

Academic and Digital Copyright 101

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Digital Resources Workshop
AAASS 37th National Convention
November 3, 2005
Salt Lake City

International copyright law

- Not a defined body of law
- Operates on basis of relations between nations
 - Country of origin
 - Protecting country
- Operates on principles of:
 - Territoriality
 - National treatment
 - Minimum protection

Berne Convention for the Protection of Literary and Artistic Works

- 159 nations
- U.S. joined in 1989
- Dates of entry of nations of Central/Eastern Europe and Eurasia:
 - Albania 1994
 - Armenia 2000
 - Azerbaijan 1999
 - Belarus 1997
 - Bosnia and Herzegovina 1992
 - Bulgaria 1921

- Croatia 1991
- Czech Republic 1993
- [Czechoslovakia 1921]
- Estonia 1994
- Georgia 1995
- Hungary 1922
- Kazakhstan 1999
- Kyrgyzstan 1999
- Latvia 1995
- Lithuania 1994
- Macedonia 1991

- Moldova 1995
- Poland 1920
- Romania 1927
- Russia 1995
- Serbia and Montenegro 1992
- Slovakia 1993
- Slovenia 1991
- Tajikistan 2000
- Ukraine 1995
- Uzbekistan 2005
- [Yugoslavia 1930]

- Other multilateral conventions and agreements
 - Universal Copyright Convention (Berne has priority if nations belong to both)
 - TRIPS Agreement
 - WIPO Copyright Treaty
 - WIPO Performances and Phonograms Treaty
- Bilateral treaties (historically important, now largely obsolete)

- Role of U.S. law – governs use within U.S. of eligible foreign works
 - Whether a work is copyrighted in U.S.
 - Copyright term
 - <http://www.unc.edu/~unclng/public-d.htm>
 - http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm
 - How a work may be used
- Copyright ownership determined by law of country of origin

U.S. law

- Copyright Act of 1976 (17 United States Code)
 - Took effect on January 1, 1978
 - Has been amended numerous times
 - <http://www.copyright.gov/title17>
- Requirements for copyright protection in U.S.
 - Originality
 - Fixation in tangible medium of expression
 - Minimal creativity

- What is protected in U.S.
 - Literary works
 - Musical works, including any accompanying words
 - Dramatic works, including any accompanying music
 - Pantomimes and choreographic works
 - Pictorial, graphic, and sculptural works
 - Motion pictures and other audiovisual works
 - Sound recordings
 - Architectural works

- What is not protected
 - Ideas, procedures, processes, systems, methods of operation, concepts, principles, discoveries
 - U.S. government works
 - Facts
 - Works in public domain

- Who owns copyright
 - Authors (initial authorship)
 - Employers for works made for hire OR employees, as defined by law of country of origin
 - Assignees (not licensees)

Copyright duration in foreign works of Berne member nations

- If published before 1923, in public domain
- If published from 1923-1977, 95 years from date of publication
- If created, but not published, before 1978, life + 70 or 12/31/2002, whichever is greater
- If created before 1978 and published between 1978 and 12/31/2002, life + 70 or 12/31/2047, whichever is greater
- If created from 1978- life + 70 (for works of corporate authorship, works for hire, anonymous and pseudonymous works, the shorter of 95 years from publication or 120 years from creation)

Essential facts for copyright assessment

- Is the work published or unpublished
- Who is/are the author/s
- Nationality of author, date of author's death, other relevant facts about author's life
- Is the work anonymous/pseudonymous
- Country of origin
 - For published works, country where the work was first published
 - For unpublished works, country of nationality or habitual residence of the author

- Date of creation or **first** publication
- Whether work is first or later edition
- Whether work was first published in journal, newspaper, etc.
- Whether work was published posthumously
- Whether work was simultaneously published in another country
- Nature of work
- Whether it is a work for hire

How Slavic, East European, Eurasian materials can be copyrighted in U.S.

- If eligible foreign work was registered/renewed in U.S. Copyright Office (few)
- If work was created/published after U.S. first established copyright relations with country of origin and is still copyrighted
- If work was created/published before or after U.S. first established copyright relations with country of origin and copyright was restored under terms of TRIPS Agreement and Article 18 of Berne Convention

Year when copyright relations established with U.S.

