

COPYRIGHT FOR ONLINE COURSE MATERIALS

#AItraining



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LEARNING OUTCOME


After participating...


...you will be able to apply copyright to online course materials more effectively.




 **AGENDA**

- Copyright: An Overview
- Rights in the Context of Online Courses


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 **POLL**


1. Has your institution offered an online course?
2. Has your institution offered a MOOC?

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TWO(ISH) TYPES OF COURSES



- Courses completely internal to the institution
 - Open to enrolled/un-enrolled students
 - Taught by employees/non-employees
- Courses taught in concert with external entities
 - Collaborations with other schools
 - Collaborations with platform providers
 - Collaborations with content providers
- Most of our discussion is provoked by the latter, but the former are not irrelevant

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**JUST ENOUGH COPYRIGHT:
AN OVERVIEW**

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THE FUNDAMENTAL PERSPECTIVE

To Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries

United States Constitution, Article I, Section 8, Clause 8

INTELLECTUAL PROPERTY BASICS



- Patents
- Trademarks
- Copyrights

PATENT RIGHTS



Image: Gizmodo

Exclude others from:

- Making
- Using
- Selling
- Importing



TRADEMARKS

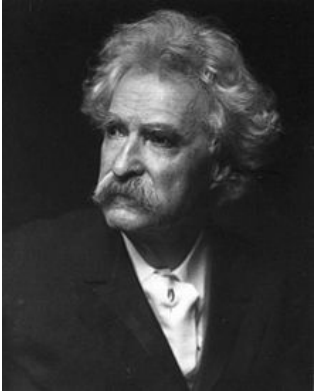
Methods to identify particular products and distinguish them from the products of another



COPYRIGHT



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Only one thing is impossible for God:
to find any sense in any copyright
law on the planet.

- Mark Twain

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■ WHOSE RIGHTS ARE RECOGNIZED?



- Selfie taken by a crested black macaque in Indonesia
- The camera owner claimed copyright in the image



POLL

Does your institution have a readily accessible copyright resource for faculty?

■ EXCLUSIVE RIGHTS OF COPYRIGHT

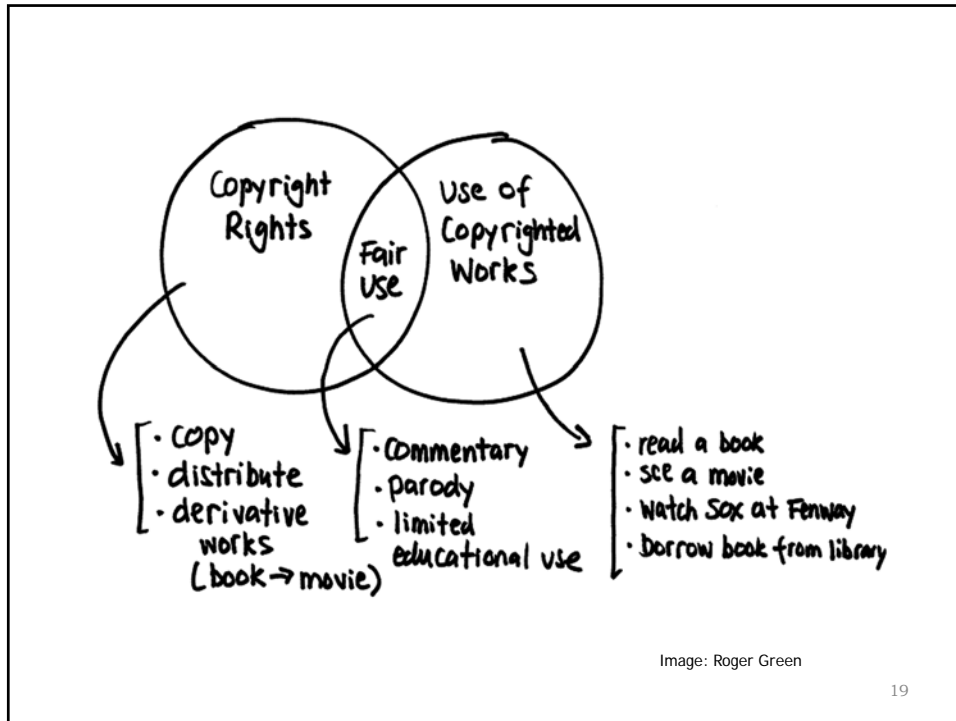
- Reproduce the work in copies
- Prepare derivative works
- Distribute copies by sale or other transfer of ownership
- Perform the work publicly



