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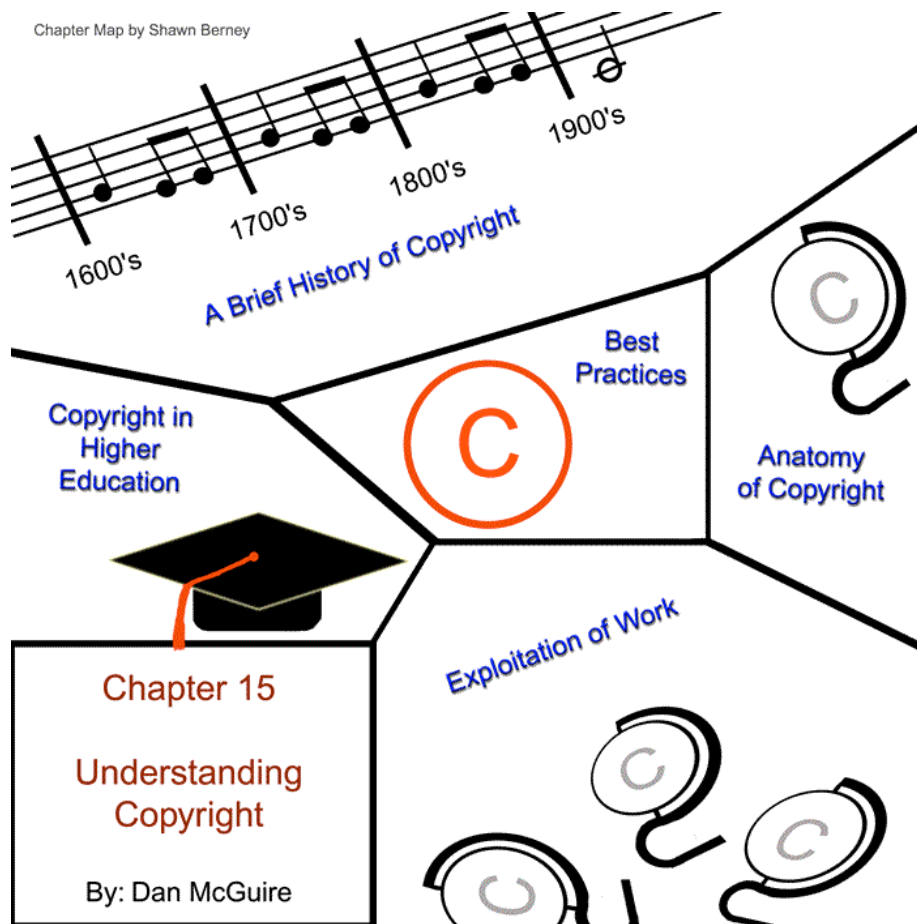
ONLINE AND DISTANCE EDUCATION

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Understanding Copyright: Knowing Your Rights and Knowing When You're Right

Dan McGuire

Chapter Map by Shawn Berney



Learning outcomes

After completing this chapter, you will be able to:

- Define “ownership”, both as a concrete concept and as an abstraction, as a practical measure of property rights.
- Identify your rights as the owner of intellectual property
- Explain why seeking permission to use copyrighted material is preferable to using materials without permission.
- Identify some common instances of copyright infringement.

Introduction

Copyright is a word that has developed its own mythology.

It is almost impossible to go through a day without coming into contact with something protected by copyright. Music on the radio as we commute into work, the architecture of the home we live in, or the buildings we drive by, articles in the newspaper—you could safely say that almost every item we touch or interact with has some ‘copyright’ factor associated with it. With such a proliferation throughout our economy it’s surprising just how often ‘copyright’ is misunderstood.

A Brief History of Copyright

EARLY HISTORY

The concepts underlying copyright protection have been around for at least 1500 years. The situation before the sixth century is a little unclear. Copyright has always been a response to technological change. The first such change was the advent of writing itself. Before writing, history was recorded through stories that were told and retold to succeeding generations. In the oral tradition it would not have occurred to anyone to restrict who could repeat the tales.

