



Another thread about ice-bound ships offers a similar digression at the node "Winter Chronicle":

All these ships and frozen explorers, they've been under the ice for centuries now. Our failures are well preserved; more carefully held than victory or success. When we remember, it is the failure we remember, for the failure contains its own ending. It wraps up nicely, all the stray ends tied together with the tightness of finality.

Yet we refuse to accept failure, and this refusal is what keeps us going. It's also what keeps us reading and perhaps lets us take comfort in a hypertext's lack of ending. It's why we allow the loose ends to dangle from our tightly woven tapestry as we add more and more strands to it.

There may be no ending, but as with many hypertexts, there are certain temporal hierarchies hardwired into *Notes Toward Absolute Zero*. The most telling of these fosters a gradual accretion of significance to the ubiquitous postage stamps. When the philatelic display greets us at the beginning, it seems no more than just an organiza-

tional device. Then somewhere in the middle of the reading we are likely to encounter two episodes that bring the stamps into the narrative's thematic warp and woof: When we learn of Winter's obsession with images, the philatelic analogizing of story elements becomes a reflection of his character. When Jericho claims the belongings of her deceased uncle, the stamps emerge as the shells of personal history. She finds that little remains apart from a suitcase containing a handful of empty stamped envelopes, the letters gone. Finally, in an episode buried deep in the hypertext (and therefore likely to appear only late in the reading), the stamps come to embody the failure of all artifacts-the erosion of original meaning as things pass from hand to hand. In this sequence, called "Conclusion," Magel's suitcase comes into Winter's possession by chance, and he takes an interest in the stamps, unaware that they are his only tangible memento of Jericho. The husk of his love affair. And to us a reminder that all of our tactics against the onslaught of time are ultimately futile. ♦

## Workshop and Analysis: Access to Intellectual Property and Its Fair Use for Research and Teaching: Copyright in the Digital Age

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As artists and scholars we tend to think of the Law as something that plays but a minor role in our daily activities. It is a silent oil that greases the wheels of our commercial transactions and maintains civil order. Of all the many bodies of law, copyright law seems the most familiar, safe, and predictable. We are apt to see it as an old trusted friend who will guard our interests in protecting our own work from misappropriation while permitting

us reasonable access to the work of others, so that we may all be further enriched. Unfortunately, we have grown far too complacent and this delicate balance of interests on which we all depend has come under steady assault from powerful interest that would turn the Law against us.

On October 22, 1998, The University Libraries of The State University of

New York at Albany presented a full day of workshops to address such concerns. The program, entitled *"Access to Intellectual Property and Its Fair Use for Research and Teaching: Copyright in the Digital Age"* was developed and run by Kenneth Crews, an Associate Professor at the *Indiana School of Law* and Director of the *Copyright Management Center at Indiana University -Purdue University, Indianapolis*. Professor Crews is a nationally recognized expert in copyright law and related issues whose primary research focus centers on applications of copyright law in higher education. He has recently written *Copyright, Fair Use, and the Challenge for Universities: Promoting the Progress of Higher Education* and travels widely to lecture on these issues.

### Program Overview

We began the day by looking at the scope of copyright protection which is implicated in decisions about photocopying, web site and multimedia creation, distance learning initiatives, and the provision of traditional library services. The balance of the morning focused on Fair Use. Then in the first part of the afternoon we focused on coursepacks and electronic reserves. Finally, we explored issues related to web page development and dissemination, including the new copyright law.

### Copyright Basics

As you may know, the copyright law is a Federal Statute set forth in Title 17 of the United States Code. It serves to provide a default framework to be applied in the absence of any other agreements between the concerned parties. Under section 102 of the Copyright Act, three requirements are set forth for a work to qualify for protection. First, it must be a work of "original authorship", second it must be "fixed in [a] tangible medium of expression from which [it] can be per-

ceived, reproduced, or otherwise communicated", and third, the protection only applies to the form of expression in the work but not "to any idea, procedure, process, system, method of operation, concept, principle or discovery" contained within it.<sup>1</sup>

Copyright attaches automatically upon the creation of a new work and vests in the author the exclusive right to exhibit a work, to make and distribute copies of that work, and to produce new derivative works based upon it.<sup>2</sup> It is no longer necessary to register a work or to affix a copyright notice to it in order to benefit from this implicit copyright. However the act of formally registering your work does entitle you to apply for what we call *statutory damages* by which you would receive a large monetary award fixed in the law for each instance of copyright violation that you could prove in a law suite. Such awards are likely to dramatically outweigh any losses you would otherwise be entitled to recover.

Under the Berne Convention—an international treaty drafted in 1971—and Section 106A of the Copyright Act, the law is also coming to recognize *moral rights* to attribution and integrity, that might enable you to "claim authorship" and "object to certain modifications and other derogatory actions".

