

Copyright and the Academy: *Education, Libraries, and the Law*



South Seattle CC
Seattle, Washington

November 5, 2010

Kenneth D. Crews, J.D., Ph.D.

Director, Copyright Advisory Office
Columbia University Libraries
Columbia Law School

www.copyright.columbia.edu

Why is Copyright Important?

- Broad **Scope** of Protected Works
- Ease of **Creating and Using** Copyrighted Works
- **Changing Law**
 - New Legislation
 - Developments in the Courts
- Role of University **Policy**
- It is all about **You!**

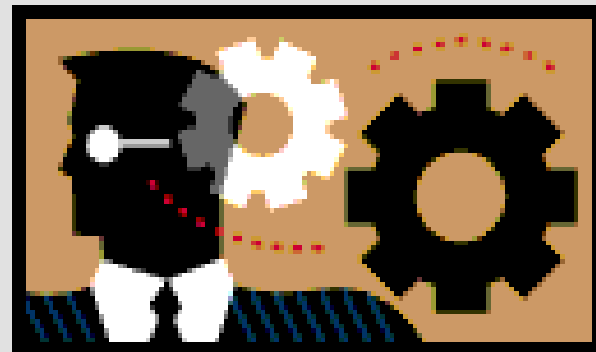
Today's Question

Dear Copyright Dude:

- A friend of mine has a copyright problem.....
- The media center has a collection of art slides.
- The viewers and projectors are failing.
- Digital is the present and the future.
- Digital makes life better.
- OK to digitize our collection of images?

That Depends....

- What are the images?
- Who owns them?
- How are you going to use them?
- How many copies?
- How will they be accessed?
- Are they available on the market?



Why is Copyright Like a Mountain?

- Educator Issues
 - Photocopying
 - Websites
 - Distance Learning
- Research Issues
 - Data Compilation and Storage
 - Publishing
 - Building New Knowledge
 - Digital Repositories
- Library & Research Issues
 - ILL and Research Copies
 - Print and Electronic Reserves
 - Data Access and Licensing

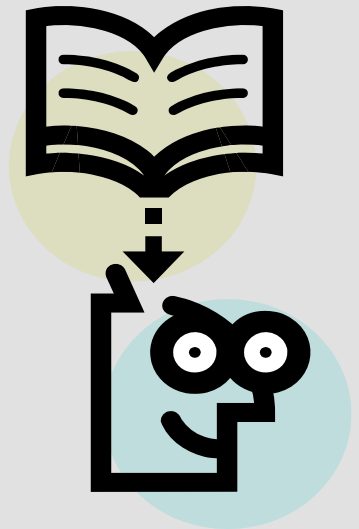


Why is Copyright Important?

- Back to thinking about YOU....
 - Are you the author?
 - Do you hold the copyright?
 - Will you sign the agreement?
 - What are the limits of Fair Use?
 - Are you subject to a policy?
 - What choices do you have?

Why is Copyright Important?

- ...Or Caring about Others?
 - Who holds the copyright?
 - What does the owner want?
 - Is permission reasonable?
 - Does fair use make sense?



The Big Picture: Structure of the Law of Copyright

- Eligibility for Copyright Protection Go!
- Securing Copyright Protection/Formalities Go!
- Ownership of Copyright Go!
- Rights of the Copyright Owner Go!
- Duration of Copyrights Go!
- Exceptions to the Rights of Owners Go!

Beginning the Copyright Trail



- Eligibility for Protection:
 - Original Works of Authorship
 - Fixed in a Tangible Medium of Expression
- Securing Protection
 - Automatic Protection
 - No Requirement of Formalities
 - Formalities Yield Some Legal Benefits



U.S. Government Works

- Works Produced by
 - Officers and Employees
 - Stamps? Smithsonian??
- Take a Look:
- Smithsonian Special Collection:
- <http://www.arago.si.edu/flash/?s1=6|eid=182>
- SI copyright Policies:
- <http://www.arago.si.edu/about.html>
- <http://www.si.edu/copyright/>

Ownership of the Copyright

- Creator of the Original Work
- Transfers of Copyright
 - Required Formalities
 - Termination of Transfers
- Work Made for Hire
 - Version 1: Employee/Scope of Employment
 - Version 2: Independent Contractor
 - Signed Writing
 - Specified List of Works



Rights of the Copyright Owner

- Fundamental Rights

- Reproduction
- Distribution
- Derivative Works
- Public Performance and Display



- Recent Additions

- Moral Rights (§106A)
- Digital Transmissions of Sound Recordings
- DMCA Provisions



Duration of Copyright Protection

- Works Created During or After 1978
 - Life of Author Plus 70 Years
 - Work-For-Hire: 95 Years from Publication
120 Years from Creation
- Works Published Before 1978
 - Generally Maximum of 95 Years/Since 1923
 - Possibly Short Term If No Notice or Renewal
 - Foreign Copyrights May Be Restored
- Works Created But Not Published Before 1978
 - Life of the Author Plus 70 Years
 - Effective Starting Jan 1, 2003!