The first documented copyright dispute occurred in sixth-century Ireland. This isn’t a tale of high priced lawyers arguing over minute details of the law—rather it is a tale of religion, power and bloodshed. In the early part of the sixth century Columba of Iona, a priest, borrowed a psalter from Finnian, and then diligently copied it page by page, though without asking Finnian for permission to do this. Finnian demanded the return of the psalter, and appealed to the Irish king Dermot, who ordered the copy be handed over to Finnian. When Co-

lumba refused to comply, Dermot used military force to see his judgment through. In the end, as many as three thousand men may have died.

While this tale certainly has all the elements of modern day copyright piracy, with the addition of armed conflict, it was not until much later that copyright issues came to the fore. St. Columba had to copy the psalter by hand, a very slow laborious process. Since very few people were literate, copyright wasn’t much of an issue. It was not until the invention of the printing press that the idea of granting permission to make copies has any significance.

First laws

With the printing press it became possible to make multiple copies of books efficiently. Books became a commodity. Printing and selling books was soon a lucrative venture. At first the system of controlling the right to make copies was ad hoc. Kings and other rulers would grant the privilege of printing books to one printer or another. Books that were not authorized were banned. Printers who produced unauthorized works were arrested. Printers held a monopoly on the titles they printed. This system was clearly aimed at aiding the printers, as opposed to the authors. It was also a system that was ripe for corruption. It has been argued that one of the causes of the English Civil War was the monopolies handed out to his friends by Charles I.

The Statute of Anne, enacted in 1710 by the British parliament, is regarded as the first copyright law. This law placed the right to authorize the reproduction of a book not in the King’s hands, but in the author’s. This exclusive right lasted for 21 years, after which time the book entered into the public domain, and anyone would be free to copy it. The state of affairs in copyright remained relatively calm for the next two centuries. Book publishing increased in importance, both in society and within the economies of the world’s nations. While printing technology improved, the process of publishing, and the state of trade in creative works remained largely the same.

Other nations took very different tacks in regard to copyright law. The United States of America, for example, entrenched the fundamental elements of their copyright law in their constitution.

TWENTIETH-CENTURY DEVELOPMENTS

While the 18th and 19th centuries were relatively stable in terms of copyright law, the 20th century saw a torrent of challenges, changes, and adaptations to the law. Technological change became a constant. Many of the technologies we take for granted today represented major challenges to the copyright status quo.

The invention of the photograph created a new, previously unimagined method of creativity, and generated an intense debate over the difference between a painting and a photograph. Was a photograph even a creative work? Was it not just a reproduction of that which already existed in nature, or was it analogous to a painter creating an impression of the same scene?

The ability to record musical performances opened a fresh can of copyright worms. For the first time there was an ability to 'fix' the performance, to store it and repeat the performance indefinitely. This raised questions about the rights of the composer, the performer, the recorder, and the distributor. For the first time, the idea of everybody owning a tiny slice of rights surfaced.

The idea of derivative rights was brought to us via the motion picture industry. This new form of expression was ripe for exploitation. The law was clear that one could not reproduce a novel or story in print, but what about adapting it into a movie? There was no law in this area, and so naturally the movie studios quickly delved into the libraries, adapting popular books for film. Book publishers of the day quickly moved to have the laws amended to block this loophole!

Other innovations included radio, television, and the photocopier. These minor challenges were essentially dealt with without legislative change to copyright law, as was one much more significant innovation.. The anticipated introduction, by Sony, of the home video tape recorder caused a great deal of consternation for television broadcasters. The VCR would allow the public to retain copies of their broadcasts for later viewing, or even sharing with friends and neighbours. Universal Studios sued Sony in an attempt to block the introduction of the VCR, and thankfully for everyone who has ever taped a television program for later viewing, they lost. The courts ruled that Universal Studios could not block the introduction of the VCR, which they acknowledged could be used to infringe copyright, because the device had significant non-copyright infringing uses. Had the VCR been intended only to reproduce copyright works it never would have seen the light of day as a consumer product. Today the sale or rental of movies for home viewing represents a major source of revenue for companies like Universal Studios.

