Chapter 11 - Copyright & Fair Use

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Copyright & Fair Use

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Do you own a copyright?

Have you written a class paper? Drawn a picture? Recorded your musical performance? If the answer to any of these is yes, then you are a copyright holder.

Copyright is an often confusing, murky area that many people are intimidated by. While there are some intentional grey areas in copyright law, this chapter is intended to clear up much of the confusion.

What is Copyright?

Copyright is best described as a bundle of rights. Envision a bundle of sticks. These sticks can travel together as a whole, or they can be separated a part into smaller parcels or even single sticks. Similarly, copyright is no one single right, but covers multiple rights including:

- the right to reproduce;
- the right to create derivative works (e.g. translation to another language);
- the right to distribute copies;
- the right to perform the work;
- the right to display the work.

These rights are granted exclusively, as a monopoly on those rights, to an author or other creator upon creation of a work and were created by the Constitution to incentivize such creative activities and, as a result, “Promote the progress of sciences and the useful arts” (U.S. Const. art. I, § 8, cl. 8).

Copyright protects original, creative works: literature, dance, painting, photography, music, architectural plans, and so forth. For an item to be protected by copyright there must be some form of creative expression or creativity in the work. Conversely, pure data is not protected by copyright. For example, a phone book is nothing more than a list of names and their corresponding phone numbers arranged in alphabetical order. The names and numbers are purely data, and there is no creativity in arranging data in descending alphabetical order (499 U.S. 340).

Other requirements for a work to be protected by copyright include that it is an original work – not a copy or derivative another work. It must be a work of authorship – that is a literary work, musical work, dramatic work, choreographic work, graphic or sculptural work, audiovisual work, sound recording, or architectural work. And
finally, it must be “fixed in a tangible medium of expression” (17 U.S.C § 102). This means it must be written down or otherwise saved. Ideas cannot be copyrighted. Works created based on an idea can be.

Copyright is automatic. Once an artist’s painting is complete, a composer has finished her score, or you have saved your research paper, that item is copyrighted. The copyright symbol © is not a requirement. Registration is not a requirement, either, though it is suggested for works that may be circulated, distributed, or by which the author intends to make a profit. As of right now, from that moment of creation the work is under copyright until 70 years after the author-creator’s death.

As you might surmise, this means there are a lot of copyrighted items out there. Most of these copyrighted items will never be profitable and will be passed on to the heirs of the original author-creators, often without those heirs realizing it. This is one of the ways in which the system is confusing. One drawback directly associated with this is that copyright extends for so long that there are many works that we know must be under copyright, yet there is no information available about who the copyright holder may be. These works are known as orphan works, which muddy the waters further from a use standpoint. This issue is especially prevalent among visual works, such as photographs, where the author-creator’s name may have never been attached to the work in the first place.

Using Copyrighted Works

As a student, the aspect of copyright you’re most likely concerned about is the use of another’s copyrighted work. This section of the chapter is going to break down the process of determining if you can do so through a series of questions:

Question 1: Is the item currently protected by copyright?

Let’s say you’re interested in using someone else’s work in a project. One of the first things you’ll want to determine is whether or not the item you’re interested in using is under copyright. If it isn’t, it is in the public domain. The public domain is a way of referring to those works for which copyright has expired, been forfeited, or to which copyright did not apply. You can do whatever you want with these works, be it adding zombies (e.g. Pride and Prejudice and Zombies by [author]), copying and distributing the work yourself, or just quoting extensively in your project. But how do you determine whether or not something is in the public domain?

Copyright law, Title 17 of the United States Code - also known as Circular 92, has changed significantly over time, and the duration of copyright protection is one of the things that has changed. The Copyright Act of 1790 grants the author of any “book, map or chart” for a 14 year monopoly on publishing and vending those works, which could be renewed for another 14 years by the author. In order to obtain these exclusive rights the author needed to register the work and provide proper copyright notice with the work. Through the 1800s the items protected by copyright expands to include prints, photographs, paintings, and musical compositions, while the term of copyright was lengthened to 28 years with one 14 year renewal, then the extension was lengthened to 28 years in 1909. During the 19th and 20th centuries, the United States was a signatory to several international treaties dealing with copyright, resulting in subsequent revisions of 17 U.S.C (Circular 1a).