### Duration and Ownership

New copyrights last for the life of the author plus 70 years. The terms on older copyrights, for works created before 1978 are somewhat less clear and depends on a number of factors. Moreover, legislation is periodically introduced and adopted to extend them to protect such financial interests as the Disney company and the Gershwin estate. Indeed the latest round of legislation may have the perverse effect of retroactively removing

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1. This is not to say that other types of intellectual property protection might not apply to such ideas. If you are interested in such alternatives as software patents, trade secrets, and the like, I would highly recommend that you consult the most recent edition of Raymond T. Nimmer's *The Law of Computer Technology*.

2. Completely rewriting a work in one's own words would create a derivative work that would still run afoul of the original author's copyright. Professor Crews also stressed that changing the language of even a small portion of a work would not protect one from charges of plagiarism.

## U.S. Copyright Office

### Copyright Statutes

**Copyright Law of the United States:** <http://lcweb.loc.gov/copyright/title17/>  
Full Text of Title 17

**Copyright Technical Amendments Act:** <http://thomas.loc.gov/cgi-bin/query/z?cl05:h.r.672.enr>:

**No Electronic Theft Act:** [http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HR02265:\[TOM:/bss/d105query.html\]](http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HR02265:[TOM:/bss/d105query.html])

**Copyright Term Extension and Music Licensing:** <http://lcweb.loc.gov/copyright/legislation/s505.pdf>  
Enacted 10/27/98

**Digital Millennium Copyright Act:** <http://lcweb.loc.gov/copyright/legislation/hr2281.pdf>  
Enacted 10/28/98

**Copyright Office:** <http://lcweb.loc.gov/copyright/>  
Homepage

**International Copyright:** <http://lcweb.loc.gov/copyright/fls/fl100.htm>

**WIPO:** <http://lcweb.loc.gov/copyright/wipo/>  
World Intellectual Property Organization

**Copyright Basics:** <http://lcweb.loc.gov/copyright/circs/circ1.html>

**Registration:** <http://lcweb.loc.gov/copyright/reg.html>

**Copyright Office FAQ:** <http://lcweb.loc.gov/copyright/faq.html>

## Copyright Management Center

A few of the many papers by Kenneth D. Crews

**Copyright and Distance Education:** [http://www.ihets.org/distance\\_ed/ipse/Edhandbook/copyrt.html](http://www.ihets.org/distance_ed/ipse/Edhandbook/copyrt.html)  
A Part of Indiana Higher Education Telecommunications System's Indiana Partnership for State Education's Faculty Handbook

**Copyright Law and the Doctoral Dissertation:** <http://www.iupui.edu/it/copyinfo/umi1992.html>  
Guidelines to Your Legal Rights and Responsibilities

**Copyright Law & Graduate Research:** <http://www.umi.com/hp/Support/DServices/copyrghr/>  
New Media, New Rights, and Your New Dissertation

**About Kenneth Crews:** <http://www.umi.com/hp/Support/DServices/copyrghr/Author.html>

**Copyright Management Center:** <http://www.iupui.edu/it/copyinfo/>  
Homepage

**Indiana University Online Copyright Tutorial:** [http://www.iupui.edu/it/copyinfo/online\\_tutorial.html](http://www.iupui.edu/it/copyinfo/online_tutorial.html)

**IP Web Sites:** <http://www.iupui.edu/it/copyinfo/intelect.html>

**Indiana University Policy on Fair Use of Copyrighted Works for Education and Research:** <http://www.iupui.edu/it/copyinfo/fupolicy.html>

## CETUS

### CETUS Discussion Series

**CETUS Projects:** <http://www.cetus.org/index.html#projects>  
Links to the CETUS Discussion Series

#### Ownership Scenarios Listserv

An open discussion of new approaches to managing intellectual property in the academy.

**List Submissions:** [ownership-talk@calstate.edu](mailto:ownership-talk@calstate.edu)

**List Subscriptions:** [ownership-talk-request@calstate.edu](mailto:ownership-talk-request@calstate.edu)

To subscribe, send a single message with the work "subscribe" as its body.

