Copyright, Fair Use, and Mandala

4/17/18

Overview

- In the U.S., content including books, journal articles, photos, audio and video can be (and for most things published in the last 50 yours or so, are) protected by copyright restrictions. Sharing these materials on Mandala can trigger copyright liability, so it is important to understand how the law works.
- This document will help to orient you about:
    - The nature of copyright
    - The right of "fair use" as applied to non-profit research, teaching, and scholarship
    - Materials in the "public domain"
    - Creative Commons and other Free-to-use Content Online
    - How to use Mandala in light of copyright law
- This page does not provide legal advice

Copyright: Subject Matter, Rights, and Limitations

- Copyright regulates certain uses of works of creative expression, including literary works, audio-visual works, images, and sound recordings.
- The law gives a work's copyright-holder the exclusive right to do or to authorize the following activities:
    - Reproduction
    - Distribution
    - Public performance and display
    - Adaptation into derivative works (including translations, sequels, annotated editions, adaptations from one form to another)
- Posting content to a web platform like Mandala involves one or more of these rights, so it is important to consider copyright as you add content to your Mandala site.
- These exclusive rights last for "limited times"—after a work's copyright term expires, it enters the public domain, and anyone is free to use the work in any way they like.
- During the term of copyright, a work may be used without permission if the use is covered by one of the several limitations and exceptions to copyright, the most important of which is fair use.
- You are free to use works where you own the copyright (photos and videos taken by you, textual material written by you where the copyright hasn't been transferred to a publisher).
- More information about copyright generally and as it applies to scholarly work and teaching can be found at the UVA Library "Copyright Essentials for Scholars" page: http://copyright.library.virginia.edu/copyright-resources/essentials/.

Fair Use Generally

- U.S. copyright law encourages "fair use" of copyrighted materials without payment or permission in certain circumstances.
    - **Fair use** is a flexible doctrine based on the weighing of **four factors** -
        1. the **purpose** of the use

2. the **nature** of the work used
3. the **amount** used
4. the **effect** of the use on the market for the work

- Non-profit research, teaching, and scholarship are among the kinds of uses favored by fair use, but not every such use is fair.
- Rather, each use has to be evaluated on its own merits to determine whether, in light of the four factors, permitting unlicensed use serves the ultimate purpose of copyright: the promotion of progress in culture and science.
- **Key Takeaway:** In recent cases, courts have made clear that use for a new, "transformative" purpose will be strongly favored under each of the four factors mentioned above.
- In the words of Judge Pierre N. Leval, to be transformative:
  - "The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely "supersede the objects"' of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings— this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society." - Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1111 (1990).
  - **Transformative uses are strongly favored, as long as the amount used is appropriate to the new purpose.**
  - Courts typically find that **a transformative use is not a threat to the original work's market because the use is not "substitutional"**—the user is not presenting the work as a substitute for the original work, but rather is using the work for her own purpose.
- Given this turn in the law, **old fair use guidelines that emphasized counting words or pre-determined percentages of a given work are no longer useful.** Indeed, courts have specifically rejected the 1976 Classroom Guidelines and similar documents as undue limits on educational use.

- Fair use is an important right that serves the public interest in spurring creative and productive new uses of existing works. The Supreme Court has said that fair use is a "First Amendment safety valve" because it ensures copyright law does not stifle important expressive and educational activity. Fair use is not 'excused infringement' or 'tolerated use'; it is socially beneficial and encouraged by the law.
- In recent years, many practice communities have come together to describe the core, recurring contexts where they believe fair use applies to their activities. Where they apply, these best practices are a great source of guidance about what uses are considered fair.
  - Links to the Best Practices documents most likely to be useful to Mandala users are included below, under "Mandala and Copyright."

Public Domain Materials

- Generally, work **published** more than 95 years ago is very likely to be in the "public domain" and can be reproduced and disseminated in any form.
  - Note that since copyright term was last extended, in 1998, the dividing line for published materials has been 1923, with works published prior to that year falling in the public domain, and works published during or after 1923 being protected by copyright. As of January 1, 2019, however, this line will begin to move forward through time. In 2019, works first published in 1923 will enter the public domain. In 2020, works first published in 1924 will do so. And so on. Be careful if you consult copyright guidance that is not updated in the next year or so, as it may erroneously continue to include 1923 as a meaningful year.
  - Works published between 1923 and 1964 had to have their copyrights renewed in order to enjoy the full 95-year term of protection. Many such works were not renewed, and entered the public domain long ago, but researching renewal can be complicated. The University of Pennsylvania's Online Books site has useful information about researching renewals: http://onlinebooks.library.upenn.edu/renewals.html.

- **Unpublished** works have a complex copyright term that is typically indexed to the life of the author—for most of these works, the copyright term is the life of the author plus 70 years.
- A thorough chart hosted by Cornell University can help you assess whether a given work is in the public domain: https://copyright.cornell.edu/publicdomain.

