

# Copyright Assumptions and Challenges

If I have discovered a single truth about copyright law, it is that my intuitions are almost always wrong. Indeed, over the past two years I have become painfully aware of the fact that the stronger my intuitions are, the more likely it is that I am in trouble. Consider the following three assumptions that people commonly make about copyright:

1. If there is no copyright symbol (©), the work is not protected by copyright.
2. Copyright protects ideas.
3. Copyright was created primarily to protect an author's intellectual property.

---

*James Hilton is Associate Provost for Academic, Information, and Instructional Technology Affairs and Professor of Psychology at the University of Michigan–Ann Arbor.*



By James Hilton

# Overnight



These three seemingly sensible assumptions are all dead wrong. Original works are protected by copyright from the moment they are fixed in a tangible medium. They no longer require copyright registration or a display of the copyright symbol (©) in order to gain protection. This means that every Web site, PowerPoint presentation, chunk of software code, letter, or manuscript is protected from the start. Similarly, copyright protects the *expression* of ideas, not the ideas themselves. Think about the seemingly endless stream of action-adventure films that pour out of Hollywood. If copyright protected ideas, new films would be rare. But new films are common because copyright protects the expressions in the films—how the lines are written and how the visuals are constructed—not the ideas behind the films. Finally, and most important, the primary purpose of copyright is to promote learning, not to protect property: “The Congress shall have Power . . . 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.”<sup>21</sup>

## The primary purpose of copyright is to promote learning, not to protect property.

In other words, the goal behind the creation of copyright was to provide economic incentives that would stimulate authors to create and publish new works. The idea, from the beginning, has been that societies thrive when ideas and expressions are made publicly available. Copyright is merely a means to that end. In the words of Justice Sandra Day O'Connor: “The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’ To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.”<sup>22</sup> This principle, by the way, also underlies academic tradition. Academicians have traditionally cared more about recognition than control of the downstream uses of their works. A scholar floats a work out and hopes that others will read it, copy it, and build on it—*with due credit given*.

The counterintuitive nature of copyright creates two broad classes of challenges within higher education. The first involves preserving access to information that is created or controlled outside of the academy. The second involves preserving and nurturing the free exchange of ideas within the academy through the creation of intellectual property policies.

### Preserving Access to Works outside the Academy

Copyright law attempts to balance the rights of the author with the rights of the public, but congressional action, judi-

cial interpretation, and international treaties continuously adjust the pivot point of that balance. Over the last two hundred years, the balance has steadily shifted away from promoting the public good (learning) in favor of protecting the copyright owner’s property. Several factors have contributed to the shift. First, the types of work that are protected by copyright have expanded—from the narrow domain of published maps and books to the broad domain of virtually any work that is fixed in a tangible medium. Second, the scope of protection has increased to include performances, public displays, and derivative works. Third, the term of protection has been extended from fourteen years to the life of the author plus seventy years.

In a statutory attempt to redress this growing imbalance, the 1976 Copyright Act explicitly introduced a “fair use” provision. In essence, the fair use provision sets a limit on the monopolistic control of the author. If the use of a work furthers progress in the sciences and the arts (i.e., if it promotes learning, knowledge, and the public good) and if its use will do relatively little harm to the author’s property rights, then it is not necessary to get the author’s permission to use the work.

Fair use is an essential component of copyright law and should be a cherished personal liberty. It is fair use that allows us to quote someone while criticizing them, even if they disapprove. It is fair use that allows us to create parodies, even if the author of the parodied work disapproves. And it is fair use that allows us to make copies for scholarly research and teaching, even if the copyright owner disapproves of our use. We can do these things

without the permission of the author/copyright owner because these uses further the overarching goal of copyright law: progress in the sciences and useful arts.