All of these technological developments and adaptations of copyright law, either through the judiciary or through legislative change, were little more than a prelude to the challenges that arose in the late 20th century.

CONTEMPORARY SITUATION

At the beginning of the 21st century technological change has reached an amazing pace. New methods of communication, creation and transmission of ideas or works are introduced every day. New methods of exploiting creative works appear almost daily. Until recently, the technologies available to copy a work would not allow a perfect copy. A photocopy of a textbook is a poor substitute for the original, a tape made from a record is never as clear as one from the publisher. Now digital technologies allow for perfect (or near-perfect) copies—as many as are needed—to be transmitted around the world.

These technological innovations have re-opened the debates surrounding copyright protection. Given the ease of reproduction, some people have wondered about the relevance of copyright laws—proposing movement from a monetary economy to a gift economy, from competitive production to collaborative models. The open-source movement is a prime example of this debate. As a response to closed, proprietary software many software developers have moved to a model where the sharing is a requirement of distribution. Open source software licences permit the modification, distribution, and reproduction of the software without further permission or payment. The only requirement of these licences is that the same terms must be offered to any recipient of the code, and that the original source must be publicly accessible. Often described as an 'anti-copyright' movement, the open-source licences are entirely reliant on the existing copyright laws.

Anatomy of copyright

PROPERTY AND OWNERSHIP

Most people are familiar with the idea of ownership. We have all felt the pride of that first bicycle, or other prized childhood possession. But what exactly is ownership? This question has an easy answer: Ownership is the possession of property. This, of course, leads to the next question: What exactly is property? Again an easy answer comes to mind: Property is the stuff I own. There is no fundamental aspect that makes one object property, while another is not.

There is of course the idea of 'property' as a portion of land (real estate) which one person controls or possesses, probably the most important property we own. But of course the owner does not have complete control over his real estate. It is impossible to pick it up and

move it to another location, and there are limits as to how the land may be used within any municipality.

Another form of property includes those items that can be moved, such as cars, computers, books, and pens. Ownership of a car is normally evidenced by registration of the title with some government agency, but what about the ownership of a pen? That form of ownership relies entirely on the mutual recognition of property rights. A pen is mine only because the other people in the room recognize it as my pen. Possession is 15/10ths of the law.

One of the key features of our modern society is the legal structure built up around the idea of property. Real estate is defined by law; my possession of a portion of land is granted by the government. Theft, fraud, trespass, vandalism are acts against property that have been forbidden by law. We accept these laws, largely without question, even when there may be valid reasons to refute them. Is someone who takes a loaf of bread from a store to keep from starving really a criminal? How about the person who paints anti-nuclear slogans on the side of a warship?

The laws relating to property have not been decreed by some dictator; rather, they have evolved to meet the needs of our society. Modern society has progressed from the time when possession of land was necessary for survival to a time when possessing tools for a trade could provide the income with which to buy the sustenance that land alone used to provide. Now we are in an age where most economic activity is cerebral—service and creative industries now dominate our economies. Similarly, laws have evolved that mirror this transition. During the last few centuries the concept of 'intellectual property' has been defined and developed.

A SIMPLE VIEW OF COPYRIGHT

Copyright is the right to copy, period. Such a simple statement could lead you to believe that any time you copy anything, even a small part of something you are infringing copyright. If it is impossible to do anything without infringing copyright then how relevant is the law?

WHAT COPYRIGHT PROTECTS

Copyright applies to, and protects, creative works. This includes the written word in literature, artistic endeavours such as painting or photography, the performing arts, and the combinations of these works in areas such as film or television.

Under international treaty, there is no requirement that a work carry any notice of copyright to be pro-

tected. This was the case for American copyright up until the 11576 Copyright Act. Today copyright protection is automatic, and applies from the moment an idea is 'fixed' into a tangible medium.

