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 itself!
How Long Does Copyright Last?

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

- Join 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- Unpublished works – Term of protection will be life of the author +70 years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](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
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
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


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

Use of the work is controlled by a license.
- Use in accordance with the license terms.

What is the Copyright Status of the work?
- Fully Protected by copyright, or uncertain of the status.
- Could the use fall under one of the exceptions found in US copyright law?
  - Yes
    - Use a copyright tool to help you make a thoughtful and thorough decision regarding the application of the exception.
  - No
    - Can a license be obtained to use the work?
      - Yes
        - Use in accordance with the license terms.
      - No
        - Can permission be obtained to make copies of the work?
          - Yes
            - Use in accordance with the license terms.
          - No
            - Use in accordance with the license terms.

It’s Public Domain Work
- Can be freely reused.

*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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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/

**Fair Use Evaluator**

**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. However, 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. [Read more](#)
- 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 [Read more](#) 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
Think Through Fair Use

**Thinking Through Fair Use - My Analysis**

Name/Title of document or item to be used

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**Factor #1: Purpose and character of the use**

(more info)

<table>
<thead>
<tr>
<th>Favors Fair Use</th>
<th>Weights Against Fair Use</th>
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<tbody>
<tr>
<td>Educational, scholarly, and research uses, and/or news reporting</td>
<td>Commercial activity</td>
</tr>
<tr>
<td>Criticism or commentary</td>
<td>Profiting from use</td>
</tr>
<tr>
<td>Non-profit use, including personal uses</td>
<td>Decorative or other non-critical, non-commentary use</td>
</tr>
<tr>
<td>Transformative use (creates a new work with a new purpose), including parody and transformative technologies</td>
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Notes: Enter additional thoughts regarding the purpose of your proposed use.

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**Overall thoughts on your purpose**

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

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[http://www.lib.umn.edu/copyright/fairthoughts](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/
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