COPYRIGHT CHEAT SHEET FOR HIGHER EDUCATION→

← IN THE UNITED STATES

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Note: JP **is not a lawyer**, and even if he were, he would not be **your** lawyer, so nothing here constitutes legal advice!

Abstract. What folks working in higher education in the US **need to know** about copyright law – the part of the legal system which is most relevant to the academic life.

1. Background: Intellectual Property

Higher education is built around the invention, retention, reuse, revision, remix, and redistribution of creative works. As such, they are particularly subject to that part of the legal system called *Intellectual Property [IP] Law*. IP law has three components: trademarks, patents, and copyrights.

Trademarks are not much discussed in this document, other than to say that they are authorized in the US by Article I, Section 8, Clause 3, the *Commerce Clause*, of the Constitution, unlike the other forms of IP law.→

Also unlike the other forms, they have no fixed duration, so long as they are defended by their owners. You should be careful when you show someone else's trademark in a work of yours, as you could be guilty of dilution, which ← trademark holders do not like.

Patents and **copyrights** are both authorized in the US by Article I, Section 8, Clause 8. the *Copyright Clause*, of the Constitution, which gives the Congress the power

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

This is the **utilitarian rationale** for copyright, dominant in the US. Some other countries instead recognize a special connection between creator and creation, resulting in authors' **moral** ← **rights** as the foundation of their copyright systems.

Both of these types of IP are granted, the *Clause* asserts, to promote scientific and [useful?] artistic production: the theory→ is that authors and inventors will be more likely to put in the effort to be creative in anticipation of the monopoly profits these laws will enable them to reap for a limited time.→

← Typically 20 years for a patent and a lot longer, according to complex rules, for copyrights – see below.

Patents differ from copyrights in that they protect *ideas*, which must be *new, non-obvious, and useful*. The patent itself only results from a complex, expensive, and time-consuming application process to the Patent Office. Additionally, patent rights are mostly not well synchronized between different countries, so that it sometimes makes sense to add to the complexity of getting the patent by applying for it in several countries' Patent Offices simultaneously.

...And that's all we have to say about patents in this document. Copyrights, on the other hand, are our main topic.

2. Copyright Basics

As permitted in the *Copyright Clause*, the US Congress has passed a number of copyright laws, in 1790, 1891, 1909, 1976, and 1998, the last being the infamous Digital Millennium Copyright Act [DMCA].

2.1. **Duration.** A major point in these revisions over the years has been to extend the duration of the limited monopoly given by a copyright: at present, it is the life of the author plus 70 years, while it is 95 years from first publication or 120 years from creation, whichever comes first, for anonymous or pseudonymous works and works made for hire.→

Those durations are for works created after 1 January 1978; for earlier works, duration is more complicated. See the ← Copyright Office's Circular 15a or a slightly more friendly Copyright at Cornell Libraries: Copyright Term and the Public Domain.

2.2. **Subject.** The works subject to copyright are spelled out in §102 of the US Copyright Act, 17 U.S.C.: they are

> *original works of authorship fixed in any tangible medium of, expression*

further explained in the same section:

> *Works of authorship include the following categories:*
> *(1) literary works;*
> *(2) musical works, including any accompanying words;*
> *(3) dramatic works, including any accompanying music;*
> *(4) pantomimes and choreographic works;*
> *(5) pictorial, graphic, and sculptural works;*
> *(6) motion pictures and other audiovisual works;*
> *(7) sound recordings; and*
> *(8) architectural works.*

This seems to cover an good part of what is created and shared in higher educational contexts, except perhaps one wonders whether things like non-fiction textbooks and articles, tests, essays, *etc.* fit somewhere here. Fortunately, *(1)* in that list is a term of art in copyright law, clarified in §101 - Definitions of the the US Copyright Act, 17 U.S.C.:

> *"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.*

Interestingly, fixation is a requirement in the US but **not** in a majority of jurisdictions worldwide. →

The fixation requirement← is also clarified in §101 - Definitions by

> *A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.*

This means that a brilliant lecture delivered extemporaneously – live or streamed over the Internet – is not eligible for copyright in the US unless it is recorded (or is read from a script written ahead of time), and likewise for a student's interpretive dance in a math class← or a music major's senior recital. But so long as they are fixed, nearly all of the works created by faculty, students, and staff in higher education are definitely copyrightable.

