

How to Triage Copyright Questions and Address Legal Issues

Tips and Best Practices for Libraries



Today

- Set the stage with a quick review of the basics
- Present some considerations for addressing copyright questions
- Identify methods for triaging/answering copyright questions and work through some examples
- Identify resources and tools that can help you learn more about the law and aid you (or your patrons) in making thoughtful applications of the law, including user rights (e.g., fair use)

A Very Brief Introduction to U.S. Copyright Law



Securing Copyright

- Copyright protection subsists in “in original works of authorship” that are “fixed in any tangible medium of expression” (17 U.S.C. § 102(a)).
- Copyright notice (e.g. © 2020 by Carla Myers) is not required for protection
- Registration is also not required

What is Copyrightable?

- **Literary works**-fiction/nonfiction, poetry, textbooks, reference works, directories, catalogs, advertising copy, compilations of information, computer programs and databases
- **Musical works**-this generally refers to music scores & accompanying words
- **Dramatic works**-plays, film, radio, and television scripts
- **Pantomimes and choreography**
- **Pictorial, graphic, and sculptural works**-art
- **Motion pictures and other audiovisual works**-film, television show, videogame, etc.
- **Sound recordings**-performances of musical works, audio recordings of literary works
- **Architectural works**-just the designs, not the building its self!

How Long Does Copyright Last?

Works created after Jan. 1, 1978 are protected for the life of the author plus 70 years

- Joint authorship-life of last surviving author +70 years
- Works for Hire-95 years from publication or 120 years from creation, whichever is shorter

For older works, it depends...

Works Created Before 1925

Works published in the US or registered with the USCO prior to 1925 are in the public domain. Use them anyway you like!

- Republish, make a movie or play, add commentary
- Original work is still not protected, but your expression of it is
- Give proper attribution, though it's not required by the law

In Limbo

- Unpublished works – Term of protection will be life of the author +70 years
 - $2020-70 = 1950$
- Works published between 1925-1978
 - It depends!
 - Inclusion of copyright notice?
 - Was the copyright renewed?
- If in doubt, treat as a protected work
- Recommended Resource: Copyright Term and the Public Domain in the United States: <https://copyright.cornell.edu/publicdomain>

Authors Rights

Owner of a protected work is provided with certain rights, including but not limited to....

- The right to reproduce (copy) the work
- The right to distribute the work (publish/sell)
- The right to make derivative works (translations, audio version of a book, etc.)
- The right to display (show) the work publically
- The right to perform (recite, act, play) the work publicly

-17 U.S. Code § 106

Learn More: Copyright Basics (Circular 1), published by the US Copyright Office:
<https://www.copyright.gov/circs/circ01.pdf>



Infringement

Copyright infringement occurs when we take advantage of one of the rights granted to creators under the law without their authorization.

1. Making copies of works;
2. Distributing copies of works
3. Making derivative works;
4. Making public performances or displays of works
5. In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Options for Answering Copyright Questions



Common Misconceptions That Often Pose Challenges

- If it's on the internet, I can use it however I want.
- If it's an educational use I can use anything I want, however I want, right?
- I provided a citation to the original work, so it's not copyright infringement.
- Arbitrary applications of the law:
 - 10% or 1 chapter from a work, 30 seconds from a song, 3 minutes from a film
 - Spontaneous use, it's fair use only 1 semester
 - They hold no force of law and provide no safe harbor against claims of infringement
 - **Learn More:** Kenneth D. Crews, The Law of Fair Use and the Illusion of Fair-Use Guidelines (October 1, 2001). Ohio State Law Journal, Vol. 62.
www.arl.org/storage/documents/publications/fair-use-code-crews.pdf

Factors to Consider

- What types of services is your institution prepared to offer?
 - What are your institution's values and mission?
 - Risk management

What Types of Consultations Will You Provide?

