1): 123-125.
- Center for Media and Social Impact. (2014). *Fair Use*. American University School of Communication. <http://www.cmsimpact.org/fair-use>.

- Constant, B. A. (2000). "The Fair Use Doctrine: Just What Is Fair?" *Journal of Law and Education* 29(3): 385-392.
- Copyright Clearance Center. (2007). "Content Use on Campus: New Copyright Challenges for Senior Administrators." http://www.copyright.com/media/pdfs/content_use_on_campus.pdf.
- Crews, K. D. (1997). "Fair Use and Higher Education: Are Guidelines the Answer?" *Academe*, 83(6): 38-40.
- Crews, K. D. and Okerson, A. (1993). *Copyright, Fair Use, and the Challenge for Universities: Promoting the Progress of Higher Education*. Chicago: U of Chicago P.
- Dannay, R. (2012). "Factorless Fair Use? Was Melville Nimmer Right?" *Journal of the Copyright Society of the USA* 60(2): 127-148.
- Davis, A. Jr. (2012). "Fair Use: Articulating the Liberal Approach." *portal: Libraries and the Academy* 12(2): 121-137.
- Davison, A. (2009). "Copyright and Scholars' Rights." *Music, Sound, and the Moving Image* 1(1): 9-13.
- Decherney, P. (2013). "Communicating Fair Use: Norms, Myth, and the Avant-garde." *Law and Literature* 25(1): 50-64.
- Donaldson, M. C. (2010). "Fair Use: What a Difference a Decade Makes." *Journal of the Copyright Society of the USA* 57(3): 331-336.
- Gervais, D. (2010). "Fair Use, Fair Dealing, Fair Principles: Efforts to Conceptualize Exceptions and Limitations to Copyright." *Journal of the Copyright Society of the USA* 57(3): 499-520.
- Hick, D. H. (2009). "Mystery and Misdirection: Some Problems of Fair Use and Users' Rights." *Journal of the Copyright Society of the USA* 56(2/3): 485-504.
- Hoon, P. (1997). *Guidelines for Educational Use of Copyrighted Materials: Designed for Educators and Librarians in the Higher Education Setting*. Pullman, WA: Washington State UP.
- Keengwe, J. and Georgina, D. (2013). "Supporting Digital Natives to Learn Effectively with Technology Tools." *International Journal of Information and Communication Technology Education (IJICTE)* 9(1): 51-59.
- Libra, S. (2010). "Copyright Clarity: How Fair Use Supports Digital Learning." *Library Media Connection* 29(3): 102.
- Lipinski, T. A. (2006). *The Complete Copyright Liability Handbook for Librarians and Educators*. New York: Neal-Schuman.
- Lipinski, T. A. (2011). "Toward a Functional Understanding of Fair Use in U.S. Copyright Law." *Annual Review of Information Science and Technology* 45(1): 523-621.
- Marley, J. L. (1999). "Guidelines Favoring Fair Use: An Analysis of Legal Interpretations Affecting Higher Education." *Journal of Academic Librarianship* 25(5): 367-371.
- Mazzone, J. (2011). *Copyfraud and Other Abuses of Intellectual Property Law*. Palo Alto: Stanford University Press.
- Mutula, S. M. (2011). "Ethics and Trust in Digital Scholarship." *The Electronic Library*, 29(2): 261-276.
- Patry, W. F. (2011). *How to Fix Copyright*. Oxford: Oxford UP.
- Rourke, B. O. (2010). "Composition and Copyright: Perspectives on Teaching, Text-Making, and Fair Use, Edited and with an Introduction by Stephen Westbrook." *Review. Journal of the Midwest Modern Language Association* 43(2): 194-197.
- Russell, C. (2012). *Complete Copyright for K-12 Librarians and Educators*. Chicago: American Library Association.
- Saint-Amour, P.K. (2013). "Your Right to What's Mine: On Personal Intellectual Property." *Law and Literature* 25(1): 103-121.
- Smith K. and Davis S. (2013). "Copyright in a Digital Age: Conflict, Risk, and Reward." *Serials Librarian* 64(1): 57-66.
- Wagner, K. I. (1998). "Intellectual Property: Copyright Implications for Higher Education." *Journal of Academic Librarianship* 24(1): 11-19.
- Waxer, B. M. and Baum, M. L. (2006). *Internet Surf and Turf—Revealed: The Essential Guide to Copyright, Fair Use, and Finding Media*. Boston: Thomson Course Technology.
- Westbrook, S. (2009). *Composition and Copyright: Perspectives on Teaching, Text-Making, and Fair Use*. New York: SUNY P.
- Wheeler, D. and Anderson, D. (2010). "Dealing with Plagiarism in a Complex Information Society." *Education, Business, and Society* 3(3): 166-177.
- Wyatt, A. M. and Hahn, S. E. (2011). "Copyright Concerns Triggered by Web 2.0 Uses." *Reference Services Review* 39(2): 303-317.