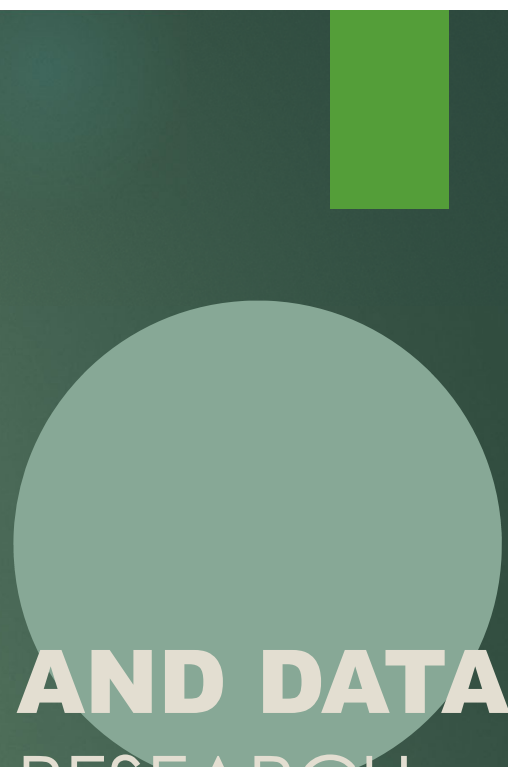


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COPYRIGHT AND DATA: THE BASICS FOR RESEARCH

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Learning Objectives

2

Copyright laws protect the authors or creators of original works of authorship through the legal concept of copyright. Copyright can be a complex concept with many nuances. However, the primary product of research is more often a copyrighted publication than a patented invention. Research institutions and individual researchers need to understand copyright both as the creators of works and as users of works of others covered by copyright protection.

Learning Objectives:

- ▶ Participants will be able to identify the intellectual property that can be protected by copyright and the protections provided.
- ▶ Participants will be able to manage the origination of copyright protections and transfers, licensing of works of others and navigate “fair use” issues in instructional and research situations.

Copyright Protects Research and Researchers

3

Copyright laws protect the authors or creators of original works of authorship through the legal concept of **copyright**. Copyright can be a complex concept with many nuances. However the primary product of research is more often a copyrighted publication than a patented invention. Research institutions and individual researchers need to understand copyright both as the creators of works and as users of works of others covered by copyright protection.

Copyright's Role in Protecting Intellectual Property

- ▶ Defines ownership and protects owners of “works” of intellectual property distinct from patent law
- ▶ Delineates “authorship” requirements (e.g., originality and fixed form) and helps allocate “credit” among authors
- ▶ Provides methodology and legal underpinning for protection and transferability of intellectual property distinct from the patent system
- ▶ Allows for the production of “derivative” works that expand the usefulness and distribution of IP by others

What Is Copyright Protection?

5

- ▶ A copyright protects
 - ▶ Literary, musical, dramatic, choreographic, pictorial or graphic, audiovisual, or architectural work or a sound recording (17 U.S.C. §102)
 - ▶ Giving the owner a set of rights to do and authorize others to do (17 U.S.C. §106)
 - ▶ Which meets the requirements of “tangible fixation” and “originality”
- ▶ If you want to jump beyond basics, see Barbara J. Evans, ***Much Ado About Data Ownership***, 25 HARV. J.L. & TECH. 69 , 90 (2011)

Who Gets Ownership

- ▶ The copyright in a work vests originally in the author(s) of the work
- ▶ The author(s) may transfer the copyright to any other party if s/he(they) choose(s) to do so (17 U.S.C. §201)
- ▶ Subject to certain limitations, the owner of a copyright has the sole right to authorize:
 - ▶ Reproduction of the work,
 - ▶ Creation of a work derived from the work,
 - ▶ Distribution of copies of the work, or
 - ▶ Public performance or display of the work (17 U.S.C. §106)

Who Gets Ownership – Sometimes Not So Simple

- ▶ Scholarly works owned by faculty members can be implemented in software
- ▶ Works-made-for-hire can incorporate pre-existing materials that an individual author created earlier or outside the employment relationship
- ▶ Other issues arise because of collaboration. Complications can arise in the following circumstances:
 - ▶ Inter-institutional collaborators or other non-affiliated collaborators
 - ▶ Student contributions
 - ▶ Contract labor contributions
 - ▶ Non-faculty university employee contributions