1. Referral to information
2. Referral to someone else
3. Consultations

Referral to Information

- Directing patrons to information about the law so they can draw their own conclusions
- Referral to QUALITY information!
 - There is lots and lots of bad information out there about the law
- Directing faculty to tools that can help them in making thoughtful applications of the law
- Think medical reference! We don't diagnose, we refer to information and encourage them to speak with a medical professional to help them interpret/apply that information

Referral to Someone Else

- Do you have a copyright librarian/copyright guru on staff?
- Can someone in the Office of General Counsel (OGC) provide assistance?
- Not passing the buck...it's directing to the person on staff best suited to help them find the information they need (e.g., subject specialist)
- Considerations
 - How can the faculty member get ahold of them?
 - What services do they provide?

Consultations

- Help the patron work through the legal considerations tied to their situation and determination options for action, or
- Answering their question

Likely a Combination!

- Referral to information
 - Law
 - Policy
- Referral to a person
 - Person administering a service
 - Copyright librarian/guru
 - OGC
 - Administrators
- Consultation
 - Performed with one of the folks above
 - Help them work through options
 - Answer their questions within the scope of a service

A Framework for Triaging Requests

Recommended resource: A Framework for Analyzing any U.S. Copyright Problem by Kevin L. Smith and Lisa Macklin: <https://www.k-state.edu/copyright/docs/CopyrightFramework.pdf>

1. Is the work protected by copyright?
2. If it's protected, who holds the rights to the work?
3. Is there a license that covers my use?
4. Is there an exception (user right) that covers my use (e.g., fair use)?
5. Do I need permission from the copyright owner?

For Example

I want to share this article I found in one of the library's databases with my students. Can I do that?

1. Is the work protected by copyright?
2. If it's protected, who owns the copyright?
3. Is there a license that covers my use?
4. Is there an exception (user right) that covers my use (e.g., fair use)?
5. Do I need permission or a license from the copyright owner?

For Example

I want to place a book you have in your collection on print reserve.
Can I do that?

1. Is the work protected by copyright?
2. If it's protected, who owns the copyright?
3. Is there a license that covers my use?
4. Is there an exception (user right) that covers my use (e.g., fair use)?
5. Do I need permission or a license from the copyright owner?

For Example

I want to make a selection from a book available via your electronic reserve service. Can I do that?

1. Is the work protected by copyright?
2. If it's protected, who owns the copyright?
3. Is there a license that covers my use?
4. Is there an exception (user right) that covers my use (e.g., fair use)?
5. Do I need permission or a license from the copyright owner?

For Example

Can I share a copy of the class study guide I developed online?

1. Is the work protected by copyright?
2. If it's protected, who owns the copyright?
3. Is there a license that covers my use?
4. Is there an exception (user right) that covers my use (e.g., fair use)?
5. Do I need permission or a license from the copyright owner?

For Example

I want to include this image in my PowerPoint presentation

1. Is the work protected by copyright?
2. If it's protected, who owns the copyright?
3. Is there a license that covers my use?
4. Is there an exception (user right) that covers my use (e.g., fair use)?
5. Do I need permission or a license from the copyright owner?

For Example

I want to post a copy of an article I published on my website. Of course I can do that, right?!

1. Is the work protected by copyright?
2. If it's protected, who owns the copyright?
3. Is there a license that covers my use?
4. Is there an exception (user right) that covers my use (e.g., fair use)?
5. Do I need permission or a license from the copyright owner?

For Example

My textbook publisher made these PowerPoint slides available to me. Can I share those with students via the LMS (e.g., Blackboard, Canvas)