The Copyright Act of 1976 provided significant revisions to 17 U.S.C. In addition to modernizing copyright law, officially codifying Fair Use (which had been common law prior to codification), of particular interest here is the extension of the term of protection for copyrighted works. Those works created on or after January 1, 1978 (when the law took effect) were protected for the life of the author plus an additional 50 years after the author’s death (Pub.L. 94-553). In 1998, the Copyright Term Extension Act (CTEA) (Pub. L. 105-298), also known as the
Copyright Decision Tree: May I use this item in my work?

- Is it in the Public Domain?
  - Yes: You can use it.
  - No: Is your use a Fair Use?
    - Yes: You can use it.
    - No: Did the author give you permission to use it?
      - Yes: You can use it.
      - No: Check out alternatives such as Creative Commons licenced works.
Sonny Bono Act or – more derisively – as the Mickey Mouse Protection Act because it prevented the earliest Mickey Mouse movies from entering the public domain, added an addition 20 years to the term of copyright after an author’s death. Additionally, it extended the term of protection for all works created in 1923 or later that were still protected to 2019.

Looking over this list of changes to the law and length of copyright protection, it is easy to understand how difficult may be to determine the copyright status of a work. Everything that you create as an author in a fixed in a tangible medium of expression has copyright protection. That said, as copyright term is lengthened and more information about authors is lost, more and more works are becoming orphan works – no one knows who the copyright holder is to request permission to use the item, effectively making these works off limits to use and/or reuse.

As a result of the CTEA, one easy rule of thumb is that all works created prior to 1923 are in the public domain and available to use in your work. Works created between 1923 and 1989 may or may not be in the public domain depending on registration and renewal. Other works automatically in the public domain include U.S. Federal Government publications and some, but not all, state government publications. Each state has its own individual law regarding copyright, in California public records cannot be copyrighted, Minnesota has multiple, conflicting legal opinions on whether state law places government works in the public domain or not, and Georgia is, at the time of writing, embroiled in a lawsuit over whether or not the Official Code of Georgia Annotated can be covered by copyright or not.

Confusing, isn’t it? But all is not lost, as there are tools available to assist with determining the copyright status of various works. A great starting point is the Copyright Term and the Public Domain in the United States table by Peter Hirtle. Using some basic information, such as what type of work you’re investigating, whether the work was published, whether it was registered, and what year it was created in, you can begin to determine whether or not the work is still protected by copyright. An additional tool that goes well with this is the Stanford Copyright Renewal Database, a searchable database of the copyright renewal records for books where you can look to see if an item published between 1923 and 1963 has been renewed. Because the Stanford Copyright Renewal Database only covers class A renewals, that is books, you may need to do further digging to determine if works of other types have been renewed. Some places to look include scans of the Catalog of Copyright Entries for the United States, available through the University of Pennsylvania Libraries, Internet Archive or Google Books.

While this step is incredibly important, you should understand that if you are uncertain as to the copyright status of an item or if you are having difficulty finding the necessary information regarding copyright for a work, you can skip to question 2, provided that the answer to that question is yes. That is, if your use constitutes fair use, you can continue with said use regardless of the copyright status in question.

Question 2: Is your use a Fair Use?

If the work you wish to use is still protected by copyright, the Fair Use Exemption may be available for you to utilize. The Fair Use exemption was codified as a part of the Copyright Act of 1976, and considers certain uses of copyrighted works to be fair uses – that is, to not be copyright infringement – even if those uses do technically violate the exclusive rights granted as a part of the copyright bundle of rights discussed earlier. Fair use applies to “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” (17 U.S.C. § 107).

Whether or not such a use is considered fair is dependent on the Four Factors of Fair Use, as follows:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for
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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.

Purpose or character of the use refers to the examples in the preamble of the fair use clause – criticism, comment, news reporting, teaching, scholarship or research. But it also isn’t limited to those examples, also looking at whether the use is transformative or a reproduction, attribution, and bad faith behaviors. Be forewarned – just because your project is for class, and therefore education, doesn’t mean that the use is automatically fair. All of the factors need to be considered.

The nature of the copyrighted work looks at the work that you are intending to use. Here attributes of that work, rather than what you’re doing, determines whether the use is fair. For example, more creative work the narrower the definition of fair use. And unpublished works have an additional layer of protection, as the courts have determine that copyright holders should have the right to determine first publication.

The third factor, amount and substantiality of the portion used, looks at what and how much are you using. The important part here is to use the amount that is necessary and appropriate. In many cases, the more you use the less your use is fair. Conversely, there is the idea of the heart of the work. Is what you’re using part of a journalistic scoop? Or the most creative or artistic portion?