MORAL RIGHTS

For an artist or author, reputation is everything. In most countries copyright law includes provisions to protect the reputation of the author or artist. Nothing may be done to a work that reduces the reputation of the creator. This could include actions such as editing a work to give it a different character, altering a work of art to change its meaning, or including a work in a context that harms the reputation of the author. Moral rights may be waived, but they cannot be sold or transferred. In some nations moral rights are perpetual. In other nations they match the term of copyright protection. In some places they cease to exist when the author dies. In the US, there is no formal recognition of moral rights.

ECONOMIC RIGHTS

The main feature of copyright law is the commoditization of creative works. This is to say the creation of property-like rights in regard to creative works. Property is an often-misunderstood concept. Usually property refers to some physical, tangible object, which someone is said to own. My car, my pen—anything that begins with 'my' is usually considered a piece of property; that is, things that belong to me. John Locke stated that people have natural right to own the fruits of their labours. Taking this further, who else could own the thoughts of an individual? Copyright law makes it possible for artists and authors to record their creative thoughts and sell, rent, or lend them. This is clearly an economic issue—how are creative people within society rewarded for their labour?

INTERNATIONAL RIGHTS

Trade in cultural goods presents many interesting dilemmas. When a tangible product, such as a car, is traded between two nations, it is a simple matter. When a book is traded, it can become a very complicated transaction. Consider a situation where two nations do not recognize each other's copyright laws. In such a case if a single book is traded, it can then be reproduced by a publisher in the receiving nation and resold many thousands of times (assuming it is a good book). Of course the copyright owners may demand that no copies be traded with nations that do not recognize their rights, but enforcement of such a decree is next to impossible.

This situation was rectified in the late 19th century with the creation of the Berne Convention for the Protection of Literary and Artistic Works. This international treaty sets out basic conditions required in each member nation’s copyright laws, as well as creating a system of international copyright law. The key concept under Berne is the idea of “national treatment”. Under this term, a work is protected by the copyright laws of a given nation regardless of the nationality of its author. This means that an Australian author’s works are protected by US copyright law in the US, just as an American author’s works are protected by Australian copyright laws in Australia. This also means that a consumer of copyright works within a country need only understand the laws of their country. It is only when a project will be multi-national that the variations between copyright laws need to be examined.

Under the Berne convention, copyright protection must last for at least the life of the author plus fifty years. Copyright must apply to “every production in the literary, scientific, and artistic domain, whatever may be the mode or form of its expression” (Berne Convention 1886, Art. 2(1)). There must not be a formal process required for copyright protection, such as a requirement for a copyright notice. Currently 163 countries are members of the Berne convention, making it a near-universal treaty.

What copyright does not protect

Copyright is not absolute. There are many situations where copyright protection is either nonexistent or limited. The exceptions and exclusions to copyright law are critical tenets of the law.

Copyright is not a system of censorship. It is not intended as a tool to suppress debate or criticism. Unfortunately this principle has not always been adhered to. Copyright is not intended as a system to confine or restrain culture, although certain groups have attempted to do just that. Copyright law attempts to grant rights to the authors and artists, while balancing the rights of readers, art lovers, and other creators.

To be protected by copyright a work must be significant, not in terms of its impact on society, but in proportion to the entire work. A small quotation is not likely to be protected by copyright, unless of course it is the kingpin in an entire work. There is a story circulating regarding a request for clarification on what constitutes a significant portion of a work made to a major

publisher. The response came back that every word copied from one of the publisher’s books should be cleared before being re-used. The question then is, what about the word “the”?

FACTS

Copyright protects creative works; that is, it enables an author or artist to collect an income from their ideas. Facts have no author, or if they did, the author exercised no creativity. Facts are clearly not protected by copyright. But what if there is some form of creativity involved in the collection or presentation of those facts? In such a case the work in its entirety would be protected, but each underlying fact would still be unprotected.

IDEAS

Copyright protects the expression of an idea, not the idea itself. For a work to be protected it must be “fixed”, that is, recorded in some physical form. Many of Disney’s movies have been based on public domain fairy tales. From *Cinderella* to *Aladdin*, Disney has used these public domain tales as the basis for feature length animated films. If copyright law protected both the expression and the idea underlying the expression, then Disney would now hold rights to these tales. While Disney does hold certain rights to their creations, those rights are limited only to the exact expression fixed in their movies. Without this critical aspect it would be impossible to maintain any balance between creators and the public.