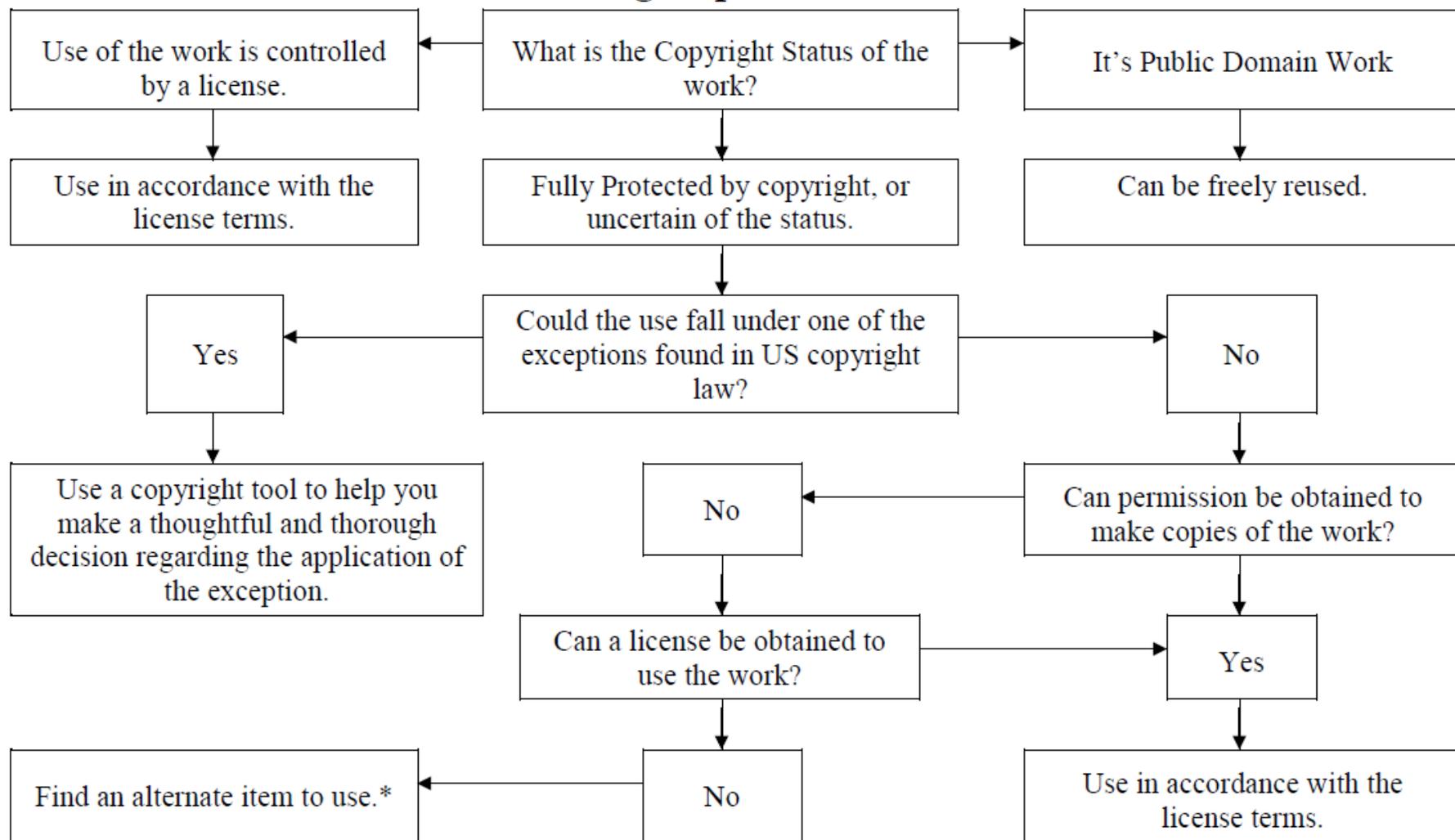
1. Is the work protected by copyright?
2. If it's protected, who owns the copyright?
3. Is there a license that covers my use?
4. Is there an exception (user right) that covers my use (e.g., fair use)?
5. Do I need permission or a license from the copyright owner?

For Example

We want to digitize and post online this archival collection!

1. Is the work protected by copyright?
2. If it's protected, who owns the copyright?
3. Is there a license that covers my use?
4. Is there an exception (user right) that covers my use (e.g., fair use)?
5. Do I need permission or a license from the copyright owner?

Making Copies of Works



*In some situations, the inability to obtain permission or a license can be reconsidered in the application of one of the exceptions, e.g. fair use.

