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May 2000: Copyright: Stain the Waters Clear

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"Stain the Waters Clear"

Copyright and Rights of the Professoriate

No one issue arouses sleepy academics more quickly than the issue of copyright. In one sense or another, most in the professoriate (including librarians) view copyright as applying to folks *not in the teaching profession.* The academy is exempt.

And nothing could be farther from the truth.

If anything, copyright applies equally to those of us in the academy as it does to those outside it. If recent court cases are any indication, the academy has more to fear legally since cases coming before the bench are increasingly those *within* the academy. Moreover, since many in the legal profession view universities as having so-called "deep-pockets," it's the *institution*, not the individual, who gets named in a seven-figure suit. Herewith, a brief primer on copyright.

What's in the Copyright Law?

In 1976, the issue of creative rights came to the foreground in an unprecedented way, but hardly for the first time. Previously, Congress had granted the right, "To promote the Progress of Science and the useful Arts, by securing for limited times to Authors ... the exclusive Right to their ... Writings, " as early as 1789. The following year, we had copyright legislation. Laws, like sausage, are things that should never be watched in the making. Congress ground out significant revisions in 1831, 1870, and 1909. Nearly seventy years later, and after much hand-wringing, the 1976 Copyright legislation became law.

Of course having a law doesn't mean anyone other than its crafters really understands it. The eyes glaze when one reads that such-and-such exclusive right is made subject to standards in Section 107, while Section 107 is made subject to Section 110, which is subject to Section 108, *ad infinitum*! Nailing Jell-o to the wall is easier than understanding the intent of legal writ. What holds the keenest interest for faculty is Section 107, or the [in]famous "Fair Use" clause. Section 108 is also important, mainly to libraries. Let's briefly look at both of these.

Section 107: Fair Use

Fair use has probably created more problems than it's solved. Faculty may view Fair Use as a "carte blanche" clause that covers a multitude of sins. *Fair Use was never meant to convey this impression.* The intent of Fair Use is to make it possible to use copyrighted works in the classroom, *not as one pleases, but within certain, very carefully outlined restrictions.* If truth be told, the widespread abuse of Fair Use, especially among the professoriate (but by no means limited to it) has created the current climate in the courts.

Fair Use allows for quotations, excerpts, short passages, summaries of addresses, or articles with brief quotations, incidental or "fortuitous reproduction" in a broadcast of a work located at the scene of an event being reported, and reproduction of work in legislative or judicial settings. Fair Use is more than 100 years old but wasn't codified until 1976. Over time, court cases helped define Fair Use by the amount or portion being used of a work, the effect of use upon the market value, purpose and character, and nature of the copyright work itself.

At not-for-profit educational institutions, a "teacher" (in quotes for this is broadly defined) may make use of: an article from a periodical; a short story, poem or essay; an illustration; or a chapter from a book, for classroom use ***as regulated by spontaneity, brevity, and cumulative effect (i.e. all three at once, not one of the three).*** Each copy used must bear the copyright restriction notice. The materials must be used in a classroom setting.

Spontaneity is defined as "at the instance and inspiration," or "from *immediate* impulse" of the teacher. Spontaneity means that you see something in a paper, a journal, or a book you're reading over the weekend and wish to use it (without permission) in class the next day or the next week, ***but not the next month or the next year***. The next day or the next week does not allow time for written permission. It is clearly a spontaneous act by the academic. Tied to spontaneity is,

Brevity. Brevity defines how much can

be used. Guidelines for brevity are usefully specific: words and/or percent copied is counted or measured. For example, one illustration per book or periodical issue. Poems, if less than 250 words and not printed on more than two pages, or only 250 words. Only 10% of prose works may be copied or 1,000 or fewer words, or a complete article, story or essay, if less than 2,500 words. Condensed, this means that if written permission has not been obtained, very little may be copied legally. You cannot, therefore, place four chapters out of a book on Reserve if those chapters constitute 11% or more of the book *without permission from the publisher in writing.* Tied to brevity is,

Cumulative Effect. Cumulative Effect refers to how often this copying may legally occur without permission. Again, the law spells this out: nine or fewer instances of multiple copying for one course during one class term; three excerpts or fewer from a collective work or periodical volume during one class term (this does NOT apply to newspapers or current news periodicals); and no more than one complete item (poem, short story, article, essay) or two excerpts by the same author during one class term. Copying an entire journal for Reserve is a violation. One can, however, put the copies of a journal on Reserve, *but never in perpetuity.* In other words, your copied Reserve reading list *must* change *every* semester *if you do not have written permission.*

These three, spontaneity, brevity and cumulative effect do NOT apply to: workbooks or standardized tests (permission is *always* required in these cases); copying as a substitute for buying (always illegal regardless of one's altruistic motives); and copying to create anthologies, whether to replace or act as a substitute for purchase of individual works. Similar standards apply to music but those standards are ***more, not less,*** restrictive. Video recording guidelines, among the newest of guidelines, allow for off-air recording of shows when broadcast. Tapes may be kept for a maximum of 45 days, after which they must be destroyed or erased. All off-air recorded videotapes used in the classroom ***must carry*** the copyright notice.

Section 108 allows libraries specific leeway, NOT exemption. In fact, the law regarding videotapes, CDs and music are VERY restrictive on everyone, *including* libraries. In a nutshell, section 108 expands the meaning of section 107 by making a few allowances for libraries. Libraries must post a copyright notice on their machines, they cannot knowingly allow copying that either infringes on the sale of the copied item, or will be resold for any reason. Libraries also have to count the number of interlibrary loans out of the same periodical title and year. The library cannot, for example, request dozens of articles out of the same volume number of a magazine.

Other restrictions apply to library Reserves:

•One copy per ten students, not to exceed six copies maximum;

•Copies made are used for that semester ONLY; further use requires written permission;

•All copies must bear the copyright notice;

•Copies are not in lieu of purchase; and

•Copies may not be altered in any way.

Meaning?

What does all of this mean? While cases such as the Texaco Case, cases involving the Internet and World Wide Web, and other such cases continue to define and restrict allowance, some few things are clear.

1. The professoriate, like any other group, is bound by copyright restrictions;
2. The professoriate, unlike other groups, does enjoy *some* exemptions;
3. Fair Use does not mean teachers get unlimited copying privileges;
4. If there is time to write for permission from the copyright holder, you must;
5. Spontaneity is good for only one instance of copying for one semester. If that copied work is used again, written permission is required.
6. Copied Reserve items must be updated EACH semester, OR, written permission acquired;
7. Music and videotaping copyrighted items are under severe copyright restrictions.
8. NO copying by anyone (faculty included) may be done for resale, whether for profit or not, without written permission.
9. NO copying by anyone (faculty included) may be done in lieu of purchase, no matter how altruistic the motives.
10. Electronic copyright of materials are treated under the Digital Millennium Copyright Act (signed into law October 1998). Access matters are still in question.

Widespread abuses, both in and out of the educational arena, have given rise to court cases involving universities. Winthrop has its own copyright policy. Familiarity with this document will save countless misunderstandings. The library cannot copy what our own policies disallow or what the law does not exempt. Caution is *strongly* advised.

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