The final factor looks at how your intended use may affect the market. Is what you’re offering going to replace sales of the original? Or, perhaps what you’re creating is enough different – is transformative enough – that it won’t. Are you making the final work available where anyone can access it? Or are you just turning it in to your instructor via Canvas, making it unlikely that anyone else may see it?

These four factors are intended to be evaluated as a whole, following the idea that together the factors weigh more for or against fair use. Not all factors may lean together toward or against, but the question can be asked of what do the factors as a group suggest?

If this seems murky and confusing, don’t worry – it is actually meant to. When the fair use exemption was codified, bright line restrictions were purposefully avoided to give fair use more flexibility. This flexibility is both fair use’s greatest asset and greatest detriment. Because there are no bright line restrictions, fair use can be anything as long as it falls within the four factors. But because it can be complicated and difficult to determine, many shy away from fair use because it has that uncertainty.

In recent years, and court cases, fair use has been boiled down to two particular questions: Does the new use transform the material taken from the original, copyrighted work, using it for a broadly beneficial purpose that is different from the original purpose? Or does this new work just reuse the original work for the same intent and value as the original work?

If you stop to unpack these questions, you can see that factors of fair use at play within them. The question of transformative use vs reproductions is a part of the first factor. The question of intent and value can be seen as a combination of the first, third, and fourth factors. And that second question is, essentially, a way of looking at the fourth factor – does this new work have the potential to replace the original work, thereby impacting the potential market of that work? Think of these questions as a way to look at the four factors through a new lens, one that may be easier to see through than the murkiness of the four factors alone.
But, the four factors alone shouldn’t be considered too excessive to make a determination. Transformiveness alone is not always an indicator of fair use. And there are plenty of tools available for making a fair use determination. One popular tool is the Fair Use Checklist, created by Dr. Kenneth Crews while at Columbia University. This tool is best used as a road map, a way to look at the individual factors and to better understand how different uses favor or oppose fair use. It is also a way to look closely at your intended use, as a guide while analyzing your intention and specific use. Finally, it is a way to keep records and keep track of what you’re doing and how you’re using other works while you work through your project or paper.

Another useful tool is the Fair Use Evaluator – a tool made available by the American Library Association. Slightly more advanced than the checklist, instead of providing prompts for you to determine how your use falls within the four factors, the evaluator provides you the opportunity to describe your use and provide context in a way the checklist does not. The descriptions of uses favoring and opposing fair use are available by clicking on “get help in describing this”, providing language you can use, but really asking you to take the time to analyze and evaluate your use.

The final tool to address here is actually a series of tools, the Codes of Best Practices in Fair Use. These codes have been put forth by a number of disciplines, created by working with representatives of those disciplines to create scenarios to explain what is considered to be fair use by those within the discipline. These guides are useful, as the put forth standards of use within a discipline. They can be more difficult to use, especially when your intended use may not exactly match one of the scenarios or when your discipline doesn’t have a guide available. Unlike the more straightforward checklist and evaluator, you may find yourself needing to look through all 14 (at the time of writing) guides to find an answer or pieces of an answer. But, also unlike the checklist and evaluator, if your use fits the scenario you can be ensured of a clear answer of what constitutes fair use.

Question 3: Did the author give you permission to use it?

Should your intended use not qualify as fair use, not all is lost. While the fair use exemption allows works to be used without a copyright holder’s permission, there is nothing preventing you from requesting permission from the copyright holder. The worst that can happen is that they’ll say no, putting you in the same place you were before making the request.

In many cases the author-creator of a work is the copyright holder, making it easy to determine who to contact to use the work. In some cases, specifically academic journal articles, the publisher may own the copyright instead. Then there are the cases that make this option more difficult – orphan works, those works where the copyright holder cannot be determined.

If the copyright holder can be identified, you can contact them to request permission to use the work. This may most likely be through a letter or email. When doing so, make certain that you include the following (think journalistically):

- **Who:** Introduce yourself and give credentials that may help explain your use (for example, “I am a student at Western Washington University working on my capstone project”)
- **What:** What is the copyrighted work you intend to use? Be specific, if you know the page numbers of a certain edition include them. Or if it is a particular photograph, include it in the request.
- **When:** How long do you intend to use their work? Is this a project you intend to turn in at the end of the quarter? Or are you taking this show on the road, with the intention of several performances over a period of time?
- **Where:** Where will their work be used? Are you creating a video for YouTube? Are you putting together a handout to go with your class presentation? How many people, if in a closed system, will have access to the final work?

