

COPYRIGHT ISSUES FOR DIGITAL MATERIAL AND ITS DISTRIBUTION

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ABSTRACT:

Passing on information within the traditional model of teaching face-to-face had been mostly volatile and for a circumscribed audience. It therefore required less attention on possible copyright infringements unless the courses had been published outside this audience. E-learning due to its digital existence offers new possibilities of archiving, re-use and distribution. Hence the scientific communities worldwide have been developing networked public repositories and retrieval mechanisms. These new information structures now allow worldwide verification of contents that so far were only locally available. In order to fully use the potential of e-learning materials special care is needed to avoid unwanted copyright infringements or other legal problems. This refers to the local teaching situation as well as to storage, reuse and distribution – be it via local intranets or the internet. The paper gives a general introduction to the legal concepts of intellectual property right and copyright, looks at the different use-scenarios of e-learning material and analyses potential problems like copyright infringements. A few practical examples are used to show one hand national characteristics of the respective legal framework and on the other hand material-specific problems.

1. INTRODUCTION

Electronic publishing and the Internet as a powerful distribution and communication medium have brought new opportunities for scientific work. Primary data can be exploited in new ways [data mining], more and more scientific information is available in the Internet, copy-and-paste allows easy and fast compilation of already existing materials, server technology has opened new possibilities of providing retrodigitised or born-digital material, E-learning material – once compiled – can be stored and reused. The digital nature of information distributed in the Internet has opened new horizons not only for using one's own data but especially the use of work accomplished by others.

But these new possibilities alongside have brought new legal problems like unintended copyright infringements or uncertainty on how to use scientific material found in the Internet. The following article aims at giving a short introduction into copyright issues regarding digital material, focussing on teaching scenarios. Nevertheless the article is not to be understood as legal counsel or device.

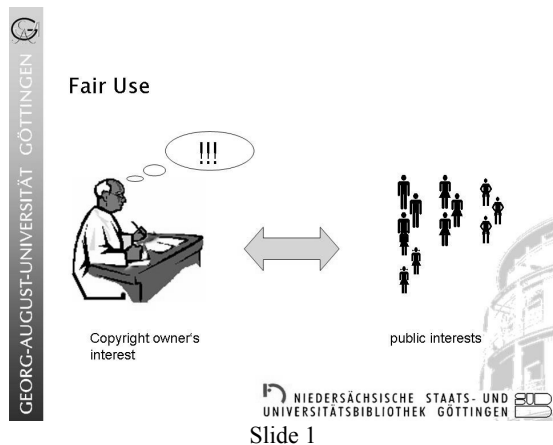
The regulating and legal base of sharing scientific results is the intellectual property right and copyright as part of it. Copyright refers to intellectual scientific work and the creative realm like music, literature, fine arts or others, whereas patents aim at protecting ideas (such as the principle of a certain effect or action) for industrial / [commercial] use. Copy right can turn into a legal weapon in the hands of those determined to use it if infringements – be they unintended or not – harm personal rights or economic interests derived of intellectual property rights. It is therefore useful to get acquainted with basic structures of copy right.

Copyright law rests on concepts of ownership, property and rights, namely on a concept that intellectual creations belong to the individual who claims them successfully to be his or hers.

Every culture in the world has a distinctive concept of property and corresponding exploitation rights like owning land and distributing the harvest it bears. Intellectual property however is a rather odd idea for certain cultures, especially those with an egalitarian social structure or with a political system rejecting individual property. China for example has only until recently, when entering the global market on a large scale, picked up the idea of copyright laws and protection of intellectual properties. Because concepts of ownership and derived rights are not laws of nature like gravity but have grown historically and are based on cultural concepts copyright legislation differs nationally. There is, however, something like a minimum standard of international copyright agreement expressed in the "Berne Convention". Since 1967 the Berne Convention is handled by the World Intellectual Property Organization and refers to all countries who are members of the World Trade Organization. In order to reduce uncertainty copyright is – theoretically – tied to territorial principles. Wherever somebody decides to claim his or her copyright that certain national legislation comes into force. Obviously this is however complicated in the digital age and the Internet and we leave it as such for the time being.

