Copyright/Ownership of Creative Works

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The Minnesota State Colleges and Universities system is an Equal Opportunity employer and educator.

What is Intellectual Property?

- "Intellectual property refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce."
  - "What is Intellectual Property?" World Intellectual Property Organization (WIPO), http://www.wipo.int/about-ip/en
- Four Types
  - Patents (inventions, discoveries, plants)
  - Trademarks (distinct names, logos, symbols, non-functional packaging)
  - Copyrights (novels, paintings, photographs, movies, songs, presentations, etc.)
  - Trade Secrets (non-public formulas, processes, etc.)

Copyright

- Most frequently encountered IP
- Copyright automatically upon creation of work
- Protects fixed expression of original ideas
  - Includes everything on the web
  - Also includes most software
    - Software piracy (more than a backup copy) is infringement
- Registration, not necessary, but desirable

What is the Basis of Copyright Law?

- U.S. Const. Art. 1 § 8 Cl. 8.
- The Copyright Act, 17 U.S.C. §§ *101 et seq.*
- The Berne Convention for the Protection of Literary and Artistic Works

What are the Rights of the Creator?

- Reproduction
- Derivative works
- First distribution
- Public performance
- Public display
- Action for infringement
- Right to assign these rights to others

Copyright Registration

- What is eligible for registration?
- 8 Categories
  - Literary, musical and dramatic works.
  - Pantomimes and choreographic works.
  - Pictorial, graphic and sculptural works.
  - Sound recordings.
  - Motion pictures and other audiovisual works.
  - Computer programs.
  - Compilations of works and derivative works.
  - Architectural works.

Copyright Registration

- Why register, if automatic?
- Required prior to commercialization
- Use © Notice even if not registered:
  - A copyright notice shall be placed on college, university, and system owned materials that will be made available to the public. The date in the notice shall be the year in which the materials are first published.
- Length of term? It depends
  - For individual author: life of author + 70 years.
  - For corporate author: 95 years from publication or 120 years from creation, whichever expires first
  - May be different for older works

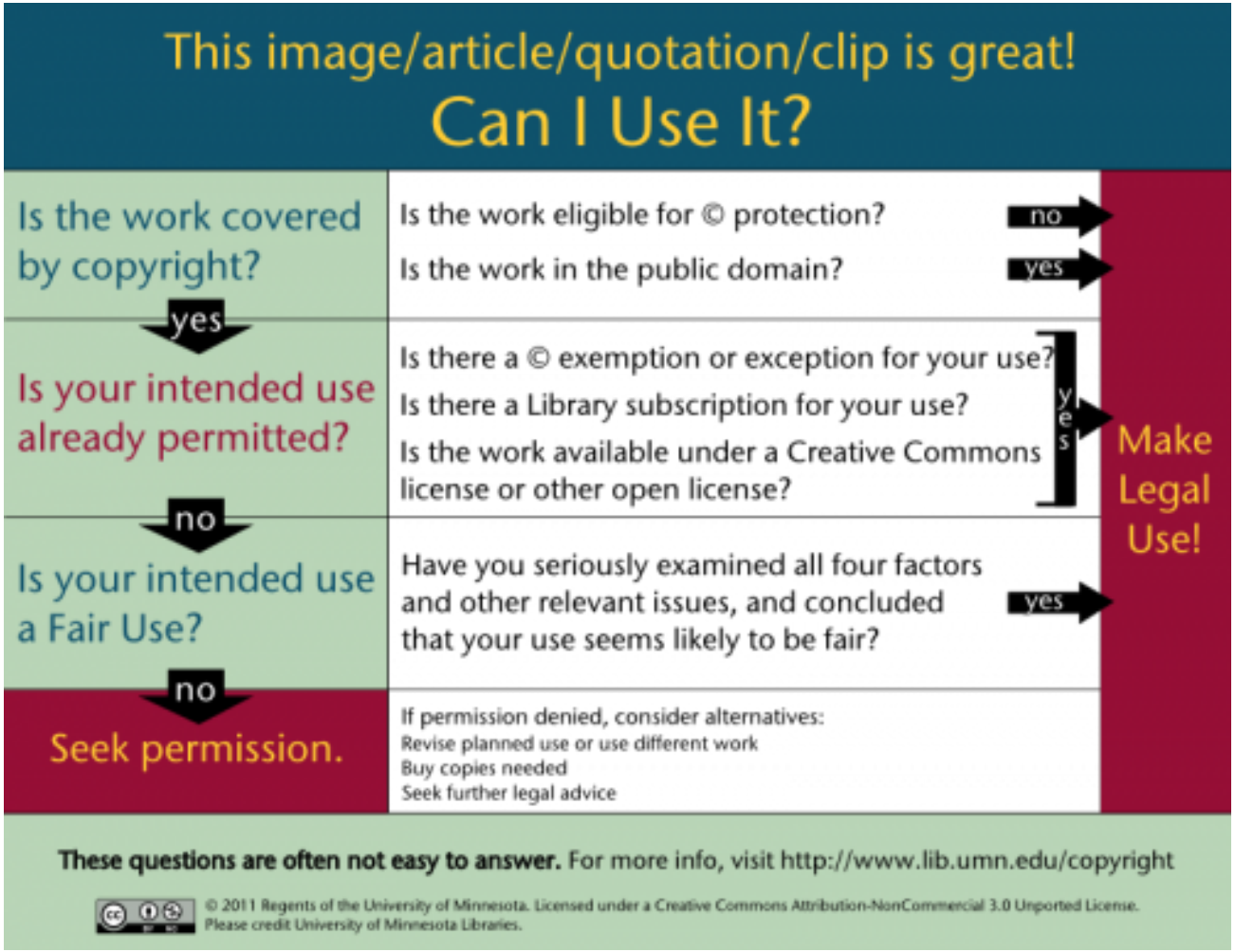
What's the Harm?

