acrl 2023

"YOU KEEP USING THAT WORD. I DO NOT THINK IT MEANS WHAT YOU THINK IT MEANS"

Copyright Myths, Misnomers, and Misconceptions

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Copyright law permeates almost every aspect of librarianship and does much to help academic libraries offer a wide variety of services and resources to patrons. Unfortunately, there are many myths and misconceptions about the law that can have a chilling effect on users, arbitrarily limiting the ways academic libraries and the scholars they serve may engage with protected resources. This paper will introduce readers to the basics of U.S. copyright law that all library employees should be familiar with, providing a foundation of knowledge they can then use to identify myths and misconceptions about the law.

BASICS OF U.S. COPYRIGHT LAW

Securing Copyright

It is a common misconception that works must be registered with the U.S. Copyright Office to receive copyright protection. However, under the current law (the Copyright Act of 1976, as amended) copyright protection instantly vests in "original works of authorship fixed in any tangible medium of expression" (17 U.S.C. § 102).

Works Eligible for Copyright Protection

In addition to the originality and fixation requirements, a work must fall into one of these broad categories, identified in Section 102, to secure copyright protection:

1. "literary works;
2. musical works, including any accompanying words;
3. dramatic works, including any accompanying music;
4. pantomimes and choreographic works;
5. pictorial, graphic, and sculptural works;
6. motion pictures and other audiovisual works;
7. sound recordings; and
8. architectural works."

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Copyright protection is also available for:

- Compilations (17 U.S.C. §103), that are works "formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship (17 U.S.C. §101).
- Collective works, "such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole (17 U.S.C. §101).
- Derivative works, that are works "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." (17 U.S.C. §101).

Works Not Eligible for Copyright Protection

A patron may approach the reference desk and ask "I have a great idea; how can I copyright it to keep others from copying it?" Section 102 tells us that ideas are not eligible for copyright protection. However, a person's original expression of an idea could be copyrightable.

For example, no one may copyright the idea of making movie about a princess being rescued by her true love and prevent others from making films in this genera. Instead, this idea is available for all to pursue and, as a result, we have a wide variety of films in this area such as The Princess Bride, Shrek, Snow White, etc. Section 102 identifies other works not eligible for copyright protection: "procedure[s], process[es], system[s], method[s] of operation, concept[s], principle[s], or discover[ies]," though some of these works may be eligible for protection under other categories of intellectual property, such as patent or trademark law.

Copyright Notices

Another common misconception about the law is that works must have a notice of copyright on them in order to be protected and those without a notice are free to be used by others in any way they wish. Works first published on or before February 28, 1989 were required to have a copyright notice placed on them to have copyright protection. However, this requirement was eliminated as of March 1, 1989, and works published after this date are still fully protected by copyright even if there is no notice on them.

Ownership of Copyright

Generally, the person who creates a copyrightable work is the rightsholder. If two or more people work together to create a work that is eligible for copyright protection, the resulting work is considered a joint work and they will share in the copyright equally so long as each individual contributed significant, copyrightable content to the work with the intention that their individual contributions will be merged together to form the final, whole work. In the case of works made for hire, an individual may create a copyrightable work, but the rights vest with their employer. This occurs when a work is "prepared by an employee within the scope of his or her employment" (17 U.S.C. § 101), or when a "contribution to a collective work; a part of a motion picture or other audiovisual work; a translation; a supplementary work; a compilation; an instructional text; a test; answer material for a test; or an atlas" is "specially ordered or commissioned" (17 U.S.C. § 101) by a contractor and the "parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire" (17 U.S.C. § 101).

Duration of Copyright

Copyrightable works created after January 1, 1978 receive the following terms of protection:

- Works created by a single author are protected for the life of the author and 70 years after their death.
- Works of joint authorship receive protection for 70 years after the passing of the last surviving author.

- Anonymous works, works created under a pseudonym, and works made for hire are protected for 95 years from the year of the works first publication, or 120 years from the year of its creation, whichever expires first.

The term of copyright protection for works created prior to January 1, 1978 vary depending on several factors, including its publication status (published or unpublished) and the rightsholder's compliance with formalities found in previous versions of the law.

Rights Granted Under the Law

Section 106 of U.S. copyright law states that the creators of copyrightable works have the right to:

1. make reproductions of copyright works;
2. prepare derivative[1] versions of the original work;
3. make public[2] performances[3] of "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works" (17 U.S.C. §106);
4. make public displays[4] of "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work" (17 U.S.C. §101); and
5. For sound recordings, making public performances of the work "by means of a digital audio transmission" (17 U.S.C. §101).