Exceptions to the Rights of Copyright Owners

- Section 107: Fair Use
- Section 108: Library Copying
- Section 109: First-Sale Doctrine
- Section 110: Displays and Performances
- Section 114: Transmissions of Sound Recordings
- Section 120: Architectural Works
- Section 121: Persons with Disabilities



What Are the Rights to Use Copyrighted Works?

- Section 107: Fair Use
 - *Purpose* of the Use
 - Education vs. Commercial
 - Transformative
 - *Nature* of the Work Used
 - *Amount* Used
 - *Effect* of the Use on Market or Value
- *Our Story Begins in a Quaint Village....*



Fair Use: Reality Check from the Courts



- Basic Books v. Kinko's Copies (1991)
 - Purpose: Commercial/NonTransformative
 - Nature: Nonfiction book chapters
 - Amount: 5% to 25%
 - Effect: Displaces sales of textbooks

Fair Use: Reality Check from the Courts



- American Geophysical Union v. Texaco
 - Purpose: Commercial
 - Nature: Nonfiction Science Articles
 - Amount: Entire Article
 - Effect: Displaced Licensing Market

Fair Use: Reality Check from the Courts



- Sundeman v. The Seajay Society (1998)
 - Purpose: Scholarly and “Transformative”
 - Nature: Unpublished manuscript
 - Amount: Consistent with scholarly needs
 - Effect: May actually help market

Fair Use: Reality Check from the Courts

- Bill Graham v. DK Publishing (2006)
 - Purpose: Scholarly and “Transformative”
 - Good!
 - Nature: Art, but historically important
 - Bad! Wait, Maybe GOOD!
 - Amount: “Thumbnail”
 - Good!
 - Effect: May help market; does not compete
 - Good!



*Don't look for pretensions or excuses at the root of the tobacco-linked to COMPL cigarette prohibits the use of them." TICKET OUTLETS - San Francisco - Inland Empire, 363 Market (Belly Street) - San Francisco - City Light Book Store, Prefecture Shop, Cedar Alley Coffee House, Stallard-Coffman, 1200 Broadway (Marina) - Berkeley and Alameda, 2148 Telegraph, Brent's Cafe, 214 Telegraph - San Mateo - Maxwell Specialist, Hillside Mall, San Carlos - Knicker's, 700 Laurel.

Fair Use: Reality Check from the Courts



- A.V. v. iParadigms, LLC (E.D. Va. 2008)
 - Purpose: Transformative, but also Commercial & Socially Beneficial
 - Nature: Protects Creativity!
 - Amount: Entire Work, but for a good purpose
 - Effect: No Market Harm

Electronic Reserves: An Example Approach

- *Words of **Caution and Context***
 - Fair Use is never certain
 - Fair Use is Flexible
 - Fair Use is for Your Needs
 - Fair Use does not allow Everything
 - Fair Use also does not require Everything
- *That Said...Some **Possible Elements of Electronic Reserves**....*

Electronic Reserves: An Example Approach

- *Purpose of the Use*
 - Serve educational needs
 - At request of instructor
 - Password restriction
- *Nature of the Work*
 - Related to educational objectives
 - Portion that serves educational need
 - Limited portions from creative works



Electronic Reserves: An Example Approach

- ***Amount of the Work***
 - Brief works or portions of longer works
 - Portion that serves educational need
- ***Effect on Market for Original***
 - Repeat use by same instructor/same course??
 - Copyright notice and citation
 - Password restriction
 - Lawfully obtained original in collection
 - Do not compete with available coursepacks³

What Are the Rights to Use Copyrighted Works?

- Section 108: Library Copying
 - Eligible Libraries
 - Preservation
 - Copying for Personal Uses
 - Interlibrary Loans
- Section 109: First Sale
 - Sales, Rental, Lending
 - Public Display



What Are the Rights to Use Copyrighted Works?