Joint Copyright Holders

- ▶ In order to be joint authors of a work, each person must:
 - ▶ Contribute copyrightable expression, and
 - ▶ Intend at the time the work is created that all contributors will be joint owners of the whole finished work
- ▶ Effort does not need to be equal!
- ▶ Even if effort is unequal, all joint “authors” are co-equal in copyright rights, except no exclusive rights and no single joint holder can grant another exclusive rights
- ▶ Again, authorship (attribution) rules and copyright ownership rules ARE NOT THE SAME

How Long Does Protection Last? United States

- ▶ For works **published** after 1977:
 - ▶ The life of the author plus 70 years
 - ▶ If it is a corporate author, then the protection is for the shorter of 95 years from publication or 120 years from creation
- ▶ However, if the work is a work for hire (that is, the work is done in the course of employment or has been specifically commissioned) or is published anonymously or under a pseudonym, the copyright lasts between 95 and 120 years, depending upon the date the work is published
 - ▶ All works published in the United States before 1923 are in the public domain
 - ▶ Works published after 1922, but before 1978 are protected for 95 years from the date of publication

(continued)

How Long Does Protection Last? United States (2)

- ▶ However, if the work is a work for hire (*continued*):
 - ▶ If the work was created, but not published, before 1978, the copyright lasts for the life of the author plus 70 years
 - ▶ However, even if the author died over 70 years ago, the copyright in an unpublished work lasts until December 31, 2002
 - ▶ And if such a work is published before December 31, 2002, the copyright will last until December 31, 2047
- ▶ *SEE*: Copyright Term and the Public Domain in the United States
 - ▶ Cornell University Library [Copyright Information Center](https://copyright.cornell.edu/publicdomain), <https://copyright.cornell.edu/publicdomain>
 - ▶ copyright.gov

How Long Does Protection Last?

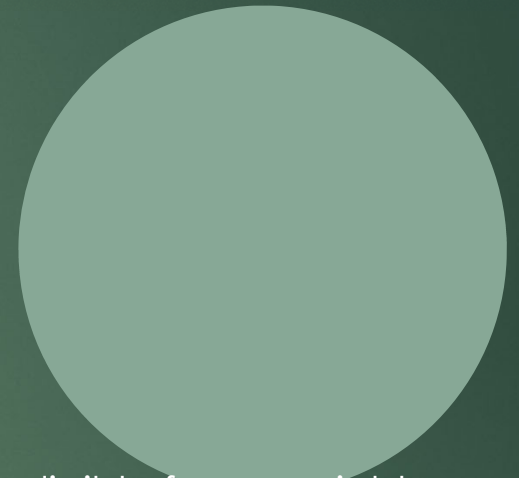
Canada

11

- ▶ Generally, copyright lasts for the life of the author, the remainder of the calendar year in which the author dies, and for 50 years following the end of that calendar year
 - ▶ Therefore, protection will expire on December 31 of the 50th year after the author dies
- ▶ Corporate duration rules are different from U.S.
- ▶ Initial individual “author” retains at least some “moral rights”

Things That Cannot Be Copyrighted¹²

- ▶ Facts cannot be copyrighted
 - ▶ Basic (and even advanced) math
 - ▶ Recipes
 - ▶ Alphabets (not FONTS)
 - ▶ Grammatical tropes (e.g., "I before e, except after c")
- ▶ Ideas cannot be copyrighted
 - ▶ Only creative media with sufficient originality in a **fixed form** is eligible for copyright



Moral Rights

- ▶ Rights in copyrighted works generally recognized in civil law jurisdictions and, to a lesser extent, in some common law jurisdictions; they include:
 - ▶ The right of attribution
 - ▶ The right to have a work published anonymously or pseudonymously
 - ▶ The right to the integrity of the work
- ▶ In U.S., there are some “visual” works protected under 17 U.S.C. § 106A – rights of certain authors to attribution and integrity

Why Copyrights Are More Like Biology Than Chemistry

- ▶ If I have a pound of gold and give you half, we each have half a pound of gold
- ▶ If I have a cell line and give you part to grow, we can each have as many cells as we can grow
- ▶ If one has a patented invention and transfers another an (exclusive) right in that invention, then the original owner has fewer rights
 - ▶ In many cases, even transfer of non-exclusive rights will reduce the owner's rights (e.g., the licensee can compete with the owner if the transfer is not limited)
- ▶ But if one has a copyrighted work and gives away a right without assigning the copyright fully, then both have co-equal rights
- ▶ SO, for instance, if I give you the right to translate my book, then both you AND I get some level of rights in the translation (it gets complicated)