**Fair Use of Copyrighted Works:** <http://www.cetus.org/fairindex.html>  
A Crucial Element in Educating America

**Ownership of New Works at the University:** <http://www.cetus.org/ownership.pdf>  
Unbundling of Rights and the Pursuit of Higher Learning

**The Academic Library in the Information Age:** [http://www.cetus.org/acad\\_lib.pdf](http://www.cetus.org/acad_lib.pdf)  
Changing Roles

**Information Resources and Library Services for Distance Learners:** [http://www.cetus.org/dist\\_lrn.pdf](http://www.cetus.org/dist_lrn.pdf)  
A Framework for Quality

**CETUS Home Page:** <http://www.cetus.org/>  
Consortium for Educational Technology in University Systems

#### Partners in CETUS:

**California State University System:** <http://www.calstate.edu/>  
21 campuses with 325,963 students

**City University of New York:** <http://www.cuny.edu/>  
213,000 students

**State University System of New York:** <http://www.suny.edu/>  
64 campuses with 325,963 students

**What is CETUS:** <http://www.cetus.org/cetusfct.html>  
General Background Info

## Other Sites & Resources

**Coalition for Networked Information:** [http://www.cni.org/docs/CNI\\_prog.oview.html#ip](http://www.cni.org/docs/CNI_prog.oview.html#ip)

**Copyright Clearance Center Online:** <http://www.copyright.com/>

**Scholarly Electronic Publishing Bibliography:** <http://info.lib.uh.edu/sepb/sepb.html>  
A wonderful resource.

some works from the public domain. In the case of works-for-hire, copyright runs 95 Years from Publication and 120 Years from Creation.

Copyright ownership vests with the creator of the original work, unless the work was created by an employee acting in the scope of his or her employment in which case the employer holds the copyright. Since independent contractors are not considered employees, it is important to explicitly arrange for an assignment and transfer of copyright if your institution contracts with them to produce materials. Adjunct faculty and some funded graduate students would also fall into this category and own the copyrights to their work. As a rule of thumb, students own the rights to their homework and one should seek formal permission before sharing it, placing it on the web, or reusing it in subsequent semesters. While authorities are split over the rights to the work produced by full time faculty within the scope of their employment, tradition and most institutional policies tend to favor faculty ownership.

Assignments of copyright must be signed and in writing, although any "signature" recognized in commercial transactions including digital signatures online would probably be recognized. Permission to use a copyrighted work is a license which can be withdrawn at will and need not be in writing.

### **General Limitations & Fair Use**

All this might seem to build up an almost insurmountable barrier against reusing a work without formal permissions. But as Professor Crews observed, the Copyright Act then goes on to carve out a number of exceptions to these expansive rights.

Section 208 provides for Library Copying in support of preservation and interlibrary loans. Section 109 permits owners of legal copies to resell or publicly display them. Section 110 (1) & (2) permit the performance (e.g. reading aloud) and display of copyrighted work as a part of face-to-face teaching. The distance learning provision of this section is

extremely limited and precludes the use of multimedia; fortunately, it will be reviewed within the next six months. Section 117 provides for backing up computer software and Section 121 permits format changes to make works accessible to the disabled.

While these provisions are of limited scope, the Copyright Act provides an omnibus solution to our scholarly and artistic concerns in Section 107 which provides for Fair Use of copyrighted works. Application of the Fair Use doctrine invokes a fuzzy balancing, which unlike the aforementioned provisions is far less specific and calls only for an open ended examination of four factors—**Purpose, Nature, Amount, and Effect.**

### **Evaluating Claims of Fair Use**

Fair use decisions are made by a rough almost numerical balancing of the four factors. The factors tend to be weighted equally and if three factors favor fair use, it is unlikely the fourth would tip the scale back in the other direction. If the break down is 2 to 2, one or more may be given slightly greater weight to reach a verdict.

In deciding if the **Purpose** of a copy supports a fair use claim, courts tend to favor non-profit educational uses with restricted access by established institutions, copies made for research or scholarship, and copies made for reviews, critiques, news reports, parodies, or other *transformative* uses. Indications that a copy was made for commercial gain (including for profit copying by an academic institution), without attribution in bad faith, or for entertainment weigh heavily against a finding of fair use.

Looking at the **Nature** of a work being copied, courts favor copies of published works over unpublished works, and of printed non-fiction works over multimedia fiction. Indeed parodies and formal academic uses of fiction are about the only areas where its copying has a good chance of being permitted.

Questions of **Amount** are much more straightforward as the less one copies and the less central that portion is to a work the more likely it is that it will be deemed a fair use. Using even a small portion can weight against fair use if it is found to be the "heart of the work", unless it is employed in a devastatingly negative review.

Finally, courts look to what has been called the most important factor, the **Effect** of the questioned use on the market for the original work. In cases where the user owned a lawfully acquired or purchased copy of the original, only made a small number of copies, was unable to license additional copies or purchase some equivalent product sold by the copyright holder, or simply had no discernible effect on the potential market for the work, courts are more likely to find the copying to be a fair use. If a reasonably priced copy, license, or permission could have been procured, if the copying significantly impairs the market or potential market for the work or other works derived from it, if the user makes many copies, repeatedly makes or uses such copies over a long term, or places them in a public forum like the World Wide Web, the court will be more inclined to find a copyright violation. One could however, make a potentially strong argument that some copying on the Web might actually increase the market for the original work, as in the case of excerpts and images of book jackets offered in book recommendations.

