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IP & Licensing: Copyright Overview

IP & Licensing: Section Focus Areas

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Copyright law exists to provide protection that complements other types of intellectual property (IP) law covering areas such as patents or trade secrets. Copyright law protects original works of authorship fixed in a tangible form that can be perceived, reproduced or otherwise communicated either directly or with the aid of a machine or computer. Copyright protection applies to literary works and writings, computer software, electronic recordings, content on Web sites, musical and dramatic works, photos, pictorial and graphic works, sculptures, motion pictures, sound recordings, other audiovisual works, and architectural works. Copyright protection does not apply to ideas, concepts, facts, names, or raw data, although these may be protected by patent, trademark, or trade-secret protections.

In order to openly and publicly publish academic course materials and their associated third-party IP, copyright law requires that you have permission to do so from all underlying copyright owners. These include but may not be limited to:

- The author of the course being published such as a faculty member, teaching assistant, instructor or a third-party course provider such as a publisher.
- The owners of all materials that accompany or are embedded in the course such as a third-party publisher, graphic designer, photographer or faculty from another institution.

You should consider your approach to managing IP-ownership issues prior to preparing and releasing courses for publication including how you will deal with internal and third-party copyright owners. Otherwise, like anyone undertaking a publishing venture, you will be vulnerable to action by copyright owners if you fail to follow the copyright law and exercise care in IP matters. For example, scrutiny may come from traditional academic publishers who may fear that their markets are being somehow eroded by the free and open availability of high-quality educational materials. Infringement of others' copyright could lead to negative publicity and financial liability for your institution.

Copyright is a complex subject and this document by no means addresses all the requirements and nuances of the law and its application. Specific questions about copyright law should be referred to appropriate intellectual property counsel.

Copyright ownership and opencourseware publishing

With certain limited exceptions, copyright owners have the exclusive right to reproduce, display, distribute, or publicly perform their works or to prepare derivative works based upon the copyrighted work. Copyright owners may sell, license or assign some or all of their exclusive rights to others as they choose. As a result, copyright ownership status can be complicated. Even if someone is the original author of a piece, they may not own the copyright. For example, if a work has been published or accepted for publication, the author may have assigned their rights to their publisher (a common requirement that publishers impose). If this is the case, you cannot publish the material without permission of the publisher/copyright owner. Further, some publishing contracts state that when a work goes out of print, the rights revert to the author.

However, copyright law includes certain limitations to a copyright owner's exclusive rights that are often applied in the academic context. These provisions allow copyrighted materials to be used in limited ways in a teaching context without being considered an infringement of the owner's rights, without securing permission, and without paying royalties. Some examples are:

Fair Use

The most commonly used exception in educational contexts is the "Fair Use" provision of Title 17 of the US Copyright Code. Fair Use is used to permit the copying or display of small portions of larger works, with limitations including the proportion of the material used, the purpose of the use and the use of the materials for a limited time with a limited audience. The specific section of Title 17 that describes fair use is shown below:

Title 17, Chapter 1, Sec. 107. - Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- 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.*

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Note that there is a wealth of case law around this provision. A detailed discussion of this is beyond the scope of this document.

The TEACH Act

A new law called the TEACH Act (Technology, Education and Copyright Harmonization Act) signed into law November 2, 2002, allows certain limited use of copyrighted work in distance education, performance or display of a work by instructors or students in face-to-face teaching activities, and performance as a regular part of the systematic instructional activities of a nonprofit educational institution.

Reserves

Under Fair Use, an educator may also put needed course materials "On Reserve" in a library to allow limited time/limited duration access to them by students taking the course. Increasingly, they can also arrange access to them by their students via "electronic reserves" which is a protected use under the TEACH Act.

Most of these special exceptions are conditioned in one way or another on limited purpose, limited duration, and limited audience for the use of the material. Open publication, as intended by an opencourseware project generally does not qualify for these special exceptions. Therefore, you cannot automatically rely on these special provisions of copyright law and as a result, generally must have permission of the underlying copyright owner(s) to publish something on your opencourseware platform.