In a technical sense all copyright legislation refers to manifestations of ideas – be it in a tangible, digital or volatile form. The mere idea however like a royal tragedy taking part in Denmark or drawing conclusions about large-scale social phenomena by analyzing representative samples is not protected by copyright law. Nor can a formula like Kekulé's discovery of the carbon ring or a simple collection of publicly available data like the sequence „Monday-Tuesday-Wednesday“ enjoy protection. Even simple data collections like a telephone book at least in German legislation enjoy a certain amount of protection and this refers especially to data collections which systematic compilation represents a certain intellectual effort. But we can leave this aside for the moment. An individual manifestation of an idea is the prerequisite of any copy right protection.

2. FAIR USE



Copy right has initially been formulated to grant economic rights to those who have put effort in creative work like fine arts, writing, or composing and yet balance these individual with social interests. German copyright for instance recognizes that scientific or cultural ideas stem from social and cultural interaction which therefore limits the individual's property right on the idea's manifestation. Another conceptual limit to copy right rests upon the very act of publishing. By publishing a certain piece of work the property right holder gives up a certain degree of individual ownership and transfers it to the public. However legislation has recognized that in order to give incentives for creators to publish results of their creative work – from which society at large would benefit – those creators should have the chance to exploit their work economically in a more or less exclusive fashion. Public interests, the creator's interests and those of the ones who wish to use other's intellectual work is balanced by concepts of „fair use“, or in German „Schrankenregelung“.

Let us simply talk of „fair use“, although German copy right does not use this term or the underlying concept exactly the way continental copy right uses it and other legislations like from the United States have a detailed understanding. With permission of the copy right holder there are hardly any limits what you can do with the work of others. „Fair use“, however refers to those rights that do not need any particular permission.

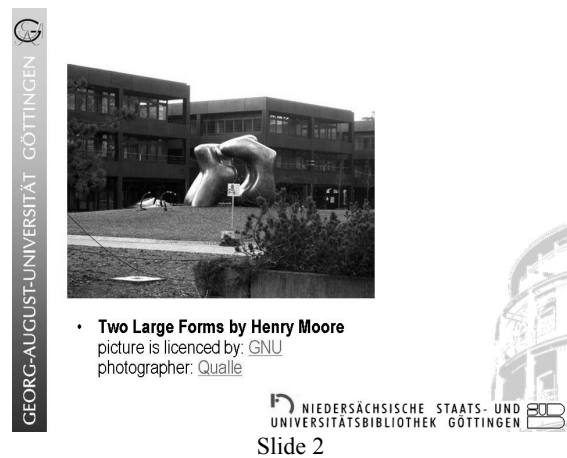
But fair use may not be what our common sense might assume it is. For example nonprofit, educational use or giving credit for the source of the work, or limiting access to materials to students in the class is not automatically fair use. The US-American understanding of fair use depends on a balancing of four factors, which may be addressed by a variety of means. The four factors are:

1. Purpose of the Use
2. Nature of the Work
3. Amount of the Work Used
4. Effect of the Use on the Market for the Original

Those four factors do not apply to all national copy right legislation but there is something like a general understanding that they apply when in case of conflict a copyright infringement is in question – especially No. 4.

Fair use is a framework of limited freedom we can operate in when using other's work for our own purposes like teaching. However if your efforts of compiling teaching material might

allow further economic exploitation like selling your work you are well advised to carefully check whether fair use regulation gives you the right to do so. If in doubt refrain from economic use of your work or seek to get permission of the copy rights holder. Especially in academic teaching scenarios where „economic exploitation“ might just mean to distribute a CD at expenses-covering costs to a handful of students permission to use the work of others if often easy to attain without involving monetary transactions. What belongs to fair use? „Gemeinfreie Werke“ or works that due to certain reasons belong to the public domain can be used freely and don't need fair use regulations. Nobody can prevent you for instance to take a picture of the art work “Two large forms” and sell it. Not because Moore doesn't have a copy right on it but because it is exhibited in a public place. Interestingly “Quelle”, the photographer has licensed his picture so I was free to use it within the limits of the GNU license.



After a certain amount after the death of a creator you are usually free to use that material if you please to do so. But beware: very successful creators like Walt Disney or Erich Kästner might have heirs who have prolonged copyright protection! If your library is one of the lucky few to own a precious piece like the first print of “Kosmos” by Alexander von Humboldt: go ahead, produce a high-quality faksimile reprint and sell it – the publishing house Eichborn might then just be one among others to distribute it.