USES FOR THE “PUBLIC GOOD”

Most copyright legislation recognizes that certain uses of copyright material benefit society as a whole. Education is a classic example. The better educated a society is, the more well off its members can expect to be.

Criticism of a work or body is considered to be in the public good. It is considered beneficial to debate important issues; as well, it is often necessary to infringe the copyright of a person or persons to reveal their intentions to the public in general. The courts in many jurisdictions have recognized this and created jurisprudence that protects such uses. There are clauses in many copyright laws specifically stating that copying for the purpose of criticism is not a copyright infringement. Consider the difficulty in gaining permission from a copyright owner to use their work in a manner which will portray them in a negative manner. There have been cases where entire works have been reproduced, and the courts declared that no infringement occurred.

CHALLENGES

It is unfortunate that most of these exemptions are not stated as a positive right; rather they are defensive in nature. The best legal arguments may protect you in court, but they do very little to protect you from being brought to court in the first place. Many times a person has copied protected work in a manner that is fair, and in the public good, however when faced with a lawsuit from the rights holder they are forced to concede, and cease their use of the material. It’s not the person with the legal right who wins, it’s the person with the deepest pockets.

Exploitation of a work

One of the best ways of understanding copyright protection is to know how copyright works can be exploited; that is, used for financial gain by the copyright owner. Here’s a list of all the ways to use a work:

- **Copying:** This is the oldest form of exploitation of a work protected by copyright! This is the arena of book publishers, music distributors and film houses. The issue is fairly clear if we are talking about an entire work. The grey areas appear when we start talking about copying part of a work. If the law states that no part of a work may be copied, then what happens to cliché’s? What about small quotations needed to make a point? What is the line between acceptable copying and copyright infringement?
- **Adaptation or derivatives:** This is a right that emerged in the late 19th and early 20th centuries. This is the right to take a work and create a new work based on it. This is the home of ‘film rights’ and the like. Examples would include making a movie from a book, or a sculpture from a painting.
- **Translation:** At times foreign markets demand a book or other work, when the artist has no intention of supplying it in the chosen language. It is often difficult to directly translate a work into a new language. This can lead to moral rights issues, if the translator is unable to properly relay the author’s original intent.
- **Performance:** In music, the choice of orchestra, the choice of arrangement even the choice of instruments can greatly affect the resulting performance. Consider the plethora of cover tunes—some good, some bad, some horrid. It is clearly in the composer’s interest to be able to control how their works are performed. In many cases it is the only way a composer can gain an income from their work.

- **Broadcast:** The advent of radio created a challenge to copyright laws of the day, not unlike the challenge brought by Napster and online file sharing. There is a tendency to believe that when one hears a song on the radio, it is being heard for ‘free’. This is not the case, as radio broadcasters carefully record each song played and remit payment to the copyright owners for each broadcast. Of course radio broadcasters cover this fee through the sale of advertising.

Copyright in higher education

UNIQUE POSITION OF EDUCATIONAL INSTITUTIONS

The university is unique as both a creator and a consumer of copyright works. Most people are unaware of the many fees and licences that exist for the use of copyright works.

Issues relating to the use of copyright materials in teaching and learning are not new, in fact most materials have been used for so long we simply forget the underlying scheme that exists to pay the copyright fees. Many forms of copyrighted works—books, music, video, and sculpture are used in the modern university. These works are brought in for a range of purposes—for the entire student body, for specific faculties and schools, or for a specific course offering. Fees for the use of these materials are paid for by university departments, including the library, the faculties and schools, and by individual students. Table 15.1 demonstrates the matrix that describes this situation.