The Public Domain

When the term of copyright protection for a work expires it passes into the public domain and can be freely reused. Works can also enter the public domain when:

- They contain no copyrightable content.
- The "work [is] prepared by an officer or employee of the United States Government as part of that person's official duties" (17 U.S.C. § 105[a]), and is not subject to exceptions found in Section 105(b).

User Rights

In Sections 107 through 122, Congress establish limitations that exclusive rights granted to rightsholder in Section 106 are subject to, allowing "the public to make limited uses of copyrighted works—uses that might otherwise constitute infringement—especially for advancing knowledge or serving other important social objectives" (Crews 2020, 95). Academic libraries take advantage of many of these user rights when providing services and resources to patrons, including:

- Section 107, fair use;
- Section 108, Reproduction by Libraries and Archives:
- Section 109, the first sale doctrine;
- Section 110(1), for classroom performances and displays;
- Section 110(2), the Technology, Education and Copyright Harmonization (TEACH) Act; and
- Section 121, Exclusive Rights: Reproduction for Blind or Other People with Disabilities.

Unfortunately there are many myths, misconceptions, and misnomers regarding these user rights perpetuated in the profession that can result in library staff hesitating to fully and effectively use them.

FAIR USE MYTHS AND MISCONCEPTIONS

The majority of myths and misconceptions about the law seem to be associated with the four factors found in fair use statute (17 U.S.C. §107);

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

For example, it is often believed that all educational, library, or not-for-profit uses are automatically considered fair uses. This is not the case. While these types of uses are highly favored under the first factor of fair use, all four factors need to be applied to the reuse situation and weighed against each other.

Many misconceptions are tied to the third factor of fair use. Library staff and instructors often are under the impression that the law limits the amount of a work that can be reused and still be considered fair, such as 10% or one chapter of a book, whichever is less; 30 seconds from a song; 3 minutes from a film; or only 8 photographs from any one photographer. As illustrated above, the third factor of fair use puts no such limits on how much of a work can be reused and still be considered fair. Looking at court case litigating fair use, we can find numerous examples showing that the reuse of 100% of a work can be considered fair, if the situation requires it. We can also find court cases where reusing a small portion of a work is considered to be unfair. How much of a work an individual needs to reuse will often be closely tied to the purpose of their use (the first factor). For example, in education, and instructor should consider how much of a book or film needs to be shared with students to teach a lesson or illustrate a point in class and only reuse that amount.

For the fourth factor, it is often thought that if a license is available for a particular reuse, such as including an image in a book, fair use cannot be considered. This is untrue. License availability should be incorporated into an analysis of the fourth factor, but the courts have told us that, "the ability to license does not demand a finding against fair use" (Cambridge University Press v. Patton 2014, 1276).

Other commons misconceptions about fair use have little to do with the factors, but rather the statute itself. For example, that fair use can only apply to one use of a protected work, and any other reuse by the same individual or institution requires that a license or permission be obtained. This is also untrue. For subsequent uses, individuals should work through the four factors of fair use again to considering if anything about the use may have changed that could impact their finding of fairness as here, with other misconceptions, the statue places no prohibitions or limitations on subsequent reuse.

REPRODUCTION BY LIBRARIES AND ARCHIVES: MYTHS AND MISCONCEPTIONS

This user right, found in Section 108 of U.S. copyright law provides, among other things an option for qualifying libraries seeking to offer ILL services. Some libraries think that, as a result, all ILL lending and borrowing must be carried out under this particular section, but that is not the case. Fair use can also be considered for ILL lending and borrowing, which is made clear in Section 108(h)(4), that states that nothing in this part of the statute "in any way affects the right of fair use as provided by section 107." Some libraries operate under the *Rule of Five* when placing ILL requests from their patrons with other libraries. Drafted by the Commission on New Technological Uses of Copyrighted Works (often referred to by its acronym, CONTU), which was established by Congress in 1975, this rule purports that libraries can ensure they are acting under the requirement found in Section 108(g) that copies they receive for their patrons via ILL services are not substituting for a "subscription to or purchase of such work" by limiting such requests "to five copies of articles from the most recent five years of each journal title" in a calendar year (Library of Congress 19789, 128). The *Rule of Five* holds no force of law, and libraries are not required to comply with it. Instead, many libraries choose to carefully monitor the requests being placed by their patrons via ILL and when articles from particular journal are being requested repeatedly by multiple patrons over a sustained period of time, decide to explore options for subscribing to it. They often choose to do the same with books and films being requested often via ILL too. Here, ILL staff can facilitate such decisions by sharing reports of items requested multiple times by patrons with the collections development staff, who can then decide if the purchase of them or a subscription to the source makes sense.