■ EXCLUSIVE RIGHTS OF COPYRIGHT

- Display the work publicly
- Perform sound recordings publicly by means of a digital audio transmission
- Attribution and integrity for visual arts



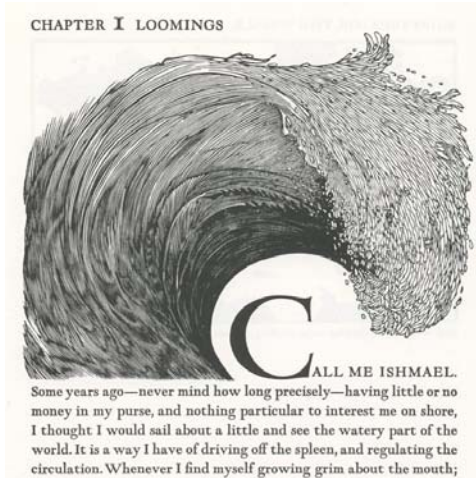


FIRST SALE DOCTRINE

A consumer owns the copy, but has only a limited license in the copyright

You can loan, sell, or dispose of a particular copy, but you cannot reproduce the work

WHAT WORKS QUALIFY FOR PROTECTION



- Original works of authorship
- Fixed in a tangible form of expression

WHAT WORKS QUALIFY FOR PROTECTION



- Literary works
- Musical works, including any accompanying words
- Dramatic works, including any accompanying music
- Pantomimes and choreographic works

WHAT WORKS QUALIFY FOR PROTECTION



- Pictorial, graphic, and sculptural works
- Motion pictures and other audiovisual works
- Sound recordings
- Architectural works
- Computer programs
- Boat hulls


TERMS OF PROTECTION

- The provisions of copyright law dealing with duration are complex
- Now, the life of the author, plus 70 years
- 120 years from creation for works for hire


PUBLIC DOMAIN

Works free to use and unprotected by copyright:


- Not perfected or protected by copyright
- Expiration of copyright
- Protection not applicable (e.g., facts, U.S. Government works)



HOW TO SECURE A COPYRIGHT




Secured **automatically** when the work is fixed for the first time in a tangible form




COPIES


- **Copy** - material object from which a work can be read or visually perceived
- **Phonorecord** - material object embodying fixations of sounds
- **Audiovisual** - a series of related images together with accompanying sounds



COPYRIGHT FORMALITIES



- Notice is not required
- Registration is not required
- Publication is not required
- © 2015 Mark Twain University



AUTHORS AND OWNERSHIP

- The creator of the work
- The entity that employs the creator
- Commissioner of a work made for hire

WORKS MADE FOR HIRE



Prepared by an employee within the scope of employment

Specially ordered or commissioned

- Limited types of works
- Writing required

HIGHER EDUCATION EXCEPTION

Waiver of work made for hire in faculty works

- Publication required copyright transfer
- Condition of promotion and tenure
- Academic works not monetarily valuable
- Academic freedom



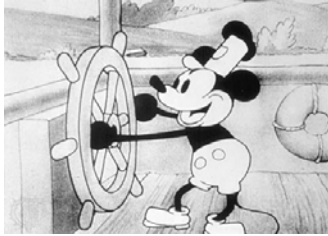
COPYRIGHT REGISTRATION



- Not required for copyright protection
- Required to file an infringement suit



FAIR USE



Fair Use of a copyrighted work may be allowed, if used for purposes such as:

- Criticism
- Comment
- News Reporting
- Teaching
- Scholarship
- Research
- Parody

FAIR USE FACTORS

1. The **purpose and character** of the use
2. The **nature** of the work
3. The **amount and substantiality** of the portion used
4. The effect of the use upon the **potential market**

GOOD FAITH FAIR USE DEFENSE

Defense for affiliates of educational, non-profit organizations who have made reasonable efforts in their judgment that their use of a work constitutes fair use



FACE-TO-FACE TEACHING EXEMPTION

Exempts all displays and performances when:

- Given by instructor or pupil
- In a face-to-face live teaching situation
- At a nonprofit educational institution
- In a place devoted to teaching
- If audiovisual works, then lawfully made



The TEACH Act

- Permits performance and display of almost all types of works - with limitations
- Solely for students officially enrolled in the course for which the transmission is made

PENALTIES FOR INFRINGEMENT




Image: Banksy

- Both civil and criminal
- \$150,000.00 per occurrence for willful use
- \$30,000.00 statutory damages regardless of actual damages
- All profits
- Attorney Fees




POLL

How does your institution's intellectual property policy address ownership of online courses?