But fair use is seriously threatened. In today's legal and popular cultures, many people increasingly see copyright as being exclusively about protecting property. They are losing sight of, or arguing the irrelevance of, the need to promote progress in the sciences and arts. If access to information, even tiny bits of information (e.g., a few paragraphs from an article), can be provided for a small fee, the argument goes, why shouldn't the copyright owner profit from that access? Of course, fair use is about more than access.

Both individually and institutionally, we *must* proactively pursue our fair use rights. If we do not use fair use, we will lose it. This pursuit will, of course, require a little education on our part. Not every use, even every educational use, is likely to be defined as fair use. Higher education institutions need to develop up-to-date, reliable, consistent, and clear copyright-related standards for use. "Who uses what" and "how they use it" have become pressing issues, in large part because new media sources and the emergence of the Web allow for the widespread dissemination of material. As such, they raise the stakes considerably from the days when distribution was limited to students physically enrolled in classes.

Institutions must accompany these use standards with a campaign to energize and educate the community about copyright, an issue that is complex and often seems as though it should be someone else's problem. Faculty, staff, and students should know when they

can use material under "fair use," when they must obtain permission (and how to obtain it), and when and how they can obtain alternative sources of the material (e.g., through commissioned works or from the public domain).

Institutions must decide how much and what kinds of risks are worth taking with regard to use. On the one hand, institutions that take a liberal position regarding fair use risk exposing themselves to litigation and the financial costs associated with it. On the other hand, institutions that take a conservative position acquiesce to the increasing costs of access to knowledge and weaken the case for fair use. The last point is worth emphasizing. Again, if we do not exercise fair use, we will almost certainly lose it. The concept of fair use exists only in the United States and Great Britain. Pressures to "harmonize" copyright law across national boundaries, combined with the profit motives of commercial publishers, make the whole concept of fair use vulnerable.

Regardless of the specific position taken regarding fair use, institutions need to nurture a culture of compliance with copyright law. This culture requires education and resources. If a coherent use policy is created but faculty, staff, and students lack access to the resources needed to comply with that policy (e.g., easy copyright clearance, alternative sources for copyrighted material, help finding things in the public domain), the policy will be ignored.

### **Preserving the Free Exchange of Ideas within the Academy**

The second challenge that copyright law poses to higher education involves the owner-



**Both individually and institutionally, we must proactively pursue our fair use rights.**

ship of copyrighted works. Most institutions already have well-established policies to deal with the ownership of patented intellectual property. Many of these policies fall short, however, when they are extended to apply to the "meat and potatoes" of new technologies—copyrighted works. Web pages, software, and multimedia are more likely to be protected by copyrights than they are to be protected by patents. This is an important distinction for three reasons.

First, because copyright protection begins at the moment of creation, the law—independent from the institution's policy—grants ownership of the work to someone. What is less clear is to whom the law grants that ownership. Normally, copyright is granted to the author of the work. But if the author of the work is operating in his or her capacity as an employee, then the work may be considered a "work-for-hire," in which case copyright is granted to the employer. Although institution-sponsored works would ordinarily seem to qualify as works-for-hire, long-standing tradition within the academic community and several court

cases challenge this assumption. As a result, there is no clear legal answer as to who owns much of the work that colleges and universities, through their faculties, create. At the very heart of this uncertainty is the question of who owns the faculty-created content of a course. Should course content be viewed as a scholarly work with ownership vested in the faculty or as a work-for-hire with ownership vested in the institution?

Second, copyright is not a single right. It consists of a bundle of rights including the rights to determine who can distribute, duplicate, perform, and create derivative works. Authors and institutions often care less about “ownership” than they do about the control of specific rights. Imagine, for example, that several junior faculty members decide to start an electronic poetry journal. Because they lack tenure, they are particularly concerned about who will “own” the journal if they leave the institution, and they are naturally predisposed against institutional ownership. But on closer examination, it is not

so clear that they want ownership as much as they want control. For example, although a poetry journal is not likely to be profitable, it is easy to imagine that it could be sued for copyright infringement if someone submits a work that is not original. If the faculty members own the journal, they are liable for any infringement. If the institution owns the journal, the institution is liable—making this a perfect situation for institutional ownership and faculty control. More generally, if copyright is viewed as a bundle of rights, many thorny issues become more manageable (e.g., faculty portability and institutional support of a project, joint ventures with for-profits, and distribution of income).