FIRST SALE DOCTRINE MYTHS AND MISCONCEPTIONS

Under Section 109, which is often referred to as the first sale doctrine, rightsholders are only able to control only the first distribution of their copyrightable works. This section of the law allows libraries to lend physical copies (e.g., books and digital video discs [DVD]) of works they acquire to patrons and to other libraries via consortia agreements or interlibrary loan (ILL). This user right benefits libraries in other ways too. For example, under the first sale doctrine, patrons to donate physical copies of works they own to the library. However, some copyrightable works may have notices on them that seem to indicate that they are not eligible for redistribution or lending under the first sale doctrine. For example, a review copy of a book and instructor received from a publisher might have a notice printed inside the front cover stating that it cannot be loaned, given, or sold to another. In cases like *Bobbs-Merrill Co. v. Straus* (210 U.S. 339 [1908]), *Universal Music Group (UMG) Recordings, Inc., v. Augusto* (558 F. Supp. 2d 1055 [2008]), and *Kirtsaeng v. John Wiley & Sons, Inc.* (568 U.S. 519 [2013]) the courts tell us that such notices placed on works by rightsholder generally hold no force of law and, as such, cannot limit libraries exercising user rights such as the first sale doctrine when looking to lend, sell, or dispose of them. However, should an individual or entity, like a library, enter into a license through which they sign away their first sale rights, then such terms may be enforceable. For example, a vendor may choose to sell a DVD to a library and, at the point of purchase, has acquisitions staff sign an agreement stating they can loan the film to their own patrons but cannot lend it to other libraries via ILL services. Alternatively, when requesting a review copy of a textbook through a publisher's website, and instructor may click on a button that says "I agree" to terms that include keeping the book for personal use only and prohibits them from giving it away or donating it to the library. In such cases where legally enforceable licenses exist, user rights granted under the law are limited by them.

Another common misconception related to the first sale doctrine often emerges when making works available via print reserve. Many of those supporting reserve services are under the impression that only one copy of a physical work, such as a book or DVD, can be made available via this service for every 10 or 15 students enrolled in the course. No such restrictions exist in Section 109. Rather, the number of copies of an item a library can circulate via print reserves services or in general is limited only by their budget and shelf space. For example, it is not uncommon for a large public library system to purchase hundreds of copies of a best selling book or film to meet patron demand for access to it.

SECTION 110(1) MYTHS AND MISCONCEPTIONS

Recognizing the critical importance of using copyrighted works as part of teaching, Congress created a user right in Section 110(1). It states that the

> performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made.

Under this user right, instructors can display photographs, images of art, or material from a book or magazine and screen lawfully made copies of films for students (in part or in total) in face-to-face instruction sessions. As straight forward as this user right may seem, there are myths and misconceptions associated with it. For example, some film vendors will tell libraries that they must purchase a copy of a film that has 'educational rights' if it will be screened in the classroom. This is untrue and, looking at Section 106, no 'educational right' is listed there for them to grant. Libraries are free to purchase physical copies of films being sold online through vendors such as Amazon or Barnes and Noble, through a department store such as Target or Wal-Mart, or even acquire lawfully made used copies at a garage sale or via eBay to circulate in their collection and for screening in classrooms. They just need to ensure that, as part of the transaction, the do not encounter any type of enforceable license agreement that limits user rights they would normally enjoy under the law, such as Section 110(1).

TEACH ACT MYTHS AND MISCONCEPTIONS

The TEACH Act, found in Section 110(2) of U.S. copyright law, was passed in 2002 to help address copyright considerations in distance education. Among other things, and when in compliance with the requirements outlined in the statute, the TEACH Act allows libraries and educational institutions to make "reasonable and limited" (17 U.S.C. 110[2]) performances of motion pictures (e.g., feature films, documentary films, and television shows), audiovisual works (e.g., video games); and sound recordings (e.g., a podcast or music) as part of instruction in distance education. It is commonly thought that here the words "reasonable and limited" mean that any of these works cannot be used in their entirety. There are several sources that tell us this is not the case, though. This includes a report put forward by the Senate when they passed the TEACH Act. It says that when considering what a reasonable and limited portion of a work might be, individuals should take into "account both the nature of the market for that type of work and the pedagogical purposes of the performance" (S. Rept. 107-31, 7-8). Then in 2006, the Congressional Research Service, released a report stating that "the exhibition of an entire film may possibly constitute a 'reasonable and limited' demonstration if the film's entire viewing is exceedingly relevant toward achieving an educational goal; however, the likelihood of an entire film portrayal being 'reasonable and limited' may be rare" (Huber, Yeh, and Jeweler, 2006, 4). This language indicates that there could be situations where the sharing of an entire work under the TEACH Act could be allowed.