All the best math classes have lots of dancing. →

What is **not** protected by copyright is "any idea, procedure, process, system, method of operation, concept, principle, or discovery" – the copyright resides in the *expression*, not the underlying *idea*. This is the **idea-expression dichotomy**← in copyright law. This means that a simple table of experimental results is likely not subject to copyright, while copyright is dubious even for some large databases,← if they contain only facts, as it is for mathematical truths and graphs, physical laws, names and dates from history, *etc.*

Or, sometimes, as in the wonderful open resource Copyright Law, Cases and Materials, it is a "distinction." →

At least, in the US. By contrast, the European Union has a special → *sui generis* property right for databases; see the Wikipedia articles Database right and Database Directive

2.3. **Getting the Copyright.** At this time in the United States, a copyright springs into existence the moment a creator fixes their original work of authorship in a tangible medium of expression. No formalities such as registration with the government← or putting "© 2022" of a document are required. This means that not only are nearly all of the works created in the higher educational context definitely *copyrightable*, as we saw above, but they are also nearly all actually *copyrighted* – even if their creator is not aware of that fact!

Although there are certain advantages of registering a copyright when a creator wants to take legal action based on their copyright ownership. →

2.4. **What's It Good For?** Copyright ownership confers enormous rights on the rightsholder over the uses which can be made of the copyrighted work, specified in §106 - Exclusive rights in copyrighted works of the the US Copyright Act, 17 U.S.C.:

...the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

So, to follow on the observation of the previous subsections that nearly all works created in the higher educational context are copyrightable and in fact (automatically) copyrighted, we must add that those copyrights give their respective rightsholders enormous control over how their works are used. While these rights tend mostly to be ignored for students,→ faculty who have published scholarly articles may have noticed that they are typically required to sign over their copyrights to their articles to commercial publishers.→ In contrast, commercial publishers of textbooks and monographs have not traditionally required the copyright to be transferred, instead leaving it with the author but requiring authors to sign a contract which gives the publisher specific rights for reproduction, distribution, and the resulting profit-taking.

← Except sometimes in cases where a class is using open educational practices which require students to be aware of their rights and perhaps to license their work openly and share it publicly.

← Unless if they are able to take advantage of a fairly strong form of Open Access

3. Constraints on Copyright

We have already seen some constraints on copyright such as their limited (but quite long) duration, the fixation requirement, and the principle that copyright applies to expressions of ideas and not the ideas themselves. Here we point out more constraints.

3.1. **Works-for-hire.** In tension with the simple notion that a creator gets the (significant) rights granted by copyright is the "works-for-hire [W4H] doctrine." §101 - Definitions of the Copyright Act defines

A "work made for hire" is–
(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire....

which matters because §201 - Ownership of copyright of the Copyright Act states

(b) Works Made for Hire.–
In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

In short, the rights over copyrightable works produced by an employee during the course of their employment, or in specially commissioned works which specify this treatment for resulting works, belong to the employer, not the employee who actually did the creation.

While W4H does not apply to students in higher education (unless they are also employees and the copyrightable work is produced as part of that employment), it would seem to imply that the copyright for essentially all curricular and scholarly works produced in institutions of higher education belong to the institution and not

the author. However, employers can waive this default right given to them by copyright law, if they choose, and put a clause granting copyrights over such materials to the employees. This is often done in the academic world: so often that it is called the "traditional academic exception to W4H." But note that the traditional exception must be stated explicitly in the employment contract. Anecdotally, it seems that this exception is usually granted to tenure-line faculty at four-year institutions for their normal courses, but non-tenure-line faculty, or even tenured folks at two-year institutions or working on a special curricular initiative, are often *not* given the "traditional exception!"←

Go check your employment contract right now! Remember, the default is that the institution gets the rights →

3.2. **Works of the US Federal Government.** One special case related to the W4H doctrine goes in the different direction: works made in a W4H situation but where the employer is the US Federal Government are specifically exempt from copyright, and are born directly into the public domain. This does make a certain amount of sense as the government is presumably not motivated by a desire for future monopoly profits but rather by a desire to increase the public good, so the utilitarian rationale should not apply in this situation.← See §105 - Subject matter of copyright: United States Government works of the Copyright Act for details.

Actually, Congress seems to worry that civilian faculty at the twelve US military service academies might be utilitarians, so in 2019 they → were personally given copyrights on many of their W4H works.

US state governments have differing approaches, with some claiming copyright in certain situations, and others mimicking the federal stance. Other nations vary on this point as well, including for example the idea of "crown copyright" in some Commonwealth countries.

