Implementing a comprehensive copyright policy

Copyright used to be an esoteric branch of intellectual property law

Traditionally, copyright law was the domain of a very limited group of industries, which was just as well because legal scholars, including at least one Supreme Court Justice, had admitted that fair use was one of the most difficult areas of the law to understand. But then most people really didn't need to understand it since it affected so few.

Technological advances in the late 20th Century began to change the picture, however, just as the invention of the printing press dramatically changed the picture many centuries before. The photocopy machine in particular seemed to upset gentlemen's agreements between publishers and consumers of printed works about the scope of fair use. Amendments to copyright law in the mid-70's ostensibly addressed these changes, but then everything seemed to fall apart again in the 90's.

The electronic environment has changed everything

Suddenly, ordinary people can copy others' works with incredible ease, become publishers, and use others' works as the basis for new works, incorporating things here and there. These potential creators and publishers work for or attend our universities so we and they need to understand copyright law. But, if copyright law was hard to understand in the print environment, it now borders on inscrutable because we must identify copyright issues, apply 200 year old law to cutting edge technologies and create guidelines that real people will follow. No small order.

The situation is very nearly critical. To some it hardly matters which way it goes, just so long as it goes. But it should matter to the university community for we have much to lose if our interests aren't considered in the resolution of the problems presented by new technologies.

Eventually, these problems will recede into the background once again, because intellectual property and information are becoming much too important to leave in limbo. They are staples of industry, and industry needs more certainty to do business in the electronic environment than academia has been willing to tolerate. Between now and then, however, there is much work to be done to deal with the ambiguities as business models collapse and legal principles crumble.

Copyright to-do list

- **Understand the issues:**
  - Why do we have to care about copyright?
  - Who owns what?
  - Rules for using others' works (copyright compliance)
    - Guiding users about fair use
    - Licensing rights when we need them

- **Implement a comprehensive copyright policy:**
  - Provide needed guidance for faculty, students and staff
    - Clarify ownership issues
    - Explain fair use and other educational exemptions
Develop strategies to accommodate (for now) and reduce (for the future) our need for "permission"

- Transactional and subscription licensing
- Acquiring electronic access that covers predictable user needs
- Assessing the university's role in scholarly communication
  - Retaining and taking advantage of rights to publicly archive scholarly works
  - Taking a more active role in the management of scholarly communication
    - Building cyberinfrastructure
    - Supporting open access to research results and data

It is important to work from a comprehensive copyright management policy, one that not only addresses use of others' works involving licensing, fair use and performance rights, but also addresses questions of ownership and copyright management so that we take care to protect and exploit that which we help to create. Failure to take action can result in catastrophic liability. A thoughtful policy that is widely disseminated will go a long way towards establishing the good faith requisite to the most effective defenses available to universities under copyright law.

Understanding the issues

Universities get sued for infringements committed by their employees

By providing Internet access and publishing capability, we can be held liable for infringements of faculty and staff, and perhaps even of students (unrelated third parties). It is of the utmost importance to have and follow a policy for addressing allegations of infringement. The Digital Millenium Copyright Act protects us and other Internet service providers only if we act strictly in accordance with its requirements.

Costs of carelessness

The rules of the road in the electronic environment are being worked out through the legislative process and in our courts. The courtroom is not where most of us would like to have our influence! Nevertheless, copyright owners are having considerable success lately pursuing strategies to narrow the scope of fair use, to hold Internet service providers liable for the infringements of their customers, let alone their employees, and to make license agreements that practically no one reads legally enforceable. They have also persuaded our Legislature to create new rights for users to violate.

Still, potential litigation is really just a risk of some cost of both time and money. More real to most of us are the costs for subscriptions to scientific, medical and technical journals that have been spiraling out of control for two decades. Most universities have been forced to cut back on book purchases to pay for the inflationary costs of journals. Some cancel subscriptions and rely upon interlibrary loan, a practice that many publishers complain is illegal in itself. Even then, costs of interlibrary loan are escalating as well.

Most importantly, the university must recognize that to a large extent, it has helped to create the circumstances that fostered the explosion of these costs by uncritically buying into the bargain we've made with commercial publishers who do not necessarily share our values regarding scholarly communication.