Creative Commons and other Free-to-use Content Online

- Many authors and publishers make their content available for free online, but the fact that something is available to *access* for free online (e.g., as a result in a Google Image search) doesn't mean that that work is free of copyright restrictions on *reuse*.
- However, some creators *do* intend their work to be not only free to access, but freely *reusable* by others. One way to indicate this is by using a Creative Commons license, such as "CC-BY."
- Creative Commons licenses are a suite of standardized terms of reuse that authors and other rightsholders can use to signal to the public that they encourage reuse of their work, and to impose various *limitations* on free reuse, such as barring commercial reuse, or requiring attribution.
- More information about Creative Commons licenses (and ways to find CC-licensed content) is available from the Creative Commons website: http://www.creativecommons.org.
- Free images are of particular interest to web publishers, and Wikipedia maintains an extensive list of sources for free images: https://meta.wikimedia.org/wiki/Free_image_resources and for public domain images: https://en.wikipedia.org/wiki/Wikipedia:Public_domain_image_resources.
- In general, pay close attention to the terms of use or other language about limitations on reuse whenever you look for media to share on Mandala. Some sites may permit free use for "personal" websites, for example, but would consider Mandala to be outside the scope of that category.

Copyright Request and Release Forms

The following templates may be useful if you need to seek copyright permission or if your project requires a release form.

- Copyright Request
- Release Form (Oral Histories, Interviews, etc.)

Mandala and Copyright

- As a Mandala user, you have promised to use the platform in ways consistent with the law, including copyright law. You are responsible for your uses of the platform. Mandala will comply with lawful take-down requests made under the Digital Millennium Copyright Act. More information about the DMCA at UVA is available here: https://security.virginia.edu/dmca.
- One way that Mandala allows you to work within the law is by tailoring your use to restrict access to each asset or collection. In Mandala, you may choose among the following restriction classifications:
    - Public
    - Private
    - Group
    - Class
    - UVA Only

- When sharing materials for course use with Mandala, consider Principle One from the Association of Research Libraries' *Code of Best Practices in Fair Use for Academic and Research Libraries*. That Principle states that "It is fair use to make appropriately tailored course-related content available to enrolled students via digital networks," subject to the following limitations:
    - **Closer scrutiny** should be applied to uses of content **created and marketed primarily for use in courses such as the one at issue** (e.g., a textbook, workbook, or anthology designed for the course). Use of more than a brief excerpt from such works on digital networks is unlikely to be transformative and therefore unlikely to be a fair use.
    - The availability of materials should be **coextensive with the duration of the course** or other time-limited use (e.g., a research project) for which they have been made available at an instructor's direction.
    - Only **eligible students and other qualified persons** (e.g., professors' graduate assistants) should have access to materials.
    - Materials should be made available **only when, and only to the extent that, there is a clear, articulable nexus** between the instructor's pedagogical purpose and the kind and amount of content involved.
    - When appropriate, the number of students with **simultaneous access** to online materials should be limited.
    - Students should also be given **information about their rights and responsibilities** regarding their own use of course materials. (For example, instructors could include in their Mandala pages a notice to students that materials are provided for use in connection with the course, and that other uses may require students to seek permission from the copyright holder.)
    - Full **attribution**, in a form satisfactory to scholars in the field, should be provided for each work included or excerpted.
    - It is a good practice to keep a **record of your rationale** for using a given excerpt—what is your pedagogical purpose, and how is the amount you use appropriate to that purpose?
    - Review posted materials and **make updates as appropriate**; remove copyrighted material that is no longer useful to the course from the course site.
- When publishing materials to the public web using Mandala, consult Best Practices documents that address uses in public, such as:
    - Open CourseWare: http://cmsimpact.org/code/code-best-practices-fair-use-opencourseware/
    - The Visual Arts: http://cmsimpact.org/code/fair-use-for-the-visual-arts/
    - Visual Resources (similar to Visual Arts, but with more emphasis on scholarship and teaching): http://cmsimpact.org/code/statement-on-the-fair-use-of-images-for-teaching-research-and-study/
    - Cinema and Media Studies Teaching: http://cmsimpact.org/code/society-cinema-media-studies-statement-best-practices-fair-use-teaching-film-media-educators/
    - Cinema and Media Studies Publishing: http://cmsimpact.org/code/society-cinema-media-studies-statement-fair-use-best-practices-media-studies-publishing/
- The Center for Media and Social Impact has collected all the best practices documents here: http://cmsimpact.org/codes-of-best-practices/.

Disclaimer

- This information orients you and better prepares you for a consultation with your attorney and/or the University's General Counsel.
- This document is not and does not substitute for legal advice.
- This document focuses on U.S. copyright law and practice.
- International copyright varies widely from U.S. law and practice.
- Copyright law and it's interpretation are continually changing, particularly in the web environment.

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