- Severe legal penalties for violating any of the exclusive rights of a copyright holder.
  - Actual dollar amount of damages and profits.
  - Statutory damages ranging from $200 to $150,000 for each work infringed.
  - Infringer pays for all attorneys fees and court costs.
  - The Court can issue an injunction to stop the infringing acts.
  - The Court can impound the illegal works.
  - The infringer can go to jail.
- Possible institutional liability for 'vicarious' infringement or 'contributory' infringement.

Lesson Learned: Using Copyrighted Material on the Web

- Example: Stock Photos used without a license
  - PicScout / TinEye and other search engines scour to the web to locate infringing images for various stock photo companies (Masterfile, Corbis, Getty, etc.).
  - No longer do we receive a simple cease & desist or DMCA takedown notice.
  - We have seen demand letters or “extortion” invoices – demanding between $800 and $3400 PER image, depending on size, location, number of uses, and time on the website.
  - Contact OGC if you get this type of demand.

The Big Question: Can I Use It?



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Public Domain

- Is not subject to copyright
  - Works of the federal government
  - Not a creative work or not fixed in a tangible medium
- Copyright has expired
  - Anything published prior to 1923
  - For works published today, Copyright extends to 70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first.
  - Incredibly complex, see: http://copyright.cornell.edu/resources/publicdomain.cfm
- Copyright has been disclaimed
  - Wikipedia

Consider Fair Use

- Portions of a copyrighted work may be used without the author's permission in certain circumstances. This is referred to as "fair use." May include use for criticism, comment, news reporting, teaching, scholarships or research.
- If something is "fair use" it does not constitute an infringement of copyright.

Fair Use Checklist

- Four factors to be used in determining whether a particular use is a fair use:
  - [1] The purpose and character of the use, including whether such use is of a commercial nature;
  - [2] The nature of the copyrighted work;
  - [3] The amount and substantiality of the portion used in relation to the copyrighted work as a whole;
  - [4] The effect of the use upon the potential market for, or value of, the copyrighted work.
- http://www.copyright.mnscu.edu/forms/Fair_Use_Checklist.pdf
- Document your analysis.

