

## An Introduction to Copyright

### *What is Copyright?*

Copyright is a form of protection grounded in the U.S. Constitution and granted by law for original works of authorship fixed in a tangible medium of expression. Copyright covers both published and unpublished works.

### *What is Protected by Copyright?*

Copyright protects original works of authorship that are fixed in a tangible form of expression. The fixation need not be directly perceptible so long as it may be communicated with the aid of a machine or device. Copyrightable works include the following categories:

- 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; and
- architectural works

These categories should be viewed broadly. For example, computer programs and most “compilations” may be registered as “literary works”; maps and architectural plans may be registered as “pictorial, graphic, and sculptural works.” (U.S. Copyright Office, 2008, p. 3).

Copyright provides copyright owners fairly substantial control over their work. The Copyright owner has the exclusive right to:

- Copy and reproduce of the work, including the exclusive right to make digital copies
- Sell or otherwise distribute copies of the work
- Prepare new works based on the protected work
- Perform the protected work (such as a stage play or a song) in public
- Display the work (such as a painting) in public (U.S. Copyright Office, 2008, p. 1)

Note that a work may be copyright protected even if the work does not contain a copyright notice (e.g. © Monroe College). Solely because a work does not contain a copyright notice, does not mean that such work is not protected under copyright law. Under the Berne Convention (which the United States signed in 1989), copyright protection extends to a work of authorship automatically upon creation, and a copyright notice, is, thus, not required to obtain such protection.

### *How long does Copyright Protection Last?*

Under the Copyright Law of the United States, the creator of an original work of authorship is automatically granted a copyright to such work for a specified period of time. The standard length of a U.S. copyright is the life of the author plus 70 years. For an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication or a term of 120 years from the year of its creation, whichever expires first. Different rules apply for works created before 1978, and for some foreign works.

Thus, solely because a work is very old does not mean that the rights of the copyright owner of such work have lapsed. It is also important to note that rights of a copyright owner survive an author's death; such rights being passed down to estates, heirs, and beneficiaries.

#### *What is Not Protected by Copyright?*

According to the United States Copyright Office (2008, p. 2), several categories of material are generally not eligible for federal copyright protection. These include among others:

- Works that have not been fixed in a tangible form of expression (for example, choreographic works that have not been fixed in a tangible medium of expression from which the work can be performed, or improvisational speeches or performances that have not been written or recorded)
- Titles, names, short phrases, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering, or coloring; mere listings of ingredients or contents
- Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices, as distinguished from a description, explanation, or illustration
- works consisting entirely of information that is common property and containing no original authorship (for example: standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources)
- Works in the public domain

#### *What is the Public Domain?*

Notwithstanding the lengthy term of copyright protection as described above, copyright protection eventually does expire on a work of authorship at which point such work enters into the public domain. When a work enters the public domain it is available to be used by the public without the requirement that a user obtain permission from the copyright owner because such works in the public domain are no longer eligible from private ownership.

#### *Permitted Uses of Copyrighted Materials*

Faculty, students and staff of Monroe College may use copyrighted materials provided such activities (1) are allowed by obtaining permission from the copyright owner (this typically involves securing a license from the copyright owner), or (2) are permissive under the fair use doctrine.

#### *Licensing: Open-source Materials*

Certain copyrighted materials are becoming available for public use without the requirement to obtain permission from the copyright holder through the use of Open-Source and Open-Access licenses. Open-Source typically refers to access to software and source code and Open-Access refers scholarly journal materials. Open-Source and Open-Access materials are not in the public domain and use of such materials is typically governed by standard "creative commons" licenses that are extended to all members of the public wishing to use such materials. The Open-Source or Open-Access licenses set forth specific limitations of such use (i.e., commercial uses may be prohibited, etc.). However, Open-Source or Open-Access materials are typically clearly labeled as such so it will be apparent to the user when encountering such materials.

## An Introduction to Fair Use

### *What is Fair Use?*

Fair use is the most significant limitation on the copyright holder's exclusive rights (United States Copyright Office, 2010, para. 1). There are no set guidelines that are universally accepted. An important facet of Fair Use analysis is that use for an educational purpose, alone, does not necessarily render such use Fair Use under Copyright Law. To determine if a use is Fair Use, a user must balance four factors "in light of the purposes of copyright" to determine whether such use best serves the goal of promoting "the Purpose of Science and Useful Arts" than protecting such use. The four factors are:

#### (1) The purpose and character of the use:

- Is the use of the copyrighted work for nonprofit or educational purposes? The use of copyrighted works for nonprofit or educational purposes is more likely to be considered fair use (NOLO, 2013, para. 6).
- Is the new work merely a copy of the original? If it is simply a copy, it is not as likely to be considered fair use.

