

COPYRIGHT ISSUES AND SCHOLARLY COMMUNICATIONS
A White Paper for the UNC-Chapel Hill Scholarly Communications Convocation
January 2005

by

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Copyright exists for a dual purpose. First, it provides an incentive for authors to produce works of literature, music, paintings, maps and sound recordings. As originally conceived in the United States, copyright belonged to an author, and the author could rely on copyright protection to make sure that whatever income a work earned through sales, performance, duplication, etc., went to the author. The second purpose of copyright is to encourage making works available to the public. The production and distribution of scholarly works serves both of these purposes. Even though the Copyright Act of 1976 was intended to strengthen the rights of authors, in many ways it has not done so. The publisher and producer community has gained considerable strength over the past few decades, tied to some extent to the cost of producing works such as motion pictures, record albums, and the like. On the other hand, technology offers faculty the ability to distribute their works directly on the web, thereby bypassing traditional publishing media.

A faculty member has at least three goals in producing copyrighted works: (1) to contribute to the advancement of knowledge in his field so that new works may serve as building blocks for later work, (2) to share the information and with others and (3) to reap rewards for the production and distribution of the work. Traditional publications media may no longer serve these goals to the extent they did in earlier times. New methods of communications may soon outstrip traditional publication for many types of scholarly works. Regardless, copyright will continue to play a crucial but perhaps different role than it did prior to the digital revolution. This paper addresses two issues: first, the creation and ownership of copyrighted works by faculty and second, the fair use of copyrighted works in teaching and scholarship.

Creation and Ownership

Scholars have encountered a variety of copyright problems over the years, perhaps none as acute as those faced by faculty authors. In order to have work published in scholarly journals or as monographs, faculty authors are often required to transfer the entire copyright to the publisher. Both commercial and scholarly society publishers typically take the entire copyright even though these publishers do not need such a broad grant of rights in order to publish and distribute faculty work. While some faculty members are aware that they may be able to negotiate with publishers and retain some rights, others simply sign the publisher-proffered copyright transfer agreement with little recognition that such transfer means the author has no more rights to the work than does anyone else. Because the faculty member conducted the research and wrote the article or book, she likely assumed that certain uses she might make of the work, such as including it in a coursepack, posting it on a course website, making copies available to departmental colleagues and others within the institution or delivering copies to attendees at a conference were permitted. Authors often found that this was not the case, however.

One of the problems this has created within the academy is that university libraries have to buy

back the work of their own faculty in the form of expensive journals, and often libraries are able to afford only the barest access to the work. This low level of access may not permit posting articles on websites, inclusion in coursepacks and repeated reproduction for library reserves absent permission from the copyright holder or a license agreement that permits such uses.

The Copyright Act of 1976 dictates that the author of a copyrighted work is the initial owner of the bundle of rights provided by the statute. These rights include reproduction, distribution, adaptation, performance, display, and for sound recordings, the right of public performance by digital transmission. Under the Act, no formalities such as registration, deposit or notice are required to perfect the copyright. There are important reasons for an author to register the work, however. Registration provides the right to sue for infringement in federal court, access to certain types of damages and the ability to recover attorneys' fees if the faculty member succeeds in proving infringement. Nonetheless, the faculty author owns the copyright regardless of whether the work is registered.

Faculty authors by tradition own their own copyrights even though under normal copyright law analysis, these works might be considered a work for hire. A work for hire is defined as a work prepared within the scope of employment; if the work is a work for hire, by law, the employer is deemed the author. Few universities claim an interest in books, articles, works of art and music created by faculty authors. This may be changing in the digital environment, however, especially for online course material. The UNC-CH copyright policy details the conditions under which the university might claim rights;¹ suffice it to say, that this will happen only on rare occasions. So, for purposes of this paper, it is assumed that the faculty member and not the institution is the initial author of faculty-generated works.

Although the author is the initial owner of the rights that copyright provides, he may transfer those rights to someone else, including a publisher or producer. In order to publish a work in a printed journal, a publisher must have at least the reproduction and distribution rights for print. Reproduction is the right to reproduce the work in copies, and distribution is the right to distribute copies to the public. These rights are divisible so that the author of a monograph may give the publisher only the North American book rights or only the right to produce and distribute the monograph in paperback. For journals, a transfer of the reproduction and distribution rights must specifically include the electronic rights or the rights remain with the author.² Today, most publishers require transfer of both the print and electronic rights for all regions of the globe and beyond, in recognition of the fact that their publications may be available in various digital formats over the years.

Traditionally, authors transfer the copyright in exchange for money in the form of royalties. Trade book authors may receive an advance on a yet-to-be written book plus royalties for each copy that the publisher actually sells. In the academic world, however, seldom are authors paid for transferring the copyright in an article or monograph. Few publishers of scholarly journals pay authors at all; in fact, in many subject fields the author or the institution must pay page

¹ Available at www.unc.edu/campus/policies/copyright.html.

² See *Tasini v. New York Times*, 533 U.S. 483 (2001).

charges to the publisher in order to have the article published. Thus, the benefit the author receives is having her work made available to the public along with reputation enhancement (if the work is well received) and career advancement.