UNIVERSITY OWNERSHIP POLICIES

- Faculty
- Non-Faculty Employees
- Staff
- Students
- Independent Contractors



■ TRADITIONAL FACULTY WORKS

Pedagogical, scholarly, literary, or artistic works originated by a faculty member resulting from non-directed effort



■ DIRECTED WORKS

- Created at the direction of the institution, e.g., directed distance learning materials
- Preceded by a clear written agreement between the creator and the institution



■ EXCEPTIONAL USE

Support for the creation of a work with resources of a degree or nature not routinely made available to faculty in a given academic department or administrative unit

■ STUDENT WORKS

- Papers, computer programs, theses, dissertations, artistic and musical works, and other creative works
- University retains a license to use student works for non-commercial educational purposes
- University retains rights to control joint works

■ STAFF WORKS

- Works for hire and owned by the institution
- The institution is considered the Author for the purposes of copyright law

■ GRANTS AND SPONSORED WORKS

- Owned by the entity designated in the agreement/contract or grant guidelines
- If not stated, the work is owned by the creator

HIGHER EDUCATION EXCEPTION REVISITED

- Gold mine fallacy
- Arthur Miller and portability
- Derivatives
- Exceptional resources



LICENSING RIGHTS

- Music
- Print Works
- Online Works
- Dramatic Works
- Photographic, Pictorial, and Graphic Works
- Motion Pictures and Audiovisual Works
- Software



The Music-Copyright Enforcers: ASCAP, BMI, SESAC

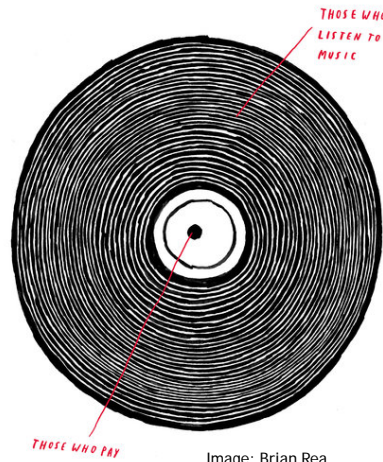


Image: Brian Rea

- Performance Only
- Blanket Licenses
- No Grand Rights
- No Synchronization

PRINT, JOURNALS, MOVIES




■ PHOTOGRAPHIC,
PICTORIAL,
GRAPHIC

gettyimages[®]



■ ADDITIONAL
RIGHTS TO
CONSIDER

- Fair use is always a separate consideration
- Permission is still an alternative
- Creative use of library resources to supplement courses



ALTERNATIVE OWNERSHIP & USE



- Public Domain
- Some Rights Reserved
- Creative Commons License
- Open Source
- Open Access Publishing
- Open Education

Image: EFF



Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014)

As the Supreme Court has explained, the overriding purpose of copyright is [t]o promote the Progress of Science and useful Arts.

This goal has animated copyright law in Anglo-American history, beginning with the first copyright statute, the Statute of Anne of 1709.

In short, our law recognizes that copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.



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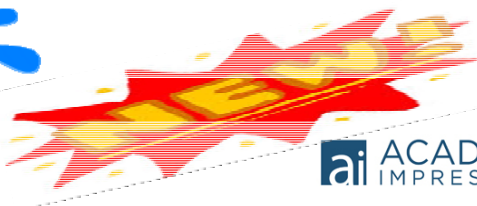
HOW SHOULD WE THINK ABOUT RIGHTS IN THE CONTEXT OF ONLINE COURSES?

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NEW COMPLEXITIES



- New technology
- New pedagogy
- New ways of learning
- New student expectations
- New business models
- New partners
- Old assumptions may not work



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OUR INSTINCTS MAY LEAD US ASTRAY!