- **How:** How will the work be used? This is the time to explain if it is an educational use or if you plan to commercialize the final product. Consider all the ways you may wish to use the final product – if you only request to be able to use the music clip in a performance over a certain period of time that may not include permission for using the music in a video of the performance that is shared over the internet.

- **Why:** Why did you decide to contact this person or organization? Are the author or potentially heir to the author? Are they the publisher?

Providing this information ahead of time will help the copyright holder determine if your intended use is something they want to support.

**Are there alternative works you can use instead?**

It’s very possible that after making the attempt to get copyright holder permission, or if there wasn’t enough time to try to secure permission, that you end up trying to find something different to use instead. Or, perhaps, you decide that instead of trying to worry about copyright or fair use, you just want to utilize other works that you don’t have to request permission or make determinations in order to use them.

One of the best places to start is Creative Commons. Creative Commons licenses are a way for copyright holders to declare upfront what kind of uses they do and don’t allow with their works. This cuts out the permission request process, making it easy for you to determine what works you can use and how. These licenses come in six varieties, from the most open to the most restrictive: Attribution (CC-BY), Attribution-ShareAlike (CC-BY-SA), Attribution-NoDerivatives (CC-BY-ND), Attribution-NonCommercial (CC-BY-NC), Attribution-NonCommercial-ShareAlike (CC-BY-NC-SA), and Attribution-NonCommercial-NoDerivatives (CC-BY-NC-ND). These license sound just like they work – if something has a share alike license, the copyright holder wishes for you to make your work available with the same license they utilizes. NonCommercial means not to use the item for commercial purposes, and no derivatives means reusing the item without making any changes to it.

Additionally, Creative Commons also provides tools for authors to waive all rights related to copyright, essentially placing their work in the public domain. The CC0 tool and Public Domain Mark are two different ways to mark that someone is available to utilize, usually for different reasons. Authors use the CC0 mark to signify that
they are waiving their rights on works they have created. Conversely, the public domain mark is useful to signal that an item is known to no longer be restricted by copyright – such as something that is old enough that it no longer has copyright protections.

While knowing this information in undoubtedly useful, the question many ask is how to find such works. Perhaps the easiest way is to use the CC Search page on the Creative Commons website. By offering up a search box with canned searches across several websites, Creative Commons simplifies the process of finding images, music, and videos with CC licenses. However, it is important to follow through on the results – not just to grab the image or music file in question, but to also read the check out the license that has been assigned to the work.

It is work noting that in many cases, the CC Search box is just utilizing and aggregating search results from many different websites. It is likely that you may wish to “skip the middle man”, so to speak, and go directly to the websites in question. If you know you are looking for an image file, you may choose to go directly to Flickr and utilize the CC filters in the advanced search instead.

Authoring Copyrighted Works

As discussed at the beginning of the chapter, an author-creator holds copyright on the work once it is created. And, that includes you. Once you hit “save” on your research paper, create a sculpture, or compose a piece of music, you own a copyright. You likely have many copyrights, and, as with a majority of copyrights, most will never be profitable. Perhaps none will. Regardless, it is important to know and understand what it means for you as an author to hold copyright.

Because registration is no longer necessary, the photo you took last night had copyright protections the minute you took it. Are you sharing that photo on Flickr? If so, did you choose to go “All Rights Reserved” or did you select a creative commons license instead? What about the portfolio you’re creating for class? It is very likely that much of that portfolio is highly creative works. Are you presenting it online, perhaps as a way to get the word out about your skills? One of the things to keep in mind about copyright is that as it becomes more and more easy to find works, thanks to the internet and search engines like Google, reuse of items (regardless of their copyright or licensing status) becomes more and more prevalent. Much of the information you’ve been presented with as someone utilizing copyrighted works can also be used to think about what you wish to do as a copyright holder.

Chapter Conclusion: Why is this important to you?

Knowledge of copyright law is important for students for many reasons, but one of the most important is that as education becomes more interdisciplinary, as more and more projects for class become more than just a traditional paper and are often transmitted over the internet, it becomes more and more important to know what you can and cannot do with someone else’s copyrighted work. While educational purposes are protected under the Fair Use Exemption to an extent, there are limits – even if they exist in a fuzzy grey area – to what fair use allows. Knowing and understanding what fair use is, how to make a fair use determination, and about licensing options like Creative Commons will help you steer safely through these murky waters.
References


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U.S. Const. Art. I, § 8, Cl. 8.