Third, unlike patents, which have logical points where individual and institutional interests converge (e.g., deciding who will pay and how to pay the \$10,000–\$15,000 patent application costs), copyright—as noted above—happens at the moment of creation, meaning that there is no separation between the

act of creating and the act of determining ownership. One implication of this difference is that the best way to build compliance with institutional copyright policies is to build a system that provides real benefits. Put another way, because points of convergence do not obviously exist, it will be relatively easy for individuals to operate outside the copyright policies of an institution. Ownership policies that deal with copyright must, therefore, be based on principles that maximize buy-in from faculty and staff. If an institution creates a policy that has little support among the faculty and staff, it will almost surely drive those activities off campus. Given the nature of copyright, it is clearly in the institutions’ and the individuals’ best interests to design policies that encourage creation within the system.

Along these lines, in developing intellectual property policies for copyrightable works, institutions should (1) treat copyright as a bundle of rights, (2) separate revenue-sharing from ownership, (3) focus more on the use of institu-

tional resources and less on the type of property created (e.g., textbook versus software), and (4) align ownership with academic values and institutional mission. The last point is worth emphasizing. Ownership policies should be principle-based and well articulated. Overly broad claims of ownership will alienate faculty and ultimately undermine the creative environment. Excellent models exist in policy papers written by the American Association of University Professors (AAUP) and the Association of American Universities (AAU) and in the recently revised intellectual property policies developed at Columbia University and the University of Chicago.<sup>3</sup>

### Conclusion

We live in what is being called “the information age.” As a university professor, I have always found this idea to be a bit ironic. It seems to presume that before the last half of the twentieth century, information was unimportant. Clearly, scholars have been concerned with information

for thousands of years. Indeed, it is their very lifeblood. But outside the halls of academia, the changes have indeed been dramatic. In the wider world, information has become a commodity, a piece of property with tangible value. It is this change—viewing information as property—that I think captures the true meaning of the information age. More important, I believe this redefinition of information threatens scholars’ ability to conduct research and teach. At the most basic level, the commodification of information runs counter to the long-standing academic principle of the free interchange of ideas. Although scholars live in academic communities that value the free expression of ideas, they are surrounded by a world that is rapidly moving to a “pay-per-view” model, in which each viewing of an idea or work carries a fee. Copyright operates at the epicenter of this movement. As major producers and consumers of information, we in the academic community must move proactively, both internally and externally, to defend fair use and to help shape copy-

right law. If we do not, we will end up at the mercy of those who are interested in the economic opportunities for information but who do not share our culture or mission. If higher education institutions do not find ways to navigate the information age, the academic course will soon be charted by the likes of Disney and Microsoft. *e*

### Notes

1. U.S. Constitution, art. 1.
2. Justice Sandra Day O’Connor, *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349 (1991).
3. American Association of University Professors, *Statement on Copyright*, 1999, <<http://www.aaup.org/stcopyright.htm>> (accessed August 27, 2001); Association of American Universities, Intellectual Property Task Force, *Intellectual Property and New Media Technologies: A Framework for Policy Development at AAU Institutions*, 1999, <<http://www.aaup.edu/reports/IPReport.html>> (accessed August 27, 2001); Columbia University Copyright Policy, adopted June 3, 2000, <<http://www.columbia.edu/cu/provost/docs/copyright.html>> (accessed August 27, 2001); University of Chicago, *New Information Technologies and Intellectual Property at the University*, approved April 27, 1999, <<http://www.uchicago.edu/docs/policies/provostoffice/intprop.html>> (accessed August 27, 2001).