Tips and Best Practices



It's Not Always Easy!

- Patrons want straight answers...yes or no
- “No” is sometimes easy. Yes is sometimes easy
- The final answer is subjective to each situation
- Low-risk scenarios vs. high risk scenarios
- Special circumstances
- Accepted/general library practices

Avoid Providing Legal Advice

- Providing information vs. interpreting the law
- If it's a tricky question, who will make the final call?
- If legal advice is needed, who can you direct the patron to?
- Be aware of your institution's copyright policies
- **Learn More:** University of South Carolina School of Law, Legal Research Training for Non-Lawyers:
<http://guides.law.sc.edu/c.php?g=315482&p=2714899>

Getting Through the Consultation

- Ask lots of questions
- Make the patron feel comfortable in sharing information
- The Framework works!
- Take the time needed to think through the answer
- It's 100% ok to say "I'm not certain, but I'll look for an answer and get back to you on this!"
- Some people will get upset with the result of the consultation
 - What other options can you offer them?
 - Be prepared to handle the occasional angry person (and refer them to an administrator)

Remember our Mission!

- Don't blatantly ignore the law, but also don't let the fear of being sued keep you from taking advantage of the exceptions found in the law.
- Thoughtful, "good faith" applications of the law can go a long way.

The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords

-17 U.S. Code § 504(c)(2)

Recommendations

- Educate yourself on copyright and fair use
- Work with colleagues/administrators/institutional attorneys to develop a game plan for answering copyright questions/providing copyright services
- Offer copyright education for your patrons
 - Classes or workshops
 - Website

Questions!

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[Learn More!](#)



Special Resources

- Resources on Copyright & Emergency Remote Teaching & Research:
<https://tinyurl.com/v6dvmcb>
- Public Statement of Library Copyright Specialists: Fair Use & Emergency Remote Teaching & Research:
<https://tinyurl.com/tvnty3a>

ALA Fair Use Evaluator

<http://librarycopyright.net/resources/fairuse/>



What this tool can do for you:

- Help you better understand how to determine the "fairness" of a use under the U.S. Copyright Code.
- Collect, organize & archive the information you might need to support a fair use evaluation.
- Provide you with a time-stamped, PDF document for your records [\[example\]](#), which could prove valuable, should you ever be asked by a copyright holder to provide your fair use evaluation and the data you used to support it. [\[why is this important?\]](#)
- Provide access to educational materials, external copyright resources, and contact information for copyright help at local & national levels.

What this tool cannot do for you:

- This tool does not provide legal advice. It records the information you provide it as well as your own judgment on the fairness of the use. See the tool [\[disclaimer\]](#) for more information.
- Only a court of law can definitively rule on whether a use is fair or unfair. This tool does not assume or predict a court outcome.

[Make a Fair Use Evaluation](#)

[Learn More about Fair Use](#)



Kenneth D. Crews' Fair Use Checklist

<https://copyright.columbia.edu/content/dam/copyright/Precedent%20Docs/fairusechecklist.pdf>

Fair Use Checklist
Copyright Advisory Office
Columbia University Libraries
Kenneth D. Crews, Director
<http://copyright.columbia.edu>

Name: _____
Institution: _____
Project: _____
Date: _____
Prepared by: _____

Purpose

Favoring Fair Use

- Teaching (including multiple copies for classroom use)
- Research
- Scholarship
- Nonprofit educational institution
- Criticism
- Comment
- News reporting
- Transformative or productive use (changes the work for new utility)
- Restricted access (to students or other appropriate group)
- Parody

Opposing Fair Use

- Commercial activity
- Profiting from the use
- Entertainment
- Bad-faith behavior
- Denying credit to original author

Fair Use Checklist p. 2

Nature

Favoring Fair Use

- Published work
- Factual or nonfiction based
- Important to favored educational objectives

Opposing Fair Use

- Unpublished work
- Highly creative work (art, music, novels, films, plays)
- Fiction