Benefits of electronic scholarly communication

The electronic medium offers a unique opportunity for universities to take a more active role in the management of our copyright properties, to more efficiently and more effectively facilitate our research and educational mission.

A comprehensive intellectual property policy supports university research and educational missions

Universities must be involved in legislative debate. Since we are both owners and users of copyright works, we have important interests at stake. Our needs are routinely ignored in legislation that is introduced nearly every session of Congress. The direction that amendments to the Copyright Act have taken over the last 10 year make clear that we should be considering right now how to best obtain broad clearances from the rights holders whose works we depend so heavily upon on a daily basis; how to better protect our interests in scholarly works created at our institutions; and how to minimize the risk of university liability for employee and third party infringements in cyberspace.

Copyright Ownership

Legal framework

17 USC Section 201(a) vests ownership of copyright in a work with the author of the work. Section 201(b) provides that the employer or other person for whom a work-for-hire is prepared will be considered the author for copyright purposes. Works-for-hire are works created by employees within the scope of their employment, or by others pursuant to written contract, if the work created falls into one
of the nine categories set out in the definition of work-for-hire in Section 101.

University intellectual property policies

Universities have for the most part altered the statutory scheme either through tradition or through policies that permit faculty ownership of their scholarly writings and educational materials. It is unclear whether the law would compel the conclusion that faculty writings are works within the scope of employment, but resolving the issue seemed of little consequence until recently. As we will discuss in a moment, this policy has contributed to the escalating prices universities must now pay to buy back the scholarly works their own and federal taxpayer funds helped to create.

New challenges

The allocation of ownership interests in the end products of university research is just one policy consideration. Today there are more subtly nuanced variations on the once-straightforward theme of ownership of works created on our campuses:

- Scholarly works implemented in software
- Multimedia courseware
- Web enhanced face-to-face teaching and distance learning
- The changing nature of authorship (joint and collaborative electronic works)

Use of others' works: copyright compliance

More often than not, the university does not own copyright in the works its faculty and students need to read. In the print world, this means the library must buy books and subscribe to e-books and journals. It also means that universities may need to acquire additional rights as well:

- To fully utilize print works, universities may need to:
  - Obtain permission to make photocopies and digitize, display, perform and distribute
    - Reserves
    - Coursepacks
    - Research, scholarship and private study
    - Interlibrary loan and document delivery
    - Administrative copies

- Regarding our licensed electronic works, universities may have to:
  - Obtain rights to make uses that are not covered by the access license; or
  - Negotiate better access licenses that cover all anticipated educational uses

But when is permission required and when does fair use apply? The simple answers, "never" and "always" are unfortunately, not the right answers. Learning to analyze a use to determine whether it's a fair use, while not impossible, does require some effort. There are workable guidelines, but they tend to be more restrictive than sometimes necessary. Nevertheless, they may be preferable to no help at all.

Ultimately, universities must focus upon licensing for the many (perhaps hundreds of thousands of) uses that go beyond fair use. We must learn more about transactionally based and subscription licenses, assess their strengths and weaknesses, and know when to exploit each type to most efficiently promote copyright compliance.

We also must provide support for staff who must negotiate license agreements for initial access to electronic works. If we acquire sufficient access upfront, we may not need additional permissions for the uses that we know we'll need to make of electronic works.

It's time to get serious

The entire publishing industry is in upheaval, trying to find its way into its own digital future. Along the way, they seem determined to be as aggressive as possible towards some of their most important customers, universities and their libraries. They are actively challenging what they consider to be unauthorized and illegal uses of their works in our course management systems (such as Blackboard), our libraries' electronic reserves systems, and on faculty and departmental Web servers. They've been encouraged by a success or two and are vigorously pressing what used to be an ambiguity about the law as though it were settled law -- the scope and extent of application of fair use to the delivery of educational course materials within academia. Will we be able to withstand an allegation of infringement?

Compliance strategies

Our first strategy for complying with copyright law must be educating our faculty, staff and students to be better consumers of copyrighted materials, more responsible in their use of others' works and careful in their exercise of statutory exemptions.