- Albania 1994
- Armenia 1973
- Azerbaijan 1973
- Belarus 1973
- Bosnia and Herzegovina 1966
- Bulgaria 1975
- Croatia 1966
- Czech Republic 1927
- Estonia 1994?
- Georgia 1973

- Hungary 1912
- Kazakhstan 1973
- Kyrgyzstan 1973
- Latvia 1995?
- Lithuania 1994?
- Macedonia 1966
- Moldova 1973
- Poland 1927
- Romania 1928
- Russia 1973

- Serbia and Montenegro 1966
- Slovakia 1927
- Slovenia 1966
- Tajikistan 1973
- Turkmenistan 1973
- Ukraine 1973
- Uzbekistan 1973

Effective date of copyright restoration was January 1, 1996 for the following countries of origin:

- Albania
- Bosnia and Herzegovina
- Bulgaria
- Croatia
- Czech Republic
- Estonia
- Georgia
- Hungary
- Latvia
- Lithuania

- Macedonia
- Moldova
- Poland
- Romania
- Russia
- Serbia and Montenegro
- Slovakia
- Slovenia
- Ukraine

Effective date of copyright restoration for other nations:

- Armenia--October 19, 2000
- Azerbaijan--June 4, 1999
- Belarus – December 12, 1997
- Kazakhstan – April 12, 1999
- Kyrgyzstan – December 20, 1998
- Tajikistan – March 9, 2000
- Uzbekistan – April 19, 2005

- Knowledge of national laws effective on January 1, 1996 or other effective date of copyright restoration is crucial
- Works are restored for full U.S. term

Copyright restoration in a nutshell

- Consider date on which TRIPS Agreement became effective for U.S. with respect to copyright restoration for eligible works created or published in foreign countries
- Works protected in the country of origin on that date were restored and are protected in the U.S. for the full U.S. term for a work created or published on that date
- If work was not protected in the country of origin on that date, it is not currently protected in the U.S.
- Works created or published after that date are protected in the U.S. for the full U.S. term

What is in the public domain in the U.S.?

U.S. works:

- No notice (copyright notice was required in U.S. for works published before 3/1/89)
- Failure to renew (renewal was required in U.S. for works published before 1964)
- Expired
- No copyright protection available-- works created by U.S. federal government employees in official capacity, state and local laws and court decisions
- Dedication (owner has decided to give the work to the public without copyright protection)

Foreign works:

- Expired
- No copyright protection available [foreign government documents and folk works are gray areas, need to distinguish between new works and restored works]
- Dedication
- Turkmenistan – works published before 1973

Exclusive rights of copyright holders

1. Right of reproduction [Section 106(1)]

For example:

- scanning
- storage of a file on a hard drive, back-up drive, disk, CD-ROM, or in RAM
- reproduction for the purpose of encoding text or supplying metadata
- reformatting

2. Preparing a derivative work [Section 106(2)]

For example:

- translation, abridgement, annotated version, or revised version
- digital alteration of an original image or sound recording so as to produce an original work
- placement of original material in a new arrangement that constitutes an original work
- collective work
- new media (film based on book, website based on print material)

3. Right of public distribution [Section 106(3)]

For example:

- public distribution on the Web, or in any electronic form available to the public
- file sharing that involves actual distribution to users that make up the public

4. Public performance [Section 106(4)]

For example:

- public viewing of a motion picture on DVD, digital audiovisual work, or streaming video
- a moving sequence of images and sounds-- does not apply to pictorial, graphic, or sculptural works that are not "performed"

5. Public display [Section 106(5)]

For example:

- placing images or text material on a server or on the Internet for public viewing
- displaying still shots from a digital film or video
- showing still digitized images in an area for public viewing
- non-sequential display of an image

6. Public performance by means of a digital audio transmission [Section 106(6)]

- involves moving digital sound transmitted to an audience that qualifies as "public"

Limitations and Exceptions

Section 107 (Fair Use)

- Broad and ambiguous
- Applies to all types of works, published and unpublished, and all formats
- Does not guarantee against infringement
- Establishes that certain uses are not infringing, depending on 4 factors, for purposes including criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research

- Four fair use factors:

- purpose and character of the work
- the nature of the copyrighted work
- the amount of the work being used
- effect of the use on the market for the work

Weighs for fair use:

- Purpose: Education, research, criticism, comment, news reporting, transformative use, parody, non-commercial use
- Nature: Published, work of factual nature, informational, nonfictional
- Amount: Small portion, non-essential portion
- Effect: No major effect on market or potential market for work

Weighs against fair use:

- Purpose: Commercial use, entertainment, non-transformative use
- Nature: Unpublished, highly creative work
- Amount: Large portion, "heart" of the work
- Effect on market: Affects market or potential market for work