When publishers require transfer of the entire copyright, the publisher and not the author has the right to prepare a new edition of the work, to use the article as a chapter in a book, to reproduce copies for the author's classes or to post it on the web. In other words, the publisher took more of the rights than it needed in order to publish the work. As faculty members began to complain to their publishers about their inability to make what they considered to be fair uses of the works they created without permission, some publishers began to grant back certain rights to the author. These typically include the right to make and distribute copies of articles or chapters to the author's own students either in print or on a password protected website, to use the article as a portion of a book, and to update the work and produce a new edition. Today, some publishers will permit the author to post the article on an open website a few months or a year after the work has appeared in the print journal.

What faculty authors cannot have is the best of both worlds. It is unlikely that top publishers will agree to publish faculty works while permitting unfettered access, distribution and use of the work which scholars often want. Thus, authors may be forced to choose between publication in the leading journal in a field and placing the work on a webpage or in an institutional repository with no access restrictions. Some faculty have assumed that they can deposit an earlier version of a work without affecting the copyright they then transfer to the publisher. Unfortunately, this is inaccurate. The copyright is not in a particular version but instead is in the underlying literary work which may experience editorial changes over various versions. Moreover, many publishers now require authors to certify that the work has not previously appeared elsewhere including digital repositories. Some publishers may agree to accept work that has been available digitally, but they are likely to require termination of online access as a condition precedent to accepting the work for publication as a monograph or journal article.

Faculty scholars whose works are paintings, sculpture, plays and music may face additional issues regarding the performance and display rights. In these fields, it is more likely that the faculty member retain the copyright.

Fair use

Faculty members often want to use the copyrighted works of other scholars in their teaching and research. Section 107 of the Copyright Act provides an exemption for uses in nonprofit educational institutions under certain conditions, but not all educational uses are fair uses. Courts are directed to apply four tests to determine whether a use is fair: (1) purpose and character of the use, (2) nature of the copyrighted work, (3) amount and substantiality of the use in comparison to the work as a whole and (4) effect on the potential market for or value of the work. Typical fair uses include one-time reproduction of articles and book chapters for handouts to classes and posting an article on password protected websites for students. Under generally accepted guidelines, however, repeated use requires permission.

Faculty authors can provide broad access and use rights to other faculty members both within and without the university through a variety means, and the benefits of ownership retention may

well outweigh the disadvantages, but not always. Although the author/owner can determine what may be done with his work, he generally cannot dictate that it will appear in a particular journal. Publisher-sponsored editorial boards decide what articles will appear in the journal. Today, however, there are many other ways to make one's scholarly work available to the public, but only if one either retains ownership of the copyright or obtains concession from the owner to permit other faculty to use the works in the above described ways. For example, a journal publisher may offer free access to articles on their own websites, at least for a limited period of time. Faculty authors may post their works directly on the web on their own websites or may limit distribution by having works available only on password-protected sites. Authors may give associations or others the right to make their works available on the association website. Or the faculty member may deposit a copy of the work in an institutional repository where it may be freely accessed and used by others. In all but the first example, the author has retained the copyright.

Moreover, there are a number of newer types of copyright licenses that the owner may adopt such as those offered through the Creative Commons.³ The Creative Commons has developed online templates for licenses whereby authors may license certain uses of their works, reduce the term of copyright from life plus 70 years to 14 years or perhaps even place their work in the public domain. The most commonly used type Creative Commons license is the attribution license in which the author licenses all scholarly uses or just nonprofit scholarly and research uses of their work and requires only that when the work is used, she receive attribution. This may meet the needs of many faculty authors whose work is not likely to produce royalties in the first place since it ensures recognition which may be all that a scholarly author really wants or can expect. Additionally, the faculty member has provided free access to others throughout academia and furthered the dissemination of knowledge.

Conclusion

Faculty authors who retain their own copyrights and who do not grant broad licenses for use such as through the Creative Commons attribution license must deal with a number of issues.

1. Should the work be registered for copyright, especially an individual article?
2. Will the faculty author respond to requests for permissions in a timely fashion?
3. How important is it to police the work to ensure that others are not reproducing and distributing it (such as in coursepacks) without the faculty author's permission?
4. Is the faculty author willing to take action if he finds that someone is infringing his copyrights? (Failure to do so could result in loss of the ability to do so through acquiescence to the use).
5. To what extent is the author willing to grant broad use rights within the university?

³ See www.creativecommons.org.

Within a consortium of universities? To the academic community in general? To the research community that includes for-profit research?

A faculty member who chooses to make her work available in nontraditional ways faces some difficulties such as recognition of these sources as equivalent to peer reviewed scholarly journals. This, in turn, may affect tenure and promotion for younger faculty members and salary increments, the award of grants and status for more senior faculty.

What actions can a university take to ease these difficulties?

1. Can the university offer a model copyright transfer agreement that permits the faculty author to retain some rights? To permit broad access and use within the institution? To scholars everywhere?
2. Is it possible to work with faculty editors of commercial peer reviewed and other journals to convince publishers to liberalize their copyright transfer agreements?
3. Can the academy recognize good sources for publication which have liberal copyright policies as opposed to the top commercially published scholarly journal in a field?
4. If the university established an institutional repository should it require or merely encourage faculty to deposit copies of their works there?
5. Can the university enhance the ability of university libraries to acquire access to scholarly works in all fields in which faculty live and work?

Perhaps those of us within academia are the enemy. Our own behavior in evaluating publication sources for faculty work often forces our colleagues to publish in a source that requires transfer of the entire copyright which hurts both the author and other faculty members and students who want to use the work. Faculty retention of the copyright benefits the individual author, other faculty, the institution and the research community. It may not, however, benefit publishers such as our own university press.