But we also must make it easier for faculty, staff and students to get permission to make uses of others' works when statutory exemptions do not apply. We must establish quick, easy and reliable links with copyright clearance centers, negotiate subscription licenses where they would be advantageous and acquire access in digital materials that is sufficient to obviate the need for additional permissions to use such licensed electronic information.

http://copyright.lib.utexas.edu/admin3.html
Implementing a comprehensive copyright policy

The manner and means of access to and use of copyrighted works is undergoing dramatic change that will only accelerate in pace in the years to come. We must assume that the way universities use copyright materials today will change too. It may be difficult to gauge or agree upon the rate of change, and now that the infrastructure is in place the rate will likely change. Nevertheless, to comply with copyright law, we must identify as closely as we can what our future needs will be so that our policies meet those needs and not just the needs we have today. It should be clear as well that a policy developed 10 or 20 years ago will not serve us well in the 21st Century.

We should expect major shifts along the following axes within the next decade:

- from institutional to personal copying
- from photocopying to printing out a copy of a digital work (print copying)
- from photocopying to digitizing (involving duplication, transmission, display and performance)
- from acquiring bare access and seeking additional permission to use works to acquiring comprehensive access (access that includes the right to make most expected educational uses of works in a digital environment)
- from for-profit print to a healthy combination of for-profit and nonprofit electronic publication of scholarly works

It may not be possible to know when or even whether we will move all the way from one end of an axis to the other. It is, nevertheless, easy to see that a policy that only suits universities’ needs at the near end of these axes will be less relevant and less valuable at the other end.

Understanding the long-term impact of any policy decision is also complicated by the following facts:

- not all universities will move along the axes at the same rates
- many universities have not yet come to terms with the scope of their responsibility for copyright permission fees or who should pay for additional costs to use works
- both subscription licenses and transactionally based licenses have their drawbacks, risks and costs as well as benefits
- there are different opinions about exactly what "short-term" and "long-term" mean
- scholarly communication issues are intimately interwoven with issues of tenure, promotion and compensation
- some factor or factors that is/are relatively unpredictable could materially alter basic underlying assumptions:
  - technological change
  - legal change
  - rapidly evolving business models

Nevertheless, it is time to get started.

**Education: distinguishing what’s fair use from what needs permission**

There is considerable online help for determining fair use. Just Google "fair use." The charge to administrators, however, is more difficult than that. You must figure out how to get people who need it to look for it, and make it easy to get permission when fair use is not enough for a proposed use. A thoughtful, realistic and widely disseminated copyright policy is the most important first step in this undertaking. Putting information online is a good first step, but it is not enough. The Crash Course has been online for more than 10 years and I still give talks on our campuses to smart people who don't know very much about copyright law or institutional policies.

The easiest thing to understand is that fair use does not cover all our activities. These are examples of the kinds of activities that probably require permissions of some sort on most campuses:

- **Photocopies.** Many universities already license some or all of their copy center photocopying activities such as coursepacks; their interlibrary loan photocopying activities that exceed the copying permitted by Section 107; document delivery services; some reserve photocopies; and sporadically, other copies.

- **Digitizing, displaying and transmitting analog works.** As the demand for electronic reserves and course materials increases in the short to mid-term, libraries and faculty need permission to digitize and distribute analog materials electronically when the amount used or the manner of presentation exceeds the bounds of fair use or other statutory exemptions.

  The Copyright Clearance Center can grant permission to digitize, display and transmit print works

- **Using digital works beyond the terms of an access license.** Universities license huge amounts of electronic information by acquiring it directly from the publisher or from aggregators who have cumulated it into a database. If universities are not careful, however, they will find that they have acquired this material in a manner that precludes the uses they may be expected to accommodate. Careful attention to the details of software and database licenses is very important.
In today's environment, institutions are responsible for the copying our employees do; thus, this copying is "institutional copying." Most people would agree that fair use is insufficient to cover all the copying that a university user might need to perform to fully utilize print library materials. Our potential liability should give us all the incentive we need to address these issues directly.

**Licensing**

The premise of both subscription and transactional licensing is that universities need permission to use works beyond fair use and the rights they acquire with access. This premise is often true in today's digital environment and that is why we will discuss these licenses.

In a fully digital library, the need for these "additional" permissions has diminished, but it will never go away completely. Comprehensive "access" licenses are the subject of the next section where we discuss strategies to further reduce our need for permissions.