Exemption For Teachers

- Single Copying for Teachers
  - A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:
    - A chapter from a book
    - An article from a periodical or newspaper
    - A short story, short essay or short poem, whether or not from a collective work
    - A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper

The Classroom Use Exemption

- Multiple Copies for Classroom Use
  - Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the faculty member giving the course for classroom use or discussion provided that:
    - The copying meets the tests of brevity and spontaneity;
    - The copying meets the cumulative effect test; and
    - Each copy includes a notice of copyright.

The Classroom Use Exception cont'd

- Brevity. When copying materials from books and periodicals for classroom use, *brevity* means the following with regard to these selected works:
  - Poetry: A complete poem if less than 250 words and if printed on not more than two pages, or an excerpt of not more than 250 words for a longer poem.
  - Prose: Either a complete article, story or essay of less than 2,500 words, or an excerpt of not more than 2,500 words from any longer prose work.
  - Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or periodical issue.

The Classroom Use Exception cont'd

- Spontaneity. When copying materials from books and periodicals for classroom use, *spontaneity* is indicated by the following with regard to the selected works:
  - The copying is at the instance and inspiration of the individual teacher; and
  - The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

The Classroom Use Exception cont'd

- Cumulative Effect. When copying materials from books and periodicals for classroom use, *cumulative effect* is indicated by the following with regard to the selected works:
  - The copying of the material is for only one course per semester taught by the faculty member.
  - Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
  - There shall not be more than nine instances of such multiple copying for one course during one class term.
  - The limitations in (b) and (c) above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.

Technology, Educational and Copyright Harmonization (TEACH) Act

- Transmission of Copyrighted Works (Distance Education)
  - The amount and type of work that may be broadcast or otherwise transmitted in a distance education setting are dictated by a recent revision (2002) to copyright law called the TEACH Act.
- Pursuant to the TEACH Act, the following types of work may be broadcast or otherwise transmitted:
  - the performance of a non-dramatic literary work;
  - the performance of a non-dramatic musical work;
  - reasonable and limited portions of other works (such as films, videos or dramatic musical works like opera, musicals and music videos); and
  - other copyrighted works (such as still images) as long as the display of such works is in an amount comparable to that which is typically displayed in the course of a live classroom session.

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TEACH Act cont'd

- Broadcasting or otherwise transmitting the above described works is subject to the following conditions, all of which must be complied with:
  - The performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the "systematic mediated instructional activities" of the college or university.
    - *"Systematic mediated instructional activities"* refers to the activities educators would engage in during the course of actual class time instruction, as opposed to activities educators might assign as part of the students' work outside of class;
  - The performance or display is directly related and of material assistance to the teaching content of the transmission;
  - The transmission is made **solely** for students officially enrolled in the course and, to the extent technologically feasible, is limited to such students; and
  - The transmitted material is not material specifically marketed for classroom use for digital distance education; has been lawfully made or acquired; and is not the type of material typically purchased by students (such as textbooks or coursepacks) for their review outside the classroom or class session.

No Exception? Get Permission

- "The act of ensuring a proposed use of another's materials complies with copyright law." The user of the materials is responsible for clearing copyright.
- Procedure 3.27.1 Copyright Clearance
- Get copyright owner' permission, in writing (a license)
  - http://www.copyright.mnscu.edu/faq/faqs_permission.html

What is a License?

- Grants permission to use a copyrighted work
- Can grant any or all of the rights associated with copyright
- Can impose other restrictions, such as type or place or usage, or duration of the license
- Does not transfer ownership of the copyright

Creative Commons

- Some permissions (licenses) are automatically associated by the author with the creative work.