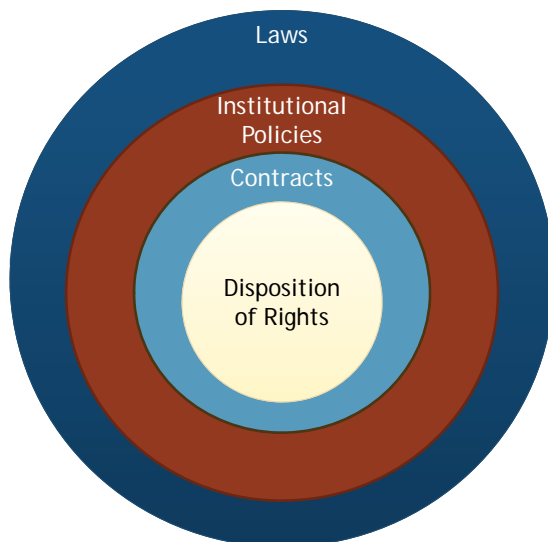
- We are filled with familiar notions about how things work
- This is true for our faculty, staff, and students
- But, new endeavors require us to think more consciously . . .
- . . . including about the disposition of rights

This course is going to take a lot longer to prepare than your typical course!



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WHERE TO LOOK TO DETERMINE THE DISPOSITION OF RIGHTS



Think about the law as creating a space in which institutions can make policies and in which institutions and individuals can make agreements.

Together they establish the disposition of rights.

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THE LAW: WHO HOLDS THE COPYRIGHT OF COURSE CONTENT?



- This is the first place you look to think about who has what rights
- As you know from David's section on copyright law, while the law may be a little complicated, it does establish some boundaries and defaults
- Default rule: The copyright holder is the author (or authors, if it's a joint work)
- Unless: An employer is the copyright holder, if the author created the work within the scope of her employment, "works made for hire"
- Note: Independent contractors tend to be authors, not employees (though not always)
- However: The terms of a contract can change the disposition of rights

THE LAW: HOW COPYRIGHT HOLDERS ACQUIRE RIGHTS




- A person can become a copyright holder:
 - By authoring a work
 - By written transfer
 - By will or bankruptcy proceedings
 - By some other process of law
- An non-person entity can become a copyright holder:
 - By having an employee author a work within the scope of employment
 - By written transfer
 - By will, bankruptcy proceeding, or other process of law.

THIRD-PARTY RIGHTS **YOURS THEIRS MINE**

- It is common for online courses to make use of third-party content
- Some uses we make will be authorized by law (e.g., fair use)
- When they are not, we should consider using something else, making our own, or seeking authorization
- In most cases, it is content providers (instructors or institutions) who are responsible for making these determinations and seeking authorization
- Contracts will often dictate who has those responsibilities, because violations can affect both platform and content providers

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CAMPUS POLICIES



Take a look at the University of Michigan's policy on Who Holds Copyright in the Reference Materials

- This is the second place you look
- Review them carefully
- They may dictate who has what rights
- They may dictate who can give access to institution courses or the institution name
- They may dictate conflict of interest and conflict of commitment limitations and processes
- As you well know, the range and scope of institutional policies is daunting . . . Happy reading!

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CONTRACTS



- This is the third place to look to get the legal lay of the land
- No one may contract to violate the law, of course, and, ideally, no one contracts to transgress institutional policies
- Otherwise, contracts can establish almost anything about who holds the rights in a work
- They can also grant uses or limit them
- In the realm of online courses there may be contracts between and among: content providers, universities/colleges, instructors, participants/students, platform providers, and third-party rights holders



WHO CONTROLS THE CONTENT?



- In the world of MOOCs and other online courses, contracts often rule the day and you can/should expect to find control spelled out within them quite clearly
- Without a contract, the copyright holder will typically control the course content, though you may have to look to an institutional policy to identify the copyright holder
- Some uses, however, are beyond the copyright holder's control



THE LAW

Please try hard not to do that.