Even if we properly license whole databases of information for our patrons, there will be works the library may prefer to acquire as needed (through interlibrary loan or by document delivery) rather than license them upfront. Thus, libraries likely will need both comprehensive access licenses and some form of transactional or subscription licensing for additional permissions even into the digital future.

**Transactional licensing**

Transactional licenses allow us to license permission as needed, one transaction at a time. It requires that we establish relationships with the Copyright Clearance Center for libraries, course management systems and copy centers and work harder to educate and inform students and employees of their rights and responsibilities under copyright law so that they know when to ask for permission. Ideally these different ways of providing students with access to digital and print materials could be integrated into a single system for behind-the-scenes rights clearance, but this option seems to elude us so far.

Transactional licensing lowers our risk of lawsuits, but it does not eliminate it entirely for two reasons:

1. We usually rely upon fair use to exempt some copies from the obligation to obtain permission and pay fees. We will always have activities that publishers think are outside the scope of fair use, even if we feel strongly that such activities are within the bounds of fair use.
2. For most of us, copying is a highly decentralized activity taking place in literally thousands of sites around campus. This kind of copying is very hard to coordinate for the purposes of reporting and paying permission fees when needed.

The current instability in the scope of fair use exacerbates these risks and requires that we devote more attention to educational efforts. On the other hand, these risks should diminish as comprehensive licensing and subscription licensing opportunities increase.

**Subscription licensing**

Subscription licenses have been discussed for many years now, but usually without much progress. In 2007, the CCC introduced the first generally available subscription license for universities. Thus, this discussion is no longer theoretical.

Subscription licensing could help us comply with copyright law, especially where a license covers a broad range of copying types, such as institutional and personal classroom, reserve and research copies, and administrative copies, and other rights including rights to create, display and transmit digital copies and to make print copies from digital works. Ideally the subscription license should contain mechanisms for adjusting fees where direct comprehensive access to electronic information diminishes the need to seek permission for uses outside the license under which access is originally acquired. The CCC indicates that it takes this into account in a rough way by providing lower per student fees for large research institutions that most likely license far more comprehensively than smaller colleges.

Reducing infringement liability: Legal risks in subscription licensing

Most institutions will likely rely on fair use for some or all uses that are not covered by the scope of a subscription license (for example, for publishers' materials that are not included), so even with such a license we will be exposed to some risk regarding our liability for the quality of fair use determinations.

Although subscription licensing proposals usually include an offer by the licensor to indemnify participating universities against suits from publishers, such an indemnity would not cover uses outside the license - the fair uses exempted from its terms. Thus, the more a subscription license covers, the better, because any remaining vulnerability to suit significantly diminishes the value of the license.

Even were we to enter into a good, mid- to long-term agreement, that encompassed electronic rights there could still be some problems:

- Many are concerned that we risk the erosion of the scope of fair use if we sign subscription licenses. The fear revolves around two points: With a subscription license in place, for any materials within its scope, whether the use might have been fair or not becomes a moot point. Thus, we don't "exercise" our right, and if we don't use it, we'll lose it. The other concern is that only large institutions will be able to afford the subscription prices leaving the smaller, poorer schools on their own to defend fair use, which, of course, they can't afford to do any more than they can afford to subscribe. I am skeptical of both arguments because the evidence I see in the court cases that have addressed the kinds of systematic, high-volume copying and distribution that combined e-reserves, Blackboard and course websites constitute (for example, the Texaco, Kinko's and Michigan Document Services cases), suggests that in the presence of a mature, efficient permissions market, a plea to characterize such uses as fair use will not fare well. Thus, it is questionable that the courts would agree that we have a "fair use" to lose in this context where we are making massive numbers of copies. That is not to say that other types of fair use are similarly threatened. On the contrary, creative, transformative uses are gaining strength in the courts. Google's use of images in search engines and a publisher's use of small images of posters from Grateful Dead concerts provide two recent examples where courts upheld fair use. Digital delivery of course materials is not likely to qualify as creative and transformative however, especially given its duplicative nature (simply making copies) in the face of the availability of a permissions market for just these kinds of copies.

http://copyright.lib.utexas.edu/admin3.html
Implementing a comprehensive copyright policy

In considering our strategies, it is important to acknowledge that so long as we are using others' works, we are obliged by copyright law to pay whatever the copyright owner asks. Even if the price seems to be too much or seems like paying twice for the same thing (once to acquire it, again to make use of it), universities are not currently paying as much as publishers want us to pay, or as much as publishers are entitled to under law. The existence or scope of fair use does not alter or affect this basic fact.