But: the „Mona Lisa” might be free of any copy rights. Its images however that have been taken by the Louvre staff still belong to the museum and are protected by property law. There will be limits how to economically exploit the image even if

you have purchased it as a slide at the museum shop. You might not even be allowed to use it in your teaching material if the printing on the slide says so. So, what belongs to “Fair Use”?

Fair Use

- Private Copies
- Right to Cite
- Copy for scientific Use
- Copy for Educational Use
- Right to Archive



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2.1 Private Copies

are widely allowed within fair use – but that’s your private business so we leave it aside for the time being.

2.2 Your Right to Cite

Scientific work intrinsically has a referential and dialogical nature. We cite each other not just out of politeness but due to our understanding of “objectivity” or intersubjective traceability. Therefore you may include pieces of other peoples work in your own. But: if without the citations of others there is not much left of your own work or there is no obvious connection between your own creative work and the citation your right to cite does not help in your teaching scenario. You may simply compile citations but you can not publish such a work nor use it in teaching. Copyright (and scientific fairness) asks however to properly attribute the work of others, especially the continental copyright laws give the copyright holder the right to restrain modifications, distortions and mutilations of his or her work.

2.3 Copy for Scientific Use

Generally copyright owners have to accept that others may copy their work for scientific use. What about sharing it? Often you may copy a piece of work and distribute it within closed circles. There might be strong limits to what a „closed circle“ means. Members of an organizational well defined research team might be regarded as a closed circle, a loose network of peers at different institutions might not. The same goes for your teaching scenarios. A doctoral colloquium or a seminar of twenty people can be regarded as a closed circle, a lecture however belongs to the public realm regardless whether on the last date before Christmas only 15 people show up or only those students are allowed in the lecture who have passed their first exams.

2.4 Right to Archive?

Libraries may and should archive. A single scientist however usually has very limited rights to do so – even within fair use. This means that you might be allowed to use a certain compilation that includes other people’s work in your teaching scenarios, you might be allowed to store it on a server for your

students to download with a password, but you may not display it on your institute’s homepage for general use. Most copyright legislations might even prevent you from storing it to reuse it at other times.

Note however, if your material does not pose any copyright problems (because you have sought for permission f.e. or have used Open Access material) you can make full use of digital supply, distribution, access and archiving.

2.5 Copies for Educational Use

Education is almost generally a realm of fair use, usually with the most limited possibility for copyright owners to prevent the use of their work. Still, under most national legislations you would only be allowed to use parts of a work or just a very small number of copies. German copyright however treats academic education as outside this special protection. Only in official exams like the diploma exams those “educational use” regulations apply. Make sure whether your national copyright legislation includes academic education within fair use. Otherwise the fair use agreements for scientific use should be applied.

3. OUTSIDE THE LIMITS OF FAIR USE?

a) *Look for other possible exceptions to the rights of copyright owners*

You might need legal advice to find such alternatives but there are possibilities.

b) *Obtain Permission to Use the Copyrighted Work*

This is always the safest road to travel. Make sure that you state the planned use correctly (like print runs, audiences, amount of material to be cited). If no permission had been asked in the first place and conflict arises it might still be argued it happened out of ignorance – but in worst-case-scenarios ignorance does not protect against punishment. To seek permission on false data however is definitely a form of deception and therefore should be avoided.

c) *Look for alternatives*

- Replace the materials with alternative works.
- Alter your planned use of the copyrighted works.
- Conduct a risk-benefit analysis (benefits might outgrow the risks and there is a German saying “wo kein Kläger, da keine Klage”; *But:* large publishing houses might fight copyright infringements as a principle even if the actual harm is minor. They usually have good lawyers and copyright infringements can become a lot more costly than simply having to take down material from a server.

Or ...

- Use Open Access Material
- Look for licensed material such as under a Creative Commons License

<http://creativecommons.org/>



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Or...

Look for work that has been published Open Access, especially if it has been published under a license such as Creative Commons License. For these materials many of the rights have been transferred to the public domain as more and more authors recognize that widespread and impact of their work is a lot more important for them than financial revenue. Make free use of those Open Access materials and consider contributing your own work in an Open Access fashion by licensing it as such.

4. ACKNOWLEDGEMENT

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