

Copyright Use Case Studies

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## Introduction

Copyright is a legal right granting exclusive rights for use and distribution to the individual who created the work in question. In this case, the work refers to the original expression of ideas, not the idea itself (Copyright, Wikipedia, 2016). This exclusivity is granted for a finite period of time, but is not an absolute privilege. One exception to copyright protection is the principle of fair use, which allows the use of some copyrighted works within specific guidelines, to “promote the progress of science and the useful arts” (Fair Use Fundamentals, 2015). It can be difficult to determine which creative works are protected by copyright, and when the principle of fair use allows use of copyrighted works. This paper will evaluate two case studies that involve copyrighted materials, to identify the relevant copyright laws and issues.

## Case Study Number 1

**An instructor scans an entire book he has authored onto a password protected web site for students in his class even though the publisher holds the copyright.**

This case seems straightforward; the instructor wrote the book therefore it seems intuitive that he can provide it to his class. He has posted it in a password protected web site to disallow distribution beyond the intended audience. But it is important to apply the criteria for fair use to determine if this practice is permissible.

There are four “fair use factors” that must be considered (Harper, 2012, p. 6). The first is what is the purpose and character of the use. If the use is transformative (“it adds something new, with a different character, expression, meaning or message, or function” (Fair Use

Fundamentals, 2015)) it leans toward fair use. Examples of uses such as criticism, commentary, news reporting, parody, repurposing a work/new context favor fair use (Fair Use Fundamentals, 2015). Commercial or personal use tend to favor upholding copyright, which nonprofit and educational uses also support fair use even though the purpose is not transformative (Fair Use Fundamentals, 2015).

The second factor is the nature of the work being used. If the work is factual and published, it leans toward fair use. If the work is imaginative and unpublished, it leans toward copyright protection. If the work is a mix of factual or imaginative work, this factor is unlikely to influence the decision (Fair Use Fundamentals, 2015). This case does not specify the nature of the published book, but it's unlikely to be a fiction novel. If the work is unpublished, the author (in this case the faculty member) is still the owner and copyright holder, therefore he is in essence giving himself permission to use the work.

The third factor is how much of the work is being used. If a small amount such as 10% or less of the work is used, and it's an appropriate amount (the least necessary) to accomplish the transformative purpose, it is likely fair use. Using larger amounts favors the need to ask permission for use (Fair Use Fundamentals, 2015; U.S. Copyright Office, 2012). In this case study, this is probably the tipping point since the publisher holds the copyright, not the author.

The fourth factor is what effect it would have on the market for the original work. If the work avoids payment for permission (sales or royalties) it would favor the need to request permission. In this case the author is using the entire work, and is absolutely preventing the publisher from earning revenue from the sale of the book to which they hold the copyright.

After evaluating these factors, it is clear that the author would need to obtain permission from the publisher to post the entire book. If the book was out of print, and/or the publisher no longer wished to publish the book, they may be entirely willing to let the author scan and post the work.

#### Case Study Number 2

**A faculty member takes the best students papers each semester and creates an online journal that he makes available to students in subsequent semesters to show them examples of good papers.**

The primary issue of contention in this case is to whom copyright belongs for the students' works. According to U.S. Copyright law, the creator retains copyright (U.S. Copyright, 2012). The academic institution should also have policy that addresses who owns the intellectual property created by students. The University of Maryland Baltimore campus has adopted the University System of Maryland Policy on Intellectual Property (UMB Policy on Intellectual Property, University System of Maryland Policy on Intellectual Property) which clearly states that "students shall have all rights in copyrights of their work" (p. 6).

Applying the four factors of fair use, it is likely that the work is for a nonprofit, educational institution (although that is not made clear in the case). The nature of the work is not clearly explained, however it is probably factual or a mixture of factual and imaginative. However, the work was likely unpublished, which favors the need to request permission. The first factor is how much of the work was used, and in this case the professor used the works in their entirety, which is not appropriate under fair use. Last, the works are not transformative,

however financial implications are unlikely. In summary, fair use would not apply in this case and the faculty should have asked permission of the authors (the students) prior to putting their work in an online journal.

#### Compare and contrast two scenarios

The issue of ownership is in common with these two scenarios. In the first case, the author assigned copyright permission to the publisher, likely in exchange for a percent of sales. In the second case, the students owned their work. The faculty member in each case did not have the right to use those works without permission.

Issues of copyright and intellectual property, and fair use implications can be complicated. Academics and others continue to call for clarity on this issue, which continues to become more complicated with the continued growth of digitization of learning objectives, and distance education.

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