

Fair Use And Digital Copyright

A Guide for The MWTC Community at Arizona State University East

Prepared by

Phillip E. Park

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Introduction

You And Copyright

As a multimedia writing and technical communication (MWTC) student, you should be concerned with fair use of copyrighted material in education. As a digital citizen—one who uses software and the Internet—you also need to consider the legal issues of these tools. These issues also concern you as someone pursuing a career as a technical communicator. Furthermore, as a professional, you may be paid via commission, wages, or salary to produce work, which has its own legal implications.

There are many misconceptions about these subjects. Is something posted on the Internet free? Who owns the work you are hired to do? This report shall address these and other issues.

Caution This paper is a collection of guidelines, not formal legal advice. The researcher is not a legal professional and makes no claim to be one.

What Is Copyright?

Copyright is designed to stimulate growth by granting protection to creators that their work—and profits thereof—shall not be stolen. United States Code title 17 describes these as “original works of authorship.”¹ Copyright holders may:²

- Reproduce work in copies or phonorecords;
- Prepare derivative works based upon the work;
- Distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- Perform the work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual work; and,
- (In the case of sound recordings) Perform the work publicly by means of a digital audio transmission.

It is illegal to infringe on another’s copyright. Special exceptions include fair use, covered elsewhere in this document.

Copyright Coverage?

So what are these original works of authorship? Copyrightable materials include the following:³

- 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

Automated databases and computer programs are classified as literary works.

Today anything a person writes is copyrighted, automatically. You can type the word “Copyright,” or the C in a circle symbol “©,” and the year of the work, e.g., “Copyright 2002” or “© 2002,” though to do this is not absolutely necessary. You also do not have to register with the U.S. Copyright Office, though this act does formally document your work. If you are submitting a short story, novel, screenplay, or some other kind of literature, most recommended you *not* add the copyright notice. The editors already know the rules, and they might think you have a chip on your shoulder for including it.⁴

Not Protected

Things that cannot be copyrighted:⁵

- Works that have not been fixed in a tangible form of expression (for example, choreographic works that have not been notated or recorded, 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 and other common sources)

Duration

Under the Sonny Bono Copyright Extension Act of 1998, an individual author's work is copyrighted for the duration of the artist's life plus 75 years. (The length of time a work remains copyrighted is an ongoing issue in the field of copyright law. The notion that artists somehow benefit from extensions to years beyond their deaths is just one controversy.)

What about the business world? Works for hire—ranging from cultural icons like Mickey Mouse to documents a technical communicator is hired to produce—are copyrighted for 95 years after the date of creation.⁶

Fair Use

What It Is

When reviewing a book or composing literary criticism, you must use directly some of the original material to do a thorough job.

Fortunately, this is perfectly legal when you follow the rules of fair use.⁷ Under the fair use concept, you may copy material for your own use (e.g., for a class) and for new, “non-infringing” material.⁸ At the same time, you must credit your source.⁹

The U.S. Code Title 17 states when using copyrighted material, you need to consider the following:¹⁰

- The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the purpose portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.

What It Is Not

However, these exceptions are for academic applications. If you use someone else’s work for commercial purposes, you (usually) are committing copyright infringement. The offense is stronger when your use of another’s material deprives that person of profit.¹¹

And yet there are exceptions to this rule. Perhaps the most famous is the case of the rap group 2 Live Crew, which copied the late Roy Orbison’s song “Pretty Woman” in a new interpretation. The Orbison estate sued, claiming copyright infringement. This case went to the U.S. Supreme Court, which ruled that the 2 Live Crew’s version constituted satire, and therefore was legal. Furthermore, the Court determined that because these musicians appeal to different audiences, the Orbison estate did not suffer any financial harm (loss of profit) from the 2 Live Crew’s production.¹²

Caution At the same time, this ruling does not give everyone the right to copy something in its entirety to perform satire. Get legal advice if you tread in this area.

TEACH Act

Passed in October 2002, the Technology, Education, and Copyright Harmonization (TEACH) Act is designed to address the new challenges of teaching on the Internet. At a basic level it states:

- Instructors may digitize and store materials for educational purposes, including distance learning.¹³
- However, these allowances are for nonprofit institutions. Furthermore, institutions need to establish usage policies that recognize copyright law and make these standards known to faculty, staff, and students. Students must be informed when their class materials are copyrighted.¹⁴
- The institution needs to ensure that only enrolled students can access these materials. The digitized materials should be available no longer than the duration of a “class session.”¹⁵
- The institution may not circumvent “embedded codes,” “technological measures,” or “management systems”¹⁶ designed to protect digitized materials.
- Instructors may not copy entire books for classroom use. Instructors who want to digitize existing analog work must first determine a digital source is not available and take care to use “portions,”¹⁷ not whole works.