Does the new work offer something above and beyond the original? Does it transform the original work in some way? If the work is altered significantly, transformative, used for another purpose, or appeals to a different audience, it more likely to be considered fair use (NOLO, 2013, para. 6).

#### (2) The nature of the copyrighted work:

- Is the copyrighted work a published or unpublished work? Unpublished works are less likely to be considered fair use.
- Is the copyrighted work out of print? If it is, it is more likely to be considered fair use.
- Is the work factual or fiction? The more a work tends toward artistic expression and fiction, the less likely it will be considered fair use (NOLO, 2013, para. 9).
- Note that if use is transformative under factor (1), then factor (2) is less important to the analysis.

#### (3) The amount and substantiality of the portion used:

- The more you use, the less likely it will be considered fair use. Minimal copying does not usually trigger infringement liability.
- Does the amount you use exceed a reasonable expectation? If it approaches 50 percent of the entire work, it is not likely to be considered a fair use of the copyrighted work.
- Is the particular portion used likely to adversely affect the author's economic gain? If you use the "heart," or "essence" of a work, it is less likely your use will be considered fair.

#### (4) The effect of use of the potential market for the copyrighted work:

- The more the new work differs from the original, the less likely it will be considered an infringement
- Does the work appeal to the same audience as the original? If the answer is yes, it will likely be considered an infringement.

- Does the new work contain anything original? If it does, it is more likely the use of the copyrighted material will be seen as fair use (NOLO, 2013, para. 11).
- Does the new work usurp the market of the original work?
- Note that if use is transformative under factor (1), then factor (4) is less important to the analysis.

Monroe College recommends that its faculty and instructors consider the four factors that are used to evaluate fair use when they are deciding what and how much of a copyrighted work to use.

#### *In General, What Counts as Fair Use?*

General examples of limited portions of published materials that might be used in the classroom under fair use for a limited period of time, include:

- Displaying works such as charts, graphs, and diagrams from a book, periodical, or newspaper
- Displaying quotes or small portions of a chapter of a non-fiction book or other work.
- Displaying drawings, cartoons or pictures from a non-fiction book or other work.
- Displaying a work that is transformative enough to outweigh commercial use.

#### *What Should Be Avoided?*

- Using films, music, or any other type of performances without obtaining permission
- Reproducing copyrighted materials for distribution to a class without obtaining permission

#### *Copyright and Electronic Publishing*

- The same copyright protections exist for the author of a work regardless of whether the work is in print, in a library research database, a blog, an online discussion board or comment space, or any social media formats.
- If you make a copy from an online source for your personal use, it is more likely to be seen as fair use. However, if you make a copy and put it online, it is less likely to be considered fair use.
- Note that the Internet IS NOT the public domain. There are both copyrighted and un-copyrighted materials online. Always assume a work online is copyrighted.

#### *Tips for Using Online Information*

Always credit the source of your information. If you do not see an individual named as the author, do not forget that the author may in fact be the organization responsible for the Web site. Credit the organization.

Find out if the author of a work (e.g., text, video, audio, graphic, etc.) provides information on how to use his or her work. If the author provides explicit guidelines, follow them.

Whenever feasible, ask the copyright holder for permission. If no copyright holder is specifically named, do not assume that the material is in the public domain. Assume that the copyright holder is the author, whether it is an individual or an organization. Keep a copy of your request for permission and the permission received.

### Summary of Civil and Criminal Penalties for Violation of Federal Copyright Laws

Copyright infringement is the act of exercising, without permission or legal authority, one or more of the exclusive rights granted to the copyright owner under section 106 of the Copyright Act (Title 17 of the United States Code). These rights include the right to reproduce or distribute a copyrighted work. In the file-sharing context, downloading or uploading substantial parts of a copyrighted work without authority constitutes an infringement. Penalties for copyright infringement include civil and criminal penalties. In general, anyone found liable for civil copyright infringement may be ordered to pay either actual damages or “statutory” damages affixed at not less than \$750 and not more than \$30,000 per work infringed. For “willful” infringement, a court may award up to \$150,000 per work infringed. A court can, in its discretion, also assess costs and attorneys’ fees. For details, see Title 17, United States Code, Sections 504, 505. Willful copyright infringement can also result in criminal penalties, including imprisonment of up to five years and fines of up to \$250,000 per offense. For more information, please see the website of the U.S. Copyright Office at [copyright.gov](http://copyright.gov).

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