As a further corollary, we should assume that ultimately there may be little difference between the cost of comprehensive access and the cost of bare access plus permission fees for all additional uses since copyright owners have the right to their price whether collected entirely upfront or collected partly upfront and partly after the fact of access. Still, efficiency has its advantages for them as well as for us, and I believe that over time, publishers will evolve more efficient ways to meet our needs and collect revenues from us.

Strategies to reduce the need for permissions

In considering our strategies, it is important to acknowledge that so long as we are using others' works, we are obliged by copyright law to pay whatever the copyright owner asks. Even if the price seems to be too much or seems like paying twice for the same thing (once to acquire it, again to make use of it), universities are not currently paying as much as publishers want us to pay, or as much as publishers are entitled to under law. The existence or scope of fair use does not alter or affect this basic fact.

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Actively pursue comprehensive access to electronic information.

- **General access licenses**: Although most would agree that electronic access is expensive, to the extent that license agreements are carefully scrutinized and favorable deals are negotiated, the electronic rights acquired this way may significantly lower costs associated with maintaining proper collections. Further, as the library becomes fully digital, licensed access may significantly lower the costs for additional permission to make any use of the licensed works.
  
  - Several issues will need to be addressed in this context, however:
    - Would these activities normally be permitted under most access licenses?
    - Would it cost more or less to acquire such rights after acquiring access (especially in a subscription license)?
    - How should the costs be paid?

- **Occasional or as-needed access licenses**: There may always be some set of materials that universities will prefer to acquire "as needed".

Retain rights to publicly archive faculty-authored scholarly works

So long as universities use others' works, they are bound to pay the owners their price. To the extent universities can retain the right to publicly archive faculty-authored scholarly works, they contribute the the lowering of costs of both access and use. It now seems possible that electronic publishing could potentially and drastically alter the dynamic among authors, publishers and consumers of scholarly works. Users want wide, affordable access and publishers and authors want reasonable remuneration. Since the university community includes authors, publishers and users under the same roof, we ought to be able to take advantage of this situation.

Libraries, scholarly presses and IT departments are collaboratively publishing new types of scholarly works

The electronic environment offers a unique opportunity to the university community to create publishing alternatives, transact business with more user-friendly publishers, and publish its works in fields dominated by the most problematic, over-priced publications with publishers who are a part of our community or who are in any event willing to deal with users in a reasonable manner. 2 We should capitalize on the strength that we have naturally because we are all part of the same enterprise. 3

It is time for a more active role for universities in copyright management

A mid 90's Association of American Universities (AAU) Intellectual Property Report suggested that an alternative scholarly works database shared by university faculty, libraries and presses would assure the community access to precisely the kinds of materials threatened by spiraling prices. One member of the Task Force suggested that "[w]here scholars are writing primarily for other scholars, the process will arguably be managed directly by faculty involved and conducted outside the 'money economy' of conventional publishing." Now, 15 years later alternative distribution systems are beginning to be developed by conscious design and simply by natural evolution from practical use of the medium. It seems clear that there will be multiple "tiers" of scholarly publication, and with respect to the greater body of copyright works, multiple tiers of publication generally.

The many publications to address over the years the crisis, now the revolution, and the opportunity of scholarly communication could fill volumes. Again, just Google it. Today, many universities are exploring scholarly electronic publishing as an adjunct to or in lieu of other forms of scholarly communication. The development of this resource is one of the most exciting aspects of the digital revolution. 4

Policy implementation: summary

- **Provide guidance to faculty, students and staff**
- **Develop strategies to obtain needed permissions**
- **Develop strategies to reduce the need for permissions**
- **Actively manage university and faculty copyrights**

The web of interdependencies among universities, their faculty members, libraries and publishers may be rewoven by the process of adapting our policies to the realities of the electronic world, but it will not disappear. To avoid harming the relationship between libraries and university presses, or the relationship between universities and for-profit publishers, we must focus on the overall goal of
facilitating educational objectives, including but not limited to facilitating scholarly communication, rather than on preserving traditional roles and institutions. We must find solutions wherein our libraries, authors and presses can be partners rather than adversaries.