- Trend is against fair use "guidelines" and more reliance on careful analysis of the four factors
- Resources:

- Prof. Kenneth Crews' guide on Fair Use Issues, incl. Fair Use Checklist, on IUPUI website, at <http://www.copyright.iupui.edu/index.htm>
- Kenneth D. Crews, *Copyright Essentials for Librarians and Educators* (Chicago: American Library Association, 2006)
- Stanford University website, esp. for good case examples, at <http://fairuse.stanford.edu/>

Section 108 (limited rights for libraries and archives to reproduce and distribute works)

- No direct or indirect commercial advantage
- Collections of library or archive open to public or to researchers in specialized field
- Reproduction/ distribution must include copyright notice

Digital preservation and security of unpublished works

- Three copies can be made
- Work copied must be in the library's collection
- Digital copies may not be distributed in that format or be made available outside library

Replacement of published works

- Copies must be damaged, deteriorating, lost, stolen, or obsolete
- If after reasonable effort an unused replacement copy cannot be found at fair price
- Digital copies may not be distributed in that format or be made available outside library

Reproduction and distribution for library and archive users

- Enables interlibrary loan of articles, in some cases of copies of books
- Does not apply to musical, pictorial, graphic, sculptural works; or motion picture or audiovisual works other than audiovisual works dealing with news
- One copy for private study, scholarship, or research
- Copy becomes property of user
- Copyright warning must be displayed

- Entire work may be copied only after reasonable effort to obtain copy at fair price
- "Isolated and unrelated" reproduction only
- Related or concerted/systematic reproduction or distribution of copies not allowed
- Interlibrary activities not to substitute for subscription or purchase of work
- Libraries/archives not liable for infringement for unsupervised use of reproducing equipment if copyright notice displayed
- Section 108 currently under revision

Works in their last 20 years of protection

- Libraries, archives and nonprofit educational institutions may reproduce, distribute, display, perform in print or digital form a work
- For preservation, scholarship or research
- If work not being not subject to normal commercial exploitation
- If copy cannot be obtained at reasonable price
- As long as copyright holder does not provide notice of commercial exploitation or that copy available at reasonable price

Section 109 (first sale doctrine)

- Enables interlibrary loan of books and other physical materials
- Libraries may lend, sell, dispose of lawfully obtained materials
- Does not apply to computer programs or sound recordings (incl. records, audiotapes, CDs) for commercial use
- Does apply to videos
- Owner of copy of work may display it publicly (important for archival material)
- No consensus on whether this provision applies to digital works

Section 110 (Performance and display of works for classroom use)

- Before 2002 Technology, Education and Copyright Harmonization (TEACH) Act, the section was outdated, drafted in mid-1960s, enacted in 1976, offered limited use of materials with no provisions for new technology
- Section 110(1): Performance and display of analog works in face-to-face teaching activities of nonprofit educational institutions
 - Lawful copies of motion pictures and audiovisual works

- Section 110 (2) revised by TEACH Act of November 2002 to allow for use of digital works in classroom and through digital networks in distance learning
 - Performance of nondramatic literary or musical works (excerpts from books, journal articles, songs, etc.)
 - "Reasonable and limited portions of any other work" (paintings, charts, graphs; dramatic: operas, plays; audiovisual works, etc.)
OR
 - display of work in amount comparable to typical live classroom session (digital simulation of classroom)
 - teaching done by instructor as integral class session
 - use must be directly related to teaching content
 - transmission must be limited to students enrolled in course

Policy and technical measures must be implemented

- Accredited nonprofit educational institution
- Copyright policies
- Provision of informational materials to faculty, students, staff to promote compliance with copyright law
- Copyright notices on materials
- Technical security measures to prevent retention "beyond duration" of class session and unauthorized further dissemination
- Interference with technological protection measures not permitted

Section 112

- Also amended by TEACH Act
 - Permits retention of content and student access for limited time, provided that no further copies are made
 - Permits reproduction and retention as necessary for technical purposes
 - Permits digitization of analog works for classroom teaching if amount is appropriate and if digital version not already available at the institution or if it is available but restricted by technological protection measures

Classroom teaching: options

- Take advantage of Section 110 and 112 as revised by TEACH Act
 - "You can't do it alone"
 - Instructors (Faculty informed and willing to implement provisions)
 - Institutional policies (with corresponding authority)
 - Systems specialists (technological expertise)
 - Requires compliance with all requirements— all or nothing