REPRODUCTION FOR BLIND OR OTHER PEOPLE WITH DISABILITIES MYTHS AND MISCONCEPTIONS

Under Section 121, copies of "a previously published literary work or of a previously published musical work" can be "reproduced or distributed in accessible formats exclusively for use" by an "individual who, regardless of any other disability—(A) is blind;

(B) has a visual impairment or perceptual or reading disability that cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or (C) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading" (17 U.S.C. §121[d][3]). Some are under he impression that is a remediated copy is to be made under Section 121 by a qualifying library or educational institution that the patron must first purchase their own copy and show it, or a receipt for the purchase, to those making the accessible version for them. Section 121 contains no such requirement. Butler (2019) tells us that "the law also says nothing about either the provider or the recipient having a responsibility to destroy accessible copies at any time after the transfer," (31) another common misconception about Section 121. He goes on to say that "this arrangement—permitting copying without purchase, and with the assumption that the copy will be retained by the recipient—is not unique to Section 121; the Copyright Act similarly provides in Section 108 that libraries and archives may provide patrons with copies of portions or, where they are not commercially available, copies of entire works, with one condition being that the copy 'becomes the property of' the requestor" (61). As such, academic libraries should feel empowered to work with others at their institution, such as those working in a disability services office, to help ensure those individuals with disabilities can have access to works being used for teaching, research, and the creation of new scholarship that fits their particular needs.

PUTTING IT ALL TOGETHER

There are many, many myths, misconceptions, and misnomers about U.S. copyright law perpetuated in libraries and academia that can unfairly curtail the ways in which library staff and their users can engage with protected works. To combat this misinformation, library staff should develop an understanding of the basics of the law, including how copyright is secured, works eligible for protection, the duration of protection, and rights granted to the creators of copyrightable works. Then, when faced with a situation where they may seek to exercise these

rights when providing services and resources to users, library staff should consult the law itself to review the rights and responsibilities outlined in Section 107, 108, 109, 110, and 121 to determine how best to proceed.[5] For additional information on these user rights, they should consult books, web resources, and other tools developed by knowledgeable individuals working in the profession or professional organizations that have the best interests of libraries and their users at heart. Or, as Peter Jaszi, Professor of Law Emeritus and Faculty director of the Glushko-Samuelson Intellectual Property Clinic at American University, wisely stated, that "whenever you read something or are given something to read which is offered [as] copyright guidance that begins by talking about how much trouble you could get in to if you get it wrong … that begins by saying you could be subject to so much damage… or lose your car or your first born or whatever it is, put that down and look for something else to read" as these types of resources could lead its readers "best case, to make decisions that are radically over conservative and, worst case, it will actually lead [them] to make decisions which although over conservative, may be wrong enough to actually get [them] into affirmative trouble. So, leave it behind and look for sources of guidance that talk … about the reasoning process that goes into making … good and robust decisions about what is and isn't acceptable [copyright] practice" (Jaszi et al., 2017).

NOTES

1. Section 101 of U.S. copyright law tells us that "A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work".
2. To perform or display a work "publicly" means "(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times" (17 U.S.C. § 101).
3. Performing a work involves "recit[ing] render[ing], play[ing], danc[ing], or act[ing] it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible" (17 U.S.C. § 101).
4. A work is displayed when a copy of it is shown "either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially" (17 U.S.C. § 101).
5. Readers of this paper must note that some user rights have requirements for libraries and educational institutions seeking to use them (e.g., Section 110[2] requiring them to be nonprofit) or outline limitations on the types of works that can be copied and distributed (e.g., various sections of Section 108) that are not fully explored here as the intent is to highlight common myths and misconceptions about the law. As such, they should carefully read and seek to fully understand the requirements of all of the user rights mentioned here before exercising them to help ensure they are acting in compliance with the law.

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