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Suspected Copyright or Trademark Infringement

- College material?
  - Call the Office of General Counsel
  - Cease & Desist Letters
- Faculty works?
  - Consult an attorney.
  - Ask them to stop.
    - Not a cease & desist
    - Polite request
  - DMCA takedown
    - For websites that host user-generated content
  - Don't wait too long!
    - 3 Year Statute of Limitations

MnSCU IP Policies

- Policy 3.26 – Intellectual Property
  - Procedure 3.26.1 Patent Inquiry Procedure
- Policy 3.27 – Copyrights
  - Procedure 3.27.1 Copyright Clearance.
  - Employees and students are responsible for clearing copyright of materials before use.
  - Copyright FAQs http://www.copyright.mnscu.edu/faq/faqs_permission.html
  - Copyright Permission Request Form & Letter

    http://www.copyright.mnscu.edu/forms/index.html

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IP Ownership

- By law, the creator is usually the owner.
- Board Policy approaches ownership differently. Policy 3.26, Part 4 sets forth basic ownership categories and default expectations:
    1. Institutional works
    2. Scholarly works
    3. Personal works
    4. Students works
- It may be impossible to identify ownership after the fact. Get agreements in place early.

Template Contracts with IP Provisions

- Professional/Technical ("PT") Contract
  - "MnSCU shall own all rights, title, and interest in all of the materials conceived of or created by the Contractor."
  - "The Contractor hereby assigns to MnSCU all rights, title and interest to the materials."
  - "The Contractor warrants that the materials produced or used … do not and will not infringe on the intellectual property rights of another."

Template Contracts with IP Provisions cont'd

- Services Contract
  - "The Contractor represents and warrants that any materials, plans, specifications, documents, software or IP of any kind do not and will not infringe up on the rights of another."
- Customized Training
  - "The _____ shall own all rights, including all IP rights, in all original materials including any curriculum materials, inventions, reports, studies, designs, drawings, … developed by the College/University and its employees individually or jointly with others under this contract."
  - This provision shall not apply to the following materials…

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Template Contracts with IP Provisions cont'd

- Inter-Agency Agreement
  - "The Requesting agency shall own all rights, title, and interest in all of the materials conceived or created by the providing agency."
  - "The Providing Agency hereby assigns to the Requesting Agency all rights, title, and interest to the materials."
- Joint Powers
  - "The State shall own all rights, including all IP rights, in all original materials created by the Contractor."
  - This provision shall not apply to the following materials…
- Grant Contract
  - The State shall own all rights, title, and interest in the materials created by the Grantee.

Guest Lecturer Agreement Options (new!)

- Guest Lecturer
  - ***[Use this language when MnSCU is commissioning the presentation and wishes to retain all intellectual property created by the Presenter. If in doubt, use this language.]*** PRESENTER assigns to MnSCU all rights, title and interest in any intellectual property materials created by the PRESENTER that arise out of the performance of this agreement, including any materials disseminated as part of the presentation. PRESENTER represents and warrants that any such intellectual property does not infringe upon any intellectual property rights of another.

OR

  - ***[Use this language when the Presenter wishes to retain all of the intellectual property associated with their presentation. Most commonly used when the presentation is not commissioned by MnSCU.]*** PRESENTER retains all rights, title and interest in any intellectual property materials created by the PRESENTER that arise out of the performance of this agreement, including any materials disseminated as part of the presentation (the "Materials"). PRESENTER represents and warrants that any such intellectual property does not infringe upon any intellectual property rights of another. PRESENTER grants to MnSCU limited permission to use the Materials for internal non-profit educational purposes consistent with this agreement. MnSCU shall not copy, display, or distribute the Materials without the prior written consent of CONTRACTOR.

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Image Release for Guest Lecturer Agreement (new!)

- PRESENTER hereby authorizes MnSCU and its agents to record the Presentation on video tape, audio tape, film, photograph, or any other medium, and grants MnSCU an irrevocable, royalty-free, non-exclusive license to use, reproduce, modify, distribute, digitize, translate, and publicly exhibit such recordings, in whole or in part, *[without restrictions or limitation for any purpose which MnSCU deems appropriate, including on the internet] OR [for MnSCU's non-profit, educational purposes].* PRESENTER further consents to the use of his/her name, likeness, voice, and biographical material in connection with such recordings.
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P/T and Guest Lecturer Contract

Other Issues that May Arise

- The contractor will use a combination of existing materials and create new materials under the contract
  - Must carefully define what “materials” are new and what existed before
  - Will we need a license for the pre-existing IP?

Contact Information
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Office of General Counsel
www.ogc.mnscu.edu

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