Amount

Favoring Fair Use

- Small quantity
- Portion used is not central or significant to entire work
- Amount is appropriate for favored educational purpose

Opposing Fair Use

- Large portion or whole work used
- Portion used is central to or "heart of the work"

Effect

Favoring Fair Use

- User owns lawfully purchased or acquired copy of original work
- One or few copies made
- No significant effect on the market or potential market for copyrighted work
- No similar product marketed by the copyright holder
- Lack of licensing mechanism

Opposing Fair Use

- Could replace sale of copyrighted work
- Significantly impairs market or potential market for copyrighted work or derivative
- Reasonably available licensing mechanism for use of the copyrighted work
- Affordable permission available for using work
- Numerous copies made
- You made it accessible on the Web or in other public forum
- Repeated or long-term use

Most recent revision: 051408



Think Through Fair Use

Thinking Through Fair Use - My Analysis

Name/title of document or item to be used

Factor #1: Purpose and character of the use

[\(more info\)](#)

Favors Fair Use

- Educational, scholarly, and research uses, and/or news reporting
- Criticism or commentary
- Non-profit use, including personal uses
- Transformative use (creates a new work with a new purpose), including parody and transformative technologies

Weights Against Fair Use

- Commercial activity
- Profiting from use
- Decorative or other non-critical, non-commentary use

Notes: Enter additional thoughts regarding the purpose of your proposed use.

Overall thoughts on your purpose

- strongly favors fair use somewhat favors fair use neutral somewhat weighs against fair use strongly weighs against fair use

<http://www.lib.umn.edu/copyright/fairthoughts>

Learn More—Fair Use

Code of Best Practices

Codes on many different fair use topics!

<http://cmsimpact.org/codes-of-best-practices/>

Fair Use Week

<http://fairuseweek.org/>

An annual celebration of the important doctrines of fair use and fair dealing.

Stanford Copyright and Fair Use Center

<https://fairuse.stanford.edu/>

A website that includes primary case law, statutes, regulations, information about newly filed copyright lawsuits, pending legislation, copyright office news, recent publications as well as blog and twitter feeds from practicing attorneys and law professors.

Learn More--Copyright

CopyrightX

<http://copyx.org/>

Copyright for Educators and Librarians

<https://www.coursera.org/learn/copyright-for-education>

Copyright for Multimedia

<https://www.coursera.org/learn/copyright-for-multimedia>

Copyright Law for Librarians and Educators: Creative Strategies and Practical Solutions

<https://www.alastore.ala.org/content/copyright-law-librarians-and-educators-creative-strategies-and-practical-solutions-fourth>

The Journal of Copyright in Education and Librarianship

<https://www.jcel-pub.org/>

Learn More—Fair Use Court Cases

US Copyright Office Fair Use Index

<https://www.copyright.gov/fair-use/>

The Fair Use Index tracks a variety of judicial decisions to help both lawyers and non-lawyers better understand the types of uses courts have previously determined to be fair—or not fair.

Georgia State Lawsuit

Provides information and resources on the Georgia State Lawsuit and its application of fair use in providing course reserve services.

<http://libguides.law.gsu.edu/gsucopyrightcase>

Tools

The Copyright Advisory Network (CAN)

<http://librarycopyright.net/>

Provides copyright tools and resources and includes a forum where you can ask questions that will be answered by members of ALA's Copyright Education Committee.

<http://librarycopyright.net/resources/>

Stay Current

CopyTalk Webinars

<http://www.ala.org/advocacy/pp/pub/copytalk>

Monthly webinars on various copyright topics

Copyright Chat Podcast

<https://www.library.illinois.edu/scp/copyright-overview/chat-podcast/>

A podcast dedicated to discussing important copyright matters.

Scholarly Communications @ Duke

<https://blogs.library.duke.edu/scholcomm/>

A blog about copyright and publication issues

IO: In the Open

<http://intheopen.net/>

A blog exploring libraries, scholarship, and publishing

The Taper

<http://thetaper.library.virginia.edu/>

A blog exploring copyright information and policy