Table 15.1

	Individual Student	University Department	Faculty or School
Books	Bookstore—assigned texts For a given class. Brought in by the bookstore and resold to students. Goal is cost recovery.	Library—the library selects titles appropriate for the entire student body.	Library—certain library purchases may be made at the request of a specific school. While these books are available to the entire student body, they are of primary interest to that one school

	Individual Student	University Department	Faculty or School
Journal subscriptions		Library—the library selects titles appropriate for the entire student body.	Library—certain library purchases may be made at the request of a specific school While these books are available to the entire student body, they are of primary interest to that one school
Photocopies	Purchased by individual students, at self serve copiers. Paid for via cost recovery (machines) and Access copyright licence. Also supplied by the university bookstore/ reprographics on cost recovery basis.		Distributed to students in class, cost borne by department. Covered by Access copyright licence
Digital Assets	Included on CD/companion website, Cost borne by the student		

EXEMPTIONS AND THEIR IMPACT

Fair use, fair dealing and other exemptions are defenses in court, nothing more. This means that even with a solid argument for fair use, the copyright owner is still able to sue the user. Often the initial press regarding the case represents the greatest cost to the right’s user, damaging their reputation and setting other rights holders’ guards up against them. Add to this the cost of mounting a defense against such claims of infringement, and it is easy to see why most claims of copyright infringement are dealt with quickly and quietly.

STUDENT RIGHTS

Often students are unaware of their rights. They produce essays and term papers for submission to their

instructors and then forget about them. The question of copyright is never considered. Most teachers know that examples of past work, both good and bad, can be an excellent aid to the learning process for current students. Presenting past student work is only legal if permission has been secured. This is easily done with a simple submission form where the submitting student can tick off what rights they are willing to grant the instructor or the school.

Best practices

KNOW THE LAW

There are two problems that occur when instructors are not familiar with copyright law. The first, and most worrisome for administrators is the infringement of copyright. When third-party materials are used without proper regard to copyright law, the institution is exposed to a serious liability. The damage from a copyright infringement case would not only be economic, as the institution would have to pay for a defense, but also the reputation of the institution would be damaged. The second problem occurs when instructors fail to use materials that would enrich the learning experience of their students simply because they believe copyright law prohibits such use, or that obtaining permission would be too onerous. This does a disservice to the students as well as to the authors and artists of our society.

PLAN FOR THE UNEXPECTED

Even in the best of circumstances things can go wrong. It is possible that a copyright owner may be unavailable to grant permission for some reason, or there may be reasons that prevent the author from granting permission, or you may run into a copyright owner who is simply not going to grant permission. Having a back-up to replace any work will be a huge benefit.

DOCUMENTATION

When using third-party material, keep careful records of where content came from, what steps have been taken to obtain permission and under what terms permission was granted. At a minimum, any correspondence with copyright owners, including any final licences, should be retained for as long as a work is used. It is also good idea to retain a record of research undertaken while trying to determine who owns the copyright.

CONSIDER THE BENEFITS

One of the side effects of seeking permission to use materials is the creation of a dialogue between creator and consumer of a work. Often, academic authors are only interested in how their works are used. By seeking permission you may also obtain access to unpublished materials, or higher quality copies. If there are any difficulties regarding the use of materials, if you have permission to use them you can go back to the rights holder for assistance. Imagine trying to do this for a ‘bootleg’ copy.

Glossary

Author. The original creator of a creative work.

Berne Convention.

Compilation. A collection of creative works, with a variety of rights holders.

Copyright owner. The person with the legal authority to authorize reproduction or other actions covered by copyright.

Derivative work. A new work based on a pre-existing one.

Fixation. Recording an idea or form of creativity in some tangible form.

Idea. The concept underlying a work

Infringement. Doing any of the actions under the control of the copyright owner without their authorization.

Licence: A document granting permission to perform one of the exclusive rights of the copyright owner in some limited form.

Medium. The format in which a work is fixed.

Moral rights. Those rights that relate to the reputation, or character of the author.

Permission. The positive response from a copyright owner. In most jurisdictions permission must be in writing.

Private. A family or close circle of individuals all known to each other, a location that is accessible only by a limited number of people.

Public. Any group of people who do not necessarily have any preexisting relationships in a location which any individual in society, or a large segment of individuals in that society may access.

Term. The length of time under which a work is protected OR the time span during which a permission or licence is valid.

Work. A fixed expression of a creative idea in some medium.

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