- Take advantage of fair use
 - If you cannot comply with all terms of TEACH Act
 - If institution does not offer means for implementing terms of TEACH Act
 - Does not specify time limitations, such as repeated use from semester to semester

See Kenneth D. Crews, *Copyright Essentials for Librarians and Educators* (Chicago: American Library Association, 2006)

Special considerations for digital works

- Browsing
 - Not generally considered to cause infringement unless substantial portion of work copied for more than transitory period
- Linking (outlinking)
 - Not generally considered to cause infringement
 - Ask permission before linking to images
 - Do not link to trademarked logos
- Deep Linking
 - Problematic, best to avoid

- Framing (inline linking)
 - Higher risk than linking
 - Avoid using frames that might cause confusion or that interfere with advertising
- Creating a digital archive for preservation
 - Follow permitted uses in Section 108
- Creating a digital archive for enhanced access
 - No exemption to cover this activity

Digitization of microform sets

- As preservation, permitted in Section 108
- For enhanced access, not permitted
- Typically two sets of rights
 - In the original works
 - In the set as a whole as a derivative work
- Not permissible to digitize set as a whole unless all works and the set as a whole are in public domain, unless purpose is preservation

Posting to Internet v. publication

Publication as defined in the 1976 U.S. Copyright Act is “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.”

- Author has right to control first public appearance of work
- If someone else posts a work publicly without author’s permission, this is not publication
- If work is posted but not publicly, this is not publication
- If work is displayed but not distributed, this is probably not publication
- Many gray areas

Seeking copyright permissions

1. Identify copyright holder
 - Use copyright notice as a starting point
 - Use any entity associated with author to track copyright holder
 - Copyright holder might be author/multiple authors, publisher, heir or assignee/multiple heirs or assignees
2. Contact a collective rights agency/collective licensing agency to negotiate permissions on behalf of copyright holder, if one exists in country of origin that handles individual permissions --or
3. Contact copyright holder directly

4. Draft permissions letter
 - Include as much information as possible on planned use (what, where, when, why, how, how much)
 - Relate the use to exclusive rights of copyright holders in U.S. law
5. Negotiate permissions agreement, possibly involving fee
6. Obtain signed permissions agreement

Copyright Infringement and Liability

- Cease and desist letters
- Legal remedies for infringement
 - Court injunction ordering that infringement stop
 - Impound and destroy order
 - Actual damages and profits made by infringer , or
 - Statutory damages
 - \$750-\$30,000 for each work
 - Up to \$150,000 for willful infringement
 - If action was innocent, court has discretion to reduce to \$200

- Possible exemptions
 - Section 504(c)(2)(i) allows court to waive statutory damages if infringer is employed by nonprofit educational institution, library, or archive and had reasonable grounds to believe use was fair
 - Eleventh Amendment "state sovereign immunity" holds that states and state institutions are not liable for damages from violations of federal intellectual property law
 - But does not protect individual employees
 - State institutions could still be liable for other remedies or face criminal action

- Section 512 limits criminal liability for online service providers (OSPs) for third-party infringement (includes libraries that provide Internet access)
 - If OSP was passive conduit
 - If OSP did not have knowledge of infringement
 - If OSP acts expeditiously to remove access
 - If OSP receives no financial gain from infringing activity
 - Other conditions

- Section 512 (e) establishes that if faculty member or graduate student infringes copyright in teaching or research activity, institutions is not liable
 - If infringement does not involve online access to material for courses taught within last 3 years
 - If institution has not received more than 2 infringement claims concerning the individual within last 3 years
 - If institution promotes copyright compliance information to users

Jurisdiction

- Difficult area of law, leads to more questions than answers
- Law of a foreign country can apply to a dispute involving Internet activity originating in U.S. but committed in and violating the law of that country
 - LICRA (League Against Racism and Antisemitism) v. Yahoo! Inc. (France)
 - See David G. Post, "Whose Law? Activity on the Internet and the Problem(s) of Jurisdiction," Educause Live Web Seminar, September 15, 2005, at <http://www.educause.edu/live>
- Judgment can be enforced in either country
- Hague Convention on Choice of Court Agreements

Additional Resources: Books

- Carrie Russell, *Complete Copyright: An Everyday Guide for Librarians* (Chicago: American Library Association, 2004)
- Kenneth D. Crews, *Copyright Law for Librarians and Educators: Creative Strategies and Practical Solutions*, 2d ed. (Chicago: American Library Association, 2006)
- Stephen Fishman, *The Copyright Handbook: How to Protect and Use Written Works*, 8th ed. (Berkeley, Calif.: Nolo, 2004)