- Section 110(1)
 - Performances and Displays
 - Face-to-Face Teaching
- Section 110(2) (“The TEACH Act”)
 - Distance Learning
 - Performances and Displays
 - Some Reproduction & Distribution



How to Make Fair Use Decisions?



- Courts: The Four Factors
- Citizens: Interpretation and Risk
- Common Advice: “Guidelines”
- Consequences if Fair Use: Good!
- Consequences if Infringement: Bad!

The Fair Use Quadrilateral



RISK

GOOD FAITH

REASON

EXPERIENCE

Thank You!

Kenneth D. Crews, J.D., Ph.D.

www.copyright.columbia.edu

Sign Up: www.facebook.com/kennycrews

Follow: www.twitter.com/kcrews

Thank You!

Postage Stamp Images:

<http://www.iomoon.com/rainier.html>

Lewis & Clark Stamp:

<http://www.rootsweb.ancestry.com/>

Copyright and Libraries: *Section 108 and More*



South Seattle CC
Seattle, Washington

November 5, 2010

Kenneth D. Crews, J.D., Ph.D.

Director, Copyright Advisory Office

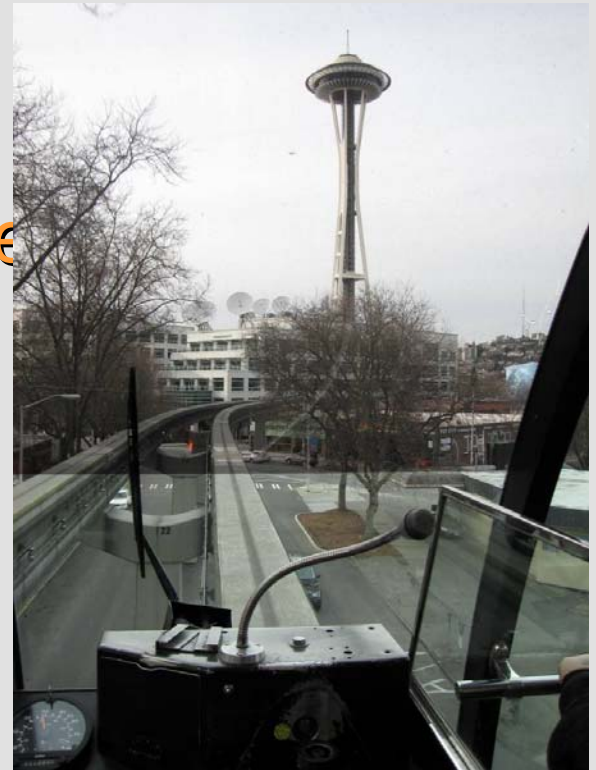
Columbia University Libraries

Columbia Law School

www.copyright.columbia.edu

What Are the Rights to Use Copyrighted Works?

- Section 108: Library Copying
 - Eligible Libraries
 - Preservation
 - Copying for Personal Use
 - Interlibrary Loans
- Section 109: First Sale
 - Sales, Rental, Lending
 - Public Display



Copyright Act, Section 108

- “Ground Rules”
 - No commercial purpose
 - Library open to outsiders
 - Notice on copies
- Preservation Copying
- Copies for Private Study
- Copies for ILL



Preservation of Unpublished Works

- **Permits 3 “Copies or Phonorecords”**
 - Master copy
 - Storage copy
 - Use copy
- **Solely for Preservation or Deposit**
- **Work Must Currently be in the Collection**
- **Digital Formats Allowed, but...**
 - Not “otherwise distributed” in that format
 - Not publicly available “outside the premises”

Preservation of Published Works

- **Permits 3 “Copies or Phonorecords”**
 - Master copy
 - Storage copy
 - Use copy
- **Solely for Replacement**
 - Damaged, Deteriorating, Lost, Stolen
 - Format is Obsolete
- **No Unused Replacement at “Fair Price”**
- **Digital Formats Allowed, but...**
 - Not publicly available “outside the premises”

Interlibrary Loans: The CONTU Guidelines

- Commission on New Technological Uses of Copyrighted Works (1979)
- Interpreting § 108(g)(2)
 - Builds on rules for “Private Study”
 - Bar on “systematic” copying
 - Allows ILL w/o “purpose or effect” that receiving library is substituting for purchase or subscription

Interlibrary Loans: The CONTU Guidelines

“Rule of 5s”

- Not More Than 5 Copies Received in One Year
- From Single Journal Title
- Published Within Last 5 Years

Interlibrary Loans: The CONTU Guidelines

Do Not Address:

- Non-journal Publications
- Materials Older than 5 Years

The Conference on Fair Use:

- Also Failed to Address ILL

Hitting the Ceiling

- Do you need uses beyond Fair Use?
 - Multiple Copies?
 - Whole Copies?
 - Online Delivery?
- Do you need more than Section 108?
 - Quantity limits on ILL?
 - Expansive preservation programs?