Definitions

For purposes of this discussion, the following words have the definitions set forth in this section:

**Bare access**: Acquisition of a work in digital or print form without the right to make any use of the work other than as provided under copyright law.

**Centralized copying**: Copying carried out at university and library copy centers or other centralized, manned copy centers (where there are usually identifiable individuals that do all of the copying for various others).

**Comprehensive access**: Acquisition of a work in digital form with sufficient rights for the licensee or end users to make all reasonable educational uses of the work needed in a digital environment.

**Decentralized copying**: Copying carried out at unmanned or unsupervised copy machines by individuals (where there are usually no identifiable individuals who are responsible for copying for various others).

**Digital copying**: Making an electronic copy from a print or digital work, including all the likely accompanying copyright related activities (transmission, display, performance).

**Educational uses in a digital environment**: The educational interactions with copyrighted materials necessary in the digital environment: browsing works; downloading portions of works; transmitting portions of works; printing hard copies of portions of works. This definition reflects a “merger” of the different categories of copying in the print environment.

**Educational uses in a print environment**: The typical educational types of copies necessary in the print environment: Photocopies for coursepacks; reserves; research copies; personal copies; interlibrary loan and document delivery copies; administrative copies.

**Institutional copying**: Copying by institution personnel for educational or institutional purposes.

**Long-term**: 8 to 20 years

**Mid-term**: 4 to 7 years

**Personal copying**: Copying by individuals for their own educational or personal purposes.

**Photocopying**: A particular kind of print copying: making a print copy from a print original.

**Print copy**: Making a "hard-copy" or print out of a digital work.

**Short-term**: 1 to 3 years

**Subscription license**: A license that permits a variety of types of copying with a charging mechanism unrelated to the number of copies made such as a yearly change based on student full-time equivalents and other factors.

**Transactional license**: A license that requires the licensee to remit fees based upon an accounting of individual items copied, each time they are copied.

Where to get more information

Copyright Crash Course

Footnotes:

1 For example, many commentators have suggested that it is appropriate at this time for universities to take more control over copyrights in scholarly works; for faculty to utilize electronic networks to communicate directly with their colleagues; and for university presses, libraries and IT departments to collaborate to offer alternatives to for-profit publication of scholarly works. Where subscribing and photocopying are irreplaceable, broadly negotiated subscription license agreements may be more cost effective than transactionally based permissions fees. See Will We Need Fair Use in the Twenty-First Century? from Filling the Pipeline and Paying the Piper, Proceedings of the Fourth Symposium on Scholarly Publishing on the Electronic Networks, Spring, 1995, and Copyright in the Library: Scholarly Electronic Publishing, both available electronically at the Copyright Crash Course.

2 The university system of faculty rewards and incentives has helped to create the overpricing problem. For accounts of other contributory elements, see Scott Bennett, Re-engineering Scholarly Communication: Thoughts Addressed to Authors; Sandy Thatcher, Re-engineering Scholarly Communication: A Role for University Presses; and Dennis Carrigan, Commercial Journal Publishers and University Librarians: Retrospect & Prospect; all in the July 1996 issue of the Journal of Scholarly Publishing. The Report of the Association of American Universities’ Task Force on Intellectual Property Rights in an Electronic Environment (April, 1994) (hereafter, “AAU/IP Report”) recommends that the university community begin to take advantage of the opportunity the electronic environment offers it, take some control over its copyrights and better manage the process of scholarly publication.


Jean-Claude Guédon, in remarks before the 4th Symposium on Scholarly Publishing on the Electronic Networks (November 1994) suggested that since the public funds most research at one end of the research activity continuum and subsidizes libraries to purchase the results at the other end, scholarly publication and library functions could theoretically merge and eliminate the transaction that seems to interfere with the unity of an essentially public undertaking.
4 For more information on scholarly publication, see Copyright in the Library: Scholarly Publication.