

# Copyright 101

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# Disclaimer

- I am a lawyer
- But I am not your lawyer, and this is not actionable legal advice
- (If this were legal advice, I'd be charging you for it)

# What is copyright?

- Copyright is a **federal** body of law that vests **exclusive rights** in **authors** of **works of authorship** for **limited times**
- See U.S. Const., art. I, § 8, cl. 8 (granting Congress power to create copyright laws); 17 U.S.C. § 101 et seq. (substantive law of copyright passed pursuant to this constitutional authority)

# What is protected by copyright

- Copyright inheres in **original** works of authorship **fixed** in a tangible medium of expression, 17 U.S.C. § 102(a)
  - Originality = creativity and origin with author, but a very low bar
  - Fixation = instantiated in some medium (e.g., print, digital)
- Copyright extends authors six exclusive rights, 17 U.S.C. § 106
  - Reproduction, adaptation, public distribution, public performance, public display, digital performance
- There are several statutory exceptions
  - E.g., fair use, § 106; some library uses, § 108; first sale, § 109(a), (c); reproduction and distribution of musical works in sound recordings, § 115

# Some counterintuitive points about copyright

- Copyright vests automatically when an original work is fixed in a tangible medium of expression
- Infringement may be any unauthorized use of an owner's work, even if not for commercial purposes, and possibly even if private
- Infringement is not just copying—it's any unauthorized exercise of an owner's exclusive right
- Infringement of registered works carries statutory damages that range from \$750-\$150k per act of infringement

# How to think about infringement

- Copyright infringement—three basic questions
  - Is there a validly fixed and sufficiently original work of authorship?
  - Is there an unauthorized use of that work?
  - Are there any applicable affirmative defenses?

## Example 1: assigning course reading

- A professor curates extensive materials for her class, including several journal and popular press articles. She downloads them all, collects them into a single .pdf file, and then posts that file to her course web page, limited by password only to students, where it can be downloaded. She does not ask for permission from or pay any royalties to the author.
  - Likely infringing

# Example 1: assigning course reading

- Journal articles are copyrighted works of authorship: literary works
- Several acts of unauthorized digital reproduction, possibly also adaptation
  - Distribution is less clear, *see London-Sire Records v Doe 1* (D. Mass. 2008)
- Cases on hard copy course packs are very conflicted
  - *Compare Basic Books v. Kinko's* (S.D.N.Y. 1991) (photocopying materials for course packs is not fair use) *with Cambridge Univ. Press v. Patton* (11th Cir. 2012) (most copying for course packs is fair use)
- What to do?
  - Safer: share links to locations where works are located online
  - Safest: get permission from publisher, perhaps through Copyright Clearance Center



## Example 2: social media

- A professor operates a blog on which he posts commentary and items of interest about his area of expertise. He finds a short editorial on the local paper's web page that he finds persuasive, copies the text and posts it verbatim on his blog. The local paper's web page is freely available without any paywall or access limitation. He gives full attribution to the author and the paper, and links back to the web page where he found the piece. He did not contact the paper or author to request permission.
- Very likely infringing

## Example 2: social media

- The editorial is clearly copyrighted as an original literary work
- The professor copied it and displayed it publicly without permission
- But wasn't the article in the public domain?
  - No. "Publicly available" is not the same as "in the public domain."
- But it didn't cost the paper anything, if anything it helped them!
  - True but irrelevant. Copyright does not turn on the impact of the use
- The poor guy didn't know!
  - Also true, also irrelevant. Copyright is a strict liability tort.
- What about fair use?
  - Plausible but a tough road b/c of wholesale copying
- Safe option: post a link to the paper's web site instead

# Notice

- © 1991 Dave Fagundes

## Example 3: showing material in class

- A professor is teaching copyright via Zoom. When teaching a case about infringement of a musical work, she shows a short clip of a music video based on that work to her class. The showing is based on a link to the artist's authorized YouTube page where the video is hosted. The professor did not ask for permission before showing the clip.
- Likely not infringing

## Example 3: showing material in class

- Work on which video is based—and video itself—clearly copyrighted
- Performance of the work took place without authorization
- First, might be an issue as to whether this is a “public” performance
- Even so, likely subject to the “classroom exception,” §110(2)
  - Displaying or performing a work \*only\* to your virtual class is permitted if your school distributes educational materials about copyright compliance and you take sufficient measures to protect the security of the work
- Might well also be fair use, § 107
  - For an educational not commercial purpose; short clip limited as necessary for purpose; no economic harm to owner (loss of license fee?); creative not factual work

## Example 4: who owns your Zoom class?

- A professor taught via Zoom last semester and recorded all her classes. She has a professional web site where she posts all these recordings for download by any visitor to the site. She did not ask her school for permission to do this. The school objects and asks her to take them down. Must she?
- It's a way harder question than you might think at first glance
  - The answer turns on who owns the Zoom lecture

# Example 4: Who owns your Zoom class?

- Is the recording even copyrightable?
  - The video itself is debatable; the content of the lecture probably would be depending on how the class was structured.
- Who owns the Zoom recording?
  - Video: whoever arranged for the setup in which any originality inhered
  - Lecture: seems like it would be the professor, but...
- Not all creators are authors
  - If an employee makes a work in the course of their employment, it's a work made for hire and the © vests in the employer not the employee, § 201(b)
  - Here, the University is the employer, the prof was acting in the course of her employment when creating and giving the lecture, so there's a colorable argument that it's a work made for hire—making the University the © owner
    - Unless you're an adjunct, in which case you're an independent contractor!

# Thanks! Q&A

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