Other pseudo factors unmentioned in the statute, like "spontaneity" or "attribution", may also come into play. For example, in some cases it has been argued that a spur of the moment reproduction used in a single class should receive a more favorable treatment or that an unattributed copy was an indicia of bad faith.

### **The Bottom Line**

If you are planning to make *fair use* copies, you will want to "look like a good

guy" in the eyes of the court. Stick to small excerpts from larger works or individual articles from journals. Try to obtain advanced permission if that seems feasible and make a reasonable effort to avoid wider dissemination of the copies than is necessary for your teaching and research. Even, if your research is for commercial purposes, you may still be entitled to make copies under Section 107. Adjuncts, artists, business people, and independent scholars engaged in research and writing will have to exercise more caution than full faculty at incorporated nonprofit entities, as the law does not offer them the same protection that it extends to traditional academics from the heavy statutory damages that accompany a good faith mistaken judgment.

The kind of analysis outlined above is no different when applied to coursepacks (in which each included item is judged on its own merits), electronic reserves<sup>3</sup> (which ought not be employed in place of primary textbooks or consumable workbooks), and web sites (which unfortunately should be restricted in some fashion if they make extensive use of copied material).

In any case, Professor Crews assured everyone in the workshop that no matter what decision they arrive at in any given case, an impressive body of opinion could be summoned in support of the other side. Even the most intuitively obvious examples of fair use will be seen as a blatant violation by some experts. He argues that we should simply think about these issues and take a position wherever our own moral compass leads us and then live with the consequences.

### **Analysis and Emerging Developments**

In law school, I was taught that part of being an attorney is to take risks and avoid the temptation to become so cautious in avoiding any adverse rulings that one's clients' rights might be gradually whittled away by the other side. As academics, we must avoid the very same timidity which is already seriously threat-

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3. Do not forget that one can always place an original copy on physical reserve without raising any copyright issues at all.

ening to wipe away the long and noble tradition of fair use to copyrighted materials.

Professor Crews ended the day with a very disturbing account of **the Digital Millennium Copyright Act** and events leading to its signing by the President. While I have not yet read the new statute, according to Professor Crews its intent is to drive a wedge between university administrators and faculty by offering institutions protection from copyright violation claims "as service providers" in return for their implementing truly Byzantine measures to police copyrights on behalf of the publishing industry while leaving individuals fully liable for any violations. Universities would apparently have to designate officials to receive complaints and terminate access privileges for anyone repeatedly accused of infringement, leading to a back and forth game of web site take downs and restorations. Moreover, to qualify for this safe harbor, administrators would have to promulgate and implement industry friendly copyright protection policies.

If the new law is as dire in its consequences as Professor Crews' initial assessment suggests, we will have to take measures to counter it.

### **The Big Picture**

This is just the latest blow to the traditional balance of commercial and academic interests in which our institutions have grown complacent. Academic publishing is controlled by a small number of publishers, many overseas who grow fat by reselling us research that we gave away for free in the hopes of achieving tenure. The cost of journals has grown without end, driving up tuition costs and eating up such a large slice of our library budgets that we are faced with virtual death of the scholarly monograph.

Even worse, to benefit from the added convenience of the latest wave of licensed electronic resources our librarians have been all too eager to sign one sided licenses that prohibit access to the

materials to make fair use copies. Whereas in the past anyone could consult bound volumes, the new licenses are restricted ever more narrowly in each renewal cycle. And because we have only licensed access and own no permanent copies, should we discontinue a subscription, we would no longer have any access to the information from that source. In short, we keep repurchasing the same materials while building up no equity in them.

### **A SIGWEB Solution**

Clearly, this is a recipe for long term disaster. The only way we can gain bargaining power vis-à-vis the publishing industry is to develop a credible threat of withholding our research from their journals. Only by creating alternative forums and laying out guidelines for tenure review based upon one's participation in them, can we join forces with our administrators and send our librarians into negotiations with the power to force the publishing houses to grant us reasonable terms, or drive them out of business.

Our community is small enough and focused enough that we can lead the way with our own digital library initiatives. If we can show the other SIGs that it is possible to wrest control of our literature from remote interests and create an economically viable self-publishing & review mechanism leading to ACM-wide guidelines for such an approach, our efforts can serve as a beacon to guide higher education out of this dark period.

We don't have the economic clout to right the balance in the legislative arena. Like it or not, the law is being reworked to strengthen the hand of the copyright holder. If we stop sacrificing our copyrights on the altar of print publication, we can turn this to our advantage. We can build the tools (see sidebar). We don't need an industrial complex to ship atoms around the world, when we can share bits with each other through far more supple and responsive hypermedia than the traditional journal. **Now is the time.** ♦