Additional Resources: Websites

- International organizations
 - Unesco website on copyright, including database of national copyright laws: http://portal.unesco.org/culture/en/ev.php-URL_ID=12313&URL_DO=DO_TOPIC&URL_SECTION=201.html
 - World Intellectual Property Organization (WIPO): <http://www.wipo.int/portal/index.html>
 - WIPO Collection of Laws for Electronic Access: http://www.wipo.int/clea/en/index_netscape.jsp
 - World Trade Organization website, section on intellectual property: http://www.wto.org/english/tratop_e/trips_e/trips_e.htm
 - International Federation of Reproduction Rights Organizations: <http://www.ifrro.org/show.aspx?pageid=home>

Additional Resources: Websites

- National copyright agencies
 - U.S. Copyright Office: <http://www.copyright.gov/>
 - Albania--Ministry of Culture, Youth and Sports, Legal and Copyright Department: <http://www.mkrs.gov.al>
 - Armenia--Intellectual Property Agency of the Republic of Armenia: <http://www.armpatent.org/>
 - Azerbaijan--Copyright Agency of the Republic of Azerbaijan
 - Belarus--National Center of Intellectual Property (NCIP): <http://www.belgospatent.org/>
 - Bosnia and Herzegovina--Institute for Standardization, Metrology and Patents of Bosnia and Herzegovina: <http://www.basmp.gov.ba/>

- Bulgaria--Copyright and Related Rights Division, Ministry of Culture: <http://www.culture.government.bg/>
- Croatia--State Intellectual Property Office of the Republic of Croatia: <http://www.dziv.hr>
- Czech Republic--Ministry of Culture of the Czech Republic, Copyright Department: <http://www.mkcr.cz/>
- Estonia--Estonian Ministry of Culture: <http://www.kul.ee/>
- Georgia--National Intellectual Property Centre (Sakpatenti): <http://www.sakpatenti.org.ge/>
- Hungary--Division of Copyright, Hungarian Patent Office: <http://www.hpo.hu/English/>
- Kazakhstan--Committee for Intellectual Property Rights, Ministry of Justice: <http://www.minjust.kz/>

- Kyrgyzstan--State Agency of Science and Intellectual Property under the Government of the Kyrgyz Republic (Kyrgyzpatent): <http://www.kyrgyzpatent.org/>
- Latvia--Ministry of Culture, Copyright and Neighboring Rights Division: <http://www.km.gov.lv>
- Lithuania--Ministry of Culture of the Republic of Lithuania, Copyright Division: <http://www.lrkmlt/>
- Former Yugoslav Republic of Macedonia--Normative, Governing and Intellectual Rights Division, Ministry of Culture: <http://www.kultura.gov.mk/>
- Moldova--State Agency on Intellectual Property Protection (AGEPI): <http://www.moldovanpatentoffice.org/>
- Poland--Ministry of Culture and National Heritage, Legal Office

- Romania--Ministry of Culture and Religious Affairs, Romanian Copyright Office
- Russian Federation--Federal Intellectual Property Service of the Russian Federation, Russian Agency for Patents and Trademarks (Rospatent): <http://www.fips.ru/>
- Serbia and Montenegro--Copyright Department Federal Intellectual Property Office Federal Ministry for Economy and Internal Trade: <http://www.yupat.sv.gov.yu/>
- Slovakia--Media and Copyright Division, Ministry of Culture: <http://www.culture.gov.sk/english/>
- Slovenia--Slovenia Intellectual Property Office (SIPO), Ministry of Economy: <http://www.uil-sipo.si/>

- Tajikistan--Agency of Copyright and Related Rights, Ministry of Culture
- Turkmenistan--Patent Department, Ministry of Economy and Finance
- Ukraine--Ukrainian Agency of Copyright and Related Rights (UACRR) Ministry of Education and Science of Ukraine:
<http://www.uacrr.kiev.ua/>
- Uzbekistan--Uzbek Republican State Copyright Agency:
<http://www.uzraap.uz/>

Additional Resources: Websites

- Educational websites
 - Copyright Management Center at Indiana University-Purdue University, Indianapolis:
<http://www.copyright.iupui.edu/index.htm>
 - Stanford University Copyright and Fair Use Center:
<http://fairuse.stanford.edu/>
 - University of Texas Copyright Crash Course:
<http://www.utsystem.edu/ogc/intellectualproperty/cprtindx.htm>
- Creative Commons: <http://creativecommons.org/>