“Derivative Work”

- ▶ Work based upon one or more preexisting works (again, not just ideas)
 - ▶ Translation
 - ▶ Musical arrangement or sound recording
 - ▶ Dramatization or fictionalization
 - ▶ Motion picture version
 - ▶ Art reproduction
 - ▶ Abridgment, condensation or any other form in which a work may be recast, transformed or adapted
- ▶ A work consisting of editorial revisions, annotations, elaborations or other modifications which, as a whole, represent an **original** work of authorship, is a “derivative work”
- ▶ This is one of the rights a copyright owner has – they can grant this right but they don't have to do so

Exception to Protection: Fair Use

17 U.S.C. §107

16

- ▶ Fair use is a legal exemption to the exclusive rights of copyright holders, based upon a consideration of the following four factors:
 - ▶ The purpose and character of the use (including whether it is commercial, non-profit, or educational)
 - ▶ The nature of the copyrighted work
 - ▶ The amount and substantiality of the portion to be used
 - ▶ The effect upon the potential market for the copyrighted work

(continued)

Exception to Protection: Fair Use

17 U.S.C. § 107 (2)

17

- ▶ Checklist for conducting a fair use analysis before using copyrighted materials
 - ▶ <https://copyright.cornell.edu/fairuse>
 - ▶ <http://cyberlaw.stanford.edu/focus-areas/copyright-and-fair-use>
- ▶ Issues are not the same as attribution and citation in other works
- ▶ Linking to authorized sites (like a public website) is not generally a copyright violation
 - ▶ But beware of commercial “embedded” links

Transformative Uses

Some Call it a 5th Fair Use Factor

- ▶ These include:
 - ▶ Criticizing the quoted work
 - ▶ Exposing the character of the original author
 - ▶ Proving a fact
 - ▶ Summarizing an idea argued in the original in order to defend or rebut it
- ▶ Transformative use also includes:
 - ▶ Parody
 - ▶ Symbolism
 - ▶ Aesthetic declarations
 - ▶ Many uses related to the internet and social media

Transfer of Copyright

- ▶ Any or all of the copyright owner's exclusive rights or any subdivision of those rights may be transferred
- ▶ The transfer of exclusive rights is not valid unless that transfer is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent
- ▶ Transfer of a right on a nonexclusive basis does not require a written agreement
- ▶ A copyright may also be conveyed by operation of law and may be bequeathed by will or passed by the laws of intestate succession
- ▶ Copyright is a personal property right, and it is subject to the various state laws and regulations that govern the ownership, inheritance or transfer of personal property as well as terms of contracts or conduct of business

Transfer Methodology

20

- ▶ Transfers of copyright are normally made by contract
- ▶ Transfer of some, but not all, rights is usually called a LICENSE
- ▶ Transfer of all rights (in some cases, all of the rights for a time) is usually called an ASSIGNMENT
 - ▶ Normally, “voluntary” assignments must be in writing to be enforced
- ▶ An assignment of copyright rights is like the sale of personal property
 - ▶ The original owner sells its rights to a third party and can no longer exercise control over how the third party uses those rights
- ▶ A license is a transfer where the copyright owner maintains ownership of the rights involved, but allows a third party to exercise some or all of those rights
 - ▶ Licenses can be exclusive or non-exclusive and can be limited by time, geography, media and other aspects of the copyrighted work

Licenses (Exclusive and Non-Exclusive)

- ▶ Express – by agreement – a contract with all the rules of contract law
- ▶ Implied license – a license created in the absence of an actual agreement between the parties
 - ▶ Implied licenses arise from the conduct of the parties or the situation
- ▶ Compulsory licenses – In a number of countries, copyright law provides for compulsory licenses of copyrighted works for specific uses
 - ▶ Scope of license (e.g., the royalties received for a copyrighted work) may be specified by local law, but may also be subject to negotiation

(continued)

Licenses (Exclusive and Non-Exclusive) (continued)

- ▶ Creative commons licenses allow use by others without charge and may be particularly appropriate for classroom materials and other works that the author wants to disseminate but doesn't want to just be "in the public domain"
- ▶ Public access requirements