- Copyright is not like real property (land) or personal property (chattels)
- Congress statutorily limited the copyright holder's rights by authorizing the public to make a variety of uses, such as fair use, even without the copyright holder's permission
- These are rights and uses reserved for the public—not exceptions, exemptions, or privileges—and they are explicitly “not an infringement of copyright”
- You can, however, contract away these rights and uses



TO SIGN A PRUDENT CONTRACT, KNOW YOUR OBJECTIVES FOR THE ONLINE COURSE/ PROGRAM

- Why invest in this activity at all? Some common reasons:
 - Money
 - Public Relations and Branding
 - Innovation, Exploration, or Keeping Up w/Joneses
 - Research, Improving Teaching, or Trying the Flipped Classroom
 - Reaching More Students and Mission
- These objectives and others will often affect the partners, the participants, the pedagogy, the policies, and the contract terms
- Having a clear set of goals up front will help prioritize the disposition of rights in a program



■ TO SIGN A PRUDENT CONTRACT, KNOW YOUR OBJECTIVES FOR THE DISPOSITION OF RIGHTS?

- These objectives is often dictated by institutional culture and extant policy (e.g. institutional policies about how the use of “extraordinary resources” affects faculty rights)
- The more the institution wants to control, the less participation there may be from faculty and it may also limit which platform providers are a good fit
- Institutions that share more rights give up some control, which may affect the long term benefits of investing in an online course or program



■ CONTRACTING RELATIONSHIPS WITH PLATFORM PROVIDERS

- Be clear about which party is providing which services and who is responsible for them
 - These often divide down Platform/Content lines, but it is not always clear (e.g., who will manage participant infringement?)
- Establish clear gate-keeping by the institution
 - Courses, Faculty, Degrees/Certificates, Descriptions, Agreements with Faculty, Agreements with Participants/Students, and Overall Quality
- Consider how the platform’s revenue model affects the institution
 - Advertising, Privacy, Data Use, Communications, Use of Institutional Logos/Name, Partnerships with Vendors/Publishers, Most Favored Nation terms, and Content Distribution
- High standards for performance, security, data management, and responsiveness
- Have an exit strategy. For example . . .



RIGHTS AFTER TERMINATION



King George walked and talked a half an hour after his head was cut off.

(Punctuation actually matters.)

- It's important to consider what happens when the romance ends
- It inevitably ends!
- *Portability and Distribution*: who, if anyone, will be able to use the course? And in what context? What about derivatives of the course?
- Who, if anyone, will be able to use the data collected through the course? In what context? (no derivatives here)
- Will anyone have to destroy content or data?
- Will anyone have/get to keep/maintain content or data?
- All of this can be addressed in the contract

CONTRACTING RELATIONSHIPS BETWEEN INSTITUTIONS AND INSTRUCTORS

- This is an opportunity for for instructors and institutions to adjust the relationship *for this project*
 - These courses often require greater risk and investment for both parties
- Be clear about who has what rights and responsibilities
- Be clear about how this activity affects other instructor activities and expectations, such as teaching, research, & tenure
 - Will there be stipends, graduate student support, release time, training, etc.?
- Be clear about the instructor's relationship with the platform provider
- Anticipate what happens if you part ways.
For example . . .

WHAT HAPPENS AFTER THE INSTRUCTOR LEAVES?



- Can she offer the course online through her new institution?
- Can the originating institution still offer the course online?
- How about the platform provider?
- How about derivatives of the course?
- Who can use the course offline?
- These details are best agreed upon up front (it is no fun after people are mad)
- Magnanimity is often prudent here



WHO WILL MANAGE AND RESPOND TO CLAIMS OF INFRINGEMENT?

- Because allegations of infringement can affect all parties, it is best to establish a framework for who is responsible for which claims of infringement
- Infringement can result from:
 - Platform security/management failures
 - Some unauthorized uses of third-party content
 - Uses by participants/students
- It is often best to put the responsibility with the party that has the most control
- Use good indemnity language
- Follow prudent DMCA protocols



DISABILITY & ACCESSIBILITY



THIS IS A PUBLIC SERVICE ANNOUNCEMENT

- Both the platform and content can be barriers and both *must* be accessible
- Even if your courses are free, your institution will likely be covered by Titles I, II, or III of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act
- Address this in your agreements

Be accessible on day one!



QUESTIONS

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EVALUATION

Thank you!

Please remember to complete the event evaluation.
Your comments will help us continually improve the
quality of our programs.

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