Digital Copyright

Is That So?

“It is easier to get forgiveness than permission.” “If it’s posted online, then it’s fair game.” Are statements like these true?

No.

Just because something is digitized and posted online does not exclude it from copyright protection or exempt you from the law.

As stated earlier, any time somebody writes something, it is copyrighted. That includes text and images posted on the Internet.¹⁸ While it might be okay to copy these things for your own use, you may not use them in a for-profit enterprise. Nor may you distribute them. If copying something denies the originator profit, then you may not copy. You can get in particular trouble if you copy someone’s material and use it in a way that implies the originator approves of something (a product, a political view, etc.).¹⁹

While you have the copyright to work you post on a public message board, bear in mind that others may forward it to anyone. Though you’ve heard this advice many times, be careful what you say online. You can type, “Please do not forward this message without permission.” This protects your privacy to the extent of the honor system.²⁰

Public Domain

When the copyright on a material expires, it enters the public domain. This means anyone can use it without special permissions. United States government publications are not copyrighted. They are your tax dollars at work for you.

Open Source

After you purchase a car, you might install a roof rack to carry cargo on long trips. If you are a serious enthusiast, you might install a new

exhaust system to improve the performance. You are altering the product so it better suits your needs.

Suppose a minor modification to an operating system would improve your business' productivity. Can you do this legally? It depends on the software company, and, sometimes, the software company and the particular product. With open source software, you may. With closed source software, you may not. Instead, you can write to the manufacturer stating your case and hope that it offers a patch or corrects the problem in a new release sometime in the next few years.

Many people find this frustrating. When the free market works well, they have a choice. The Linux operating system is a well-known open source success story.

And there are others. In late October 2002, British telephone manufacturer Sendro announced it was dropping Microsoft MSFT.O software in favor of Nokia's NOV1V.HE. A desire for open source software motivated this decision.²¹

Endnotes

¹ “Copyright Basics (Circular 1),” *United States Copyright Office*, 16 September 2002, 04 November 2002 <<http://www.copyright.gov/circs/circ1.html>>.

² Ibid.

³ Ibid.

⁴ Jerry Jackson, Jr., “Frequently Asked Questions: Copyright,” *Writer’s Digest*, December 2002, 8.

⁵ “Copyright Basics (Circular 1),” *United States Copyright Office*, 16 September 2002, 04 November 2002 <<http://www.copyright.gov/circs/circ1.html>>.

⁶ Christopher Jullet, “Cyberlaw and You: What New Media Communicators Must Know,” *intercom*, June 2002: 22–24.

⁷ Lessig, Lawrence, *The Future of Ideas* (New York: Random House Inc., 2001) 105.

⁸ “A Description of the Digital Future Coalition,” *Digital Future Coalition* 04 November 2002 <http://www.dfc.org/dfc1/Learning_Center/about.html>.

⁹ Field, Thomas G., Jr. “Copyright on the Internet,” *Franklin Pierce Law Center Basic IP Information* 11 March 2001, 11 November 2002, <<http://www.Piercelaw.edu/tfield/cOpyNet.htm>>.

¹⁰ “Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code Chapter 1: Subject Matter and Scope of Copyright,” *United States Copyright Office*, 30 August 2002, 13 November 2002 <<http://copyright.gov/title17/92chap1.html>>.

¹¹ Field, Thomas G., Jr. “Copyright on the Internet,” *Franklin Pierce Law Center Basic IP Information* 11 March 2001, 11 November 2002 <<http://www.Piercelaw.edu/tfield/cOpyNet.htm>>.

¹² Vaidhyathan, Siva. *Copyrights and Copywrongs* (New York and London: New York University Press, 2001) 146–148.

¹³ Crews, Kenneth D. "New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act," *American Library Association* 20 October 2002 <<http://www.ala.org/washoff/teach.html>>.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Field, Thomas G., Jr. "Copyright on the Internet," *Franklin Pierce Law Center Basic IP Information* 11 March 2001, 11 November 2002 <<http://www.Piercelaw.edu/tfield/cOpyNet.htm>>.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Reddall, Braden, "U.K.'s Senda Drop's Microsoft Software for Nokia's," *Reuters.COM* 07 November 2002, 08 November 2002 <<http://reuters.com/printerfriendly.jhtml?type=technologynews&StoryID=169782>>.

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