Assignment Methodology

23

- ▶ Assignment of a copyright is normally by agreement – a purchase and sale document similar to the contract and bill of sale for a car
- ▶ Needs to be recorded in the Copyright Office (U.S.) or equivalent, to assure enforceability against third parties
- ▶ Enforcement under treaties may require recordation (somewhere)
- ▶ Wording is crucial to assure ownership of work
- ▶ ***Stanford University v. Roche Molecular Systems, Inc.***, 563 U.S. 776 (2011) (prior assignment of rights arising in the future triumphed over attempted later assignment of the same rights to another party)

Copyright in Institutional Settings

24

- ▶ U.S. and Canada (and at least most “commonwealth” countries) recognize a “WORK FOR HIRE” doctrine for works produced by employees for their employer in the course of employment
- ▶ Who is employee?
- ▶ Who is employer?
- ▶ What is the course/scope of employment?
- ▶ ***Community for Creative Non-Violence v. Reid***, [490 US 730](#)

“... not a ‘work made for hire’ within the meaning of § 101. Reid was an independent contractor rather than a § 101(1) “employee” since, although CCNV members directed enough of the work to ensure that the statue met their specifications, all other relevant circumstances weigh heavily against finding an employment relationship.”

Organizations' Policies for Copyright

- ▶ Work for Hire does not need to be in writing to apply to EMPLOYEES, but it is a good idea
- ▶ Work for Hire policy won't be effective for non-employees (in the U.S.) due to **CCNV v. Reid** and copyright law, so organization must have policy for transfer of ownership of copyrights for consultants, service providers, students and others creating "works" but who are not legally employees
- ▶ In academic setting, organization needs policy for ownership of scholarly works (retention by faculty?) and exceptions
- ▶ TEACH Act policy must be in writing
- ▶ Fair Use policy
- ▶ Publications policy (when, authorship, IP review issues, licensing and use in other organization activities, outside organizations such as ICMJE)

Getting Permission for Use of Someone Else's Data

- ▶ Direct contact
 - ▶ Copyright Office
 - ▶ Orphan works
 - ▶ Copyright Clearance Center
 - ▶ Foreign organizations (such as UK Copyright Licensing Agency ("CLA"))
 - ▶ Image archives
 - ▶ The Author's Registry
 - ▶ ASCAP, BMI, SESAC, RIAA, etc.
 - ▶ Motion Picture Licensing Corporation, Movie Licensing USA, Swank Motion Pictures, Inc., MPAA
- 

Digital Copyright Issues

- ▶ First Sale Doctrine
 - ▶ Hot right now – **Capitol Records LLC, et al. v. ReDigi Inc., et al.**, No. 16-2321, 2nd Cir.
 - ▶ See, also: **Disney Enters. v. VidAngel, Inc.**, No. 16-56843, 2017 U.S. App. LEXIS 16188 (9th Cir. Aug. 24, 2017)
- ▶ Parallel issues to re-use of Protocol design to reproduce experiments, particularly with copyrighted questionnaires, etc.
- ▶ Digital Millennium Copyright Act (DMCA)
 - ▶ **Mavrix Photographs, Ltd. Liab. Co. v. LiveJournal, Inc.**, 853 F.3d 1020 (9th Cir. 2017)
 - ▶ See example of use: ESSAYS: USING DIGITAL LOCKS IN INVENTION DEVELOPMENT , 15 Santa Clara Computer & High Tech. L.J. 363
- ▶ Fair Use
 - ▶ **Penguin Random House LLC v. Colting**, No. 17-cv-386 (JSR), 2017 U.S. Dist. LEXIS 145852 (S.D.N.Y. Sep. 7, 2017)

When Is It Data and Not Necessarily a Work

- ▶ FAR Part 27

- ▶ 27.401

- ▶ “Data” means recorded information, regardless of form or the media on which it may be recorded.
 - ▶ The term includes technical data and computer software.
 - ▶ The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing or management information.

(continued)

When Is It Data and Not Necessarily a Work (2)

- ▶ DFARS 227
 - ▶ 252.227-7013 (A) (15)
 - ▶ “Technical data” means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation **[NOTE THE DIFFERENCE!]**).
 - ▶ The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

Who Owns “Data”/Protection/Transfer

30

- ▶ U.S. Government contracts
 - ▶ Civilian agencies
 - ▶ DoD
 - ▶ See ARTICLE: Federal Circuit Bar Association: Study of Best Practices and Opportunities for Improvements in Federal Procurement Contracting: Intellectual Property Subcommittee Report, 24 