Copyright law and its application for traditional printed works are fairly well established. However, copyright in the context of the emerging electronic/digital world that has been made possible by the Internet and other technology continues to be tested and established by court cases and new laws. As a result, there are many gray areas. As an example, different courts in different jurisdictions have handed down opposite rulings on whether or not the practice of "deep-linking" for different purposes (linking to a page in a Web site's

architecture below the site's home page) is a violation of the linked-to site owner's rights.

Other Copyright Limitations

The most significant exception to a copyright owner's exclusive rights is if the material has been placed in the public domain. Material that is in the public domain may be used without permission of the original author. A work is in the public domain only if:

- It was produced by the Federal government.
- Its original copyright owner deposited it to the public domain by placing a statement on or within the copyrighted work.
- Its copyright has expired or has been lost.

It is worth noting that today, copyrighted materials are not required to carry a copyright notice, and the absence of a copyright notice does not imply that a work is in the public domain. However, under previous US copyright laws, if certain requirements were not met (such as inclusion of an explicit copyright notice on works published prior to January 1, 1978), the work is automatically considered to be in the public domain.

IP Objects

For the purposes of an opencourseware initiative, the term IP object can be used to describe discrete items within course materials that are included in one or more sections of a course. The type of objects can vary widely with some of the most common types listed below:

- Text including articles and papers.
- Images including photographs, diagrams and graphs (even if embedded within text since they may be subject to different copyright ownership).
- Links to other objects on other Web sites such including text and images.
- Multimedia including video and audio recordings and animations.
- Software including screenshots and source or object code

The bulk of the work in IP clearance involves identifying the source of embedded third party IP objects, obtaining permissions from the author/copyright owner or determining a replacement strategy.

Deciding who owns what

Consideration of ownership is likely to start with your institution's overall policy addressing whether the faculty own the copyright to course materials they author or whether the copyright is retained by the institution. If the faculty does own the course copyright (as at MIT), then to publish a course, it will be necessary to get permission from the faculty through the granting of an appropriate license to your institution in order to publish their materials on your opencourseware site.

Once this overarching ownership situation has been clarified, then IP clearance for courses involves determining if the course author has used third-party materials in their course or if other authors have been involved in producing the course. Many faculty are accustomed to incorporating third-party materials in their courses under the Fair Use provision of Title 17, or less formal, collegial relationships. This may range from an original author having assigned rights to someone else (a common example is that a faculty member has assigned rights to publisher), to an author having incorporated ("embedded") material from another source. Most frequently, these embedded materials are photos, charts, graphs, text extracts or video clips. The source of these embedded materials will probably range from colleagues (at your or another institution) and students to publishers and photographers.

Other embedded materials may be owned by the sponsoring institution, for example, where institutional funding or sponsorship provided "significant resources" toward development of the material, or if the course material was created as a "work for hire" by someone paid with institutional funds such as a paid teaching assistant or other paid student help.

All materials originally produced as part of the opencourseware project will also be owned

by the sponsoring institution. This will range from specific objects commissioned as replacements for ones embedded in courses to all the “wrapper” material in the opencourseware Web site.

Royalties

Some copyright owners will require you to pay a royalty payment in return for granting permission to use their materials in your opencourseware. Common examples include commercial publishers, commercial archives, and professional photographers. While there may be some instances where you deem royalty payments to be appropriate, in general there are two main factors to consider that weigh against paying for permissions in an opencourseware:

- **Cost:** Paid permissions can be expensive. A copyright owner may base the royalty on such factors as quantity and nature of the material being licensed, duration of use, and breadth of audience.
- **Restrictions:** Anyone who is in the business of selling IP assets is likely to want to protect those assets and retain some control over them. Accordingly, paid permissions typically come with restrictions such as limited duration of use, restrictions on reuse or redistribution, prohibitions on making derivative works, and so on. Such restrictions are generally incompatible with the opencourseware concept, since it encourages free and open adoption and adaptation of materials for educational purposes. It would be confusing to opencourseware end-users if the terms of use varied among or within courses.

International Considerations

It is beyond the scope of this Web site to cover the variations in international copyright law. However, some useful resources related to this topic can be found at:

- The World Intellectual Property Organization (<http://www.wipo.org>)
- The International Intellectual Property Institute (<http://www.iipi.org>)