3.3. **Fair Use.** Different copyright regimes around the world have different recognized situations where the wide-ranging powers of copyright are curtailed in the service of some other public good; these are called copyright **exceptions and limitations** [**E&Ls**] and include things like more liberal use of copyrighted materials for education, or to make them accessible to people with disabilities, *etc.* In the US, the main E&L is called **fair use**, which allows uses "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," as §107 - Limitations on exclusive rights: Fair use of the Copyright Act puts it. §107 also lays out the [in]famous "four-step" test for determining if a use is fair, but for the purposes of higher education, the explanation of fair use in the wonderful Code of Best Practices in Fair Use for Open Educational Resources is a much more useful approach – it articulates

> *...two key analytic questions that effectively collapse the four factors:*
>
> - *Did the use "transform" the copyrighted material by using it for a purpose significantly different from that of the original, or did it do no more than provide consumers with a "substitute" for the original?*
> - *Was the material taken appropriate in kind and amount, considering the nature of both the copyrighted work and the use?*
>
> *If the answer to these two questions is clearly in the affirmative, a court is likely to find a use fair.*

This and other information in the Code of Best Practices make it clear that folks in higher education could probably apply fair use much more assertively, although campus attorneys and academic publishers (both for-profit and not) tend to be very risk-averse, so they might counsel a more cautious approach.←

And remember **IAmNotALawyer**, so you will want to get real legal advice for your particular situation so as to avoid potentially nasty outcomes. →

4. Some Advanced Topics

4.1. **Remixes and Collections.** It's important to notice that the word "transformative" which we just saw as part of a fair use determination is about a transformative **purpose**. The work itself – or, rather, usually an excerpt of the work – is not itself changed, or transformed, in those situations. If an existing work *is* transformed, then the resulting work would not be a reproduction of [a part of] the original, over which copyrights gives rightsholders control (see *(1)* mentioned above in §2.4), but rather it would be a **derivative work**,← a different thing – albeit one over which the rightsholder of the original work still has control (this was *(2)* in §2.4).

Also called a "derivative," an "adaptation," or, particularly when more than one work is being simultaneously adapted, a "remix" →

Not every change of a work is considered as rising to the level of the creation of a derivative: simply fixing a typo or changing an electronic file format **would not** be making a derivative, while making a movie from a novel or translating a work of literature from one language to another **is**. The general principle is fairly straightforward:→ if there is enough new original authorship added to the prior work in the creation of the new work that the new – while still retaining clear traces of the prior work – would be worthy of a copyright on its own, then the new work is a derivative; otherwise, the new work is just a *copy* [of an excerpt] of the prior work.→

Although how that principle is realized can depend upon the jurisdiction and ← judicial interpretation.

When several prior works are chosen and arranged together, but none of them is adapted, they are merely copied,→ then the object that results is what is called in copyright law a **collection** or **compilation**. Interestingly, the Copyright Act gives to collectors and arrangers of collections a (fairly thin) copyright for the original authorship displayed by the choice and arrangement of the collected works, and of course also for any entirely new elements that may be added such as a cover or introduction to the collection and interpretive notes which might accompany the works in the collection. One way to think of a collection is as simply the plural of a copy, plus the additional thin copyright just mentioned. See §103 - Subject matter of copyright: Compilations and derivative works of the Copyright Act for more details.

The difference between a copy and a derivative is important when using Creative Commons licenses, since some ← CC license terms apply differently to derivatives than they do to copies.

← "Copied" in the sense of copyright law, so fixing a typo or changing file formats would still count as copying.

When several pre-existing works are combined and there *is* an addition of new original authorship, so that the older works are all adapted as they appear in the new work, then that new thing is often called a **remix**, or it could also be described as simply a new work which is simultaneously a derivative of each of the other, prior works.

4.2. **Transnational Applicability of Copyright.** Copyright laws in different countries have been brought to a level of minimal agreement, and a system set up under which it was clear what uses could be made in some country of a work copyrighted in another country, by various international treaties. The foundational copyright treaty at the moment is the Berne Convention for the Protection of Literary and Artistic Works, which is overseen by the World Intellectual Property Organization and which has 197 signatory countries. It is the Berne Convention which sets a minimum duration of copyrights as the lifetime of the author plus 50 years, although signatory states may increase that.→

← As most have.

Berne also required that works created outside a particular signatory country, and/or by a citizen of another country, must nevertheless be given full copyright protection in that country. That means that if a citizen of country A creates a work in country B which a citizen of country C uses in country D, then (if all are Berne signatories) the copyright laws of D apply to that use and the creator can sue in D's courts if the use violates those laws.

For folks in higher education, this means that if you publish your work with a scholarly publisher in another country, it will get all of the local copyright protections in that country, as well as local protections in your country – or, indeed, in any Berne signatory country where it is used. It also means that if you create a work that you hope will be used internationally, then you must be aware that every such use must be legal according to the copyright laws in those various countries of use. For example, if you use an excerpt of someone else's work within your own, in a way that is legal for you because of your local laws about the duration of copyright (*i.e.*, the excerpt has fallen into the public domain in your country) or because of an E&L in your country (such as fair use in the US), then people who want to use your work in other countries will have to check that those excepts can be legally used where they are, as well. Since some countries have much weaker E&Ls and a few have longer copyrights, inclusion of these excerpts may limit the usefulness of your work on the global stage.