Revisions to Section 108?

- Section 108 Study Group
 - www.section108.gov
- Proposals:
 - Preservation of Websites
 - Expanded use of Technologies
 - Wider Range of Works

Copyright and Distance Education: *Ownership and Rights of Use*



South Seattle CC
Seattle, Washington

November 5, 2010

Kenneth D. Crews, J.D., Ph.D.

Director, Copyright Advisory Office
Columbia University Libraries
Columbia Law School

www.copyright.columbia.edu

What Are the Rights to Use Copyrighted Works?

- Section 108: Library Copying
 - Eligible Libraries
 - Preservation
 - Copying for Personal Uses
 - Interlibrary Loans
- Section 109: First Sale
 - Sales, Rental, Lending
 - Public Display

What Are the Rights to Use Copyrighted Works?

- Section 110(1)
 - Performances and Displays
 - Face-to-Face Teaching
- Section 110(2): *The TEACH Act!*
 - Distance Learning
 - Performances and Displays
 - Some Reproduction & Distribution

The TEACH Act: Policy Requirements

- Accredited Nonprofit Educat'l Institution
- Development of Copyright Policies
- Copyright "Informational Materials"
- Notice to Students about Copyright
- Access Limited "Solely" to Enrolled Students

The TEACH Act: Technology Requirements

- Technological Restrictions on Access only for Enrolled Students
- Technological Controls on Downloading
- Technological Controls on Further Transmission
- No Interference with Technological Control Measures embedded on Works

The TEACH Act: Content Limits

- Performances of nondramatic literary works
- Performances of nondramatic musical works
- Performances of any other work, including dramatic works and audiovisual works, but only in “reasonable and limited portions”
- Displays of any work “in an amount comparable to that which is typically displayed in the course of a live classroom session.”

The TEACH Act: Prohibited Materials

- Works that are marketed “primarily for performance or display as part of mediated instructional activities transmitted via digital networks”
- Performances or displays given by means of copies “not lawfully made and acquired” under the U.S. Copyright Act, if the educational institution “knew or had reason to believe” that they were not lawfully made and acquired

The TEACH Act: Additional Conditions

- The performance or display “is made by, at the direction of, or under the actual supervision of an instructor”
- The materials are transmitted “as an integral part of a class session offered as a regular part of the systematic, mediated instructional activities” of the educational institution
- The copyrighted materials are “directly related and of material assistance to the teaching content of the transmission”

Strategic Implementation

- Step 1: Assemble the Team
 - Technological Expertise
 - Well-Informed Faculty
 - Policymaking Authority
- Step 2: Find the Right Course
 - Who can use the benefits?
 - Who needs the “relative certainty”?
 - Who is ready to cooperate?

Strategic Implementation

- **Step 3: Stay Flexible!**
 - Statutory Interpretations
 - Ever-Changing Needs
 - Temperamental Players
 - Preserve Your Alternatives
- **Largest Lessons:**
 - *Licensing!*
 - *Fair Use!!*
 - *Ownership!!!*



A Few Words about Ownership



South Seattle CC
Seattle, Washington

November 5, 2010

Kenneth D. Crews, J.D., Ph.D.

Director, Copyright Advisory Office

Columbia University Libraries

Columbia Law School

www.copyright.columbia.edu

New Meaning of Ownership

- **Open Access**
- Reaching New Readers
- Increasing Impact
- **Creative Commons**
- Allowing Use
- Reducing Transaction Costs



A Few Developments

- **Harvard Resolution (2008-10)**
- Pre-Licensed to the University
- Accessible in Repository
- Opt-Out with Permission
- **NIH Public Access Policy (2008)**
- Final Ms. to PubMed Central
- 12-Month Embargo



A Few Goals

- **Advancing Scholarship**
- **Promoting Access to Publications**
- **Preserving Academic Freedom**
- **Encouraging Innovation & Creativity**
- **Expanding the Classroom**
- **Supporting Research Worldwide**
- **Building the Next Generation of Research**
- **Reducing Costs and Barriers**

Thank You!

Kenneth D. Crews, J.D., Ph.D.

www.copyright.columbia.edu

Sign Up: www.facebook.com/kennycrews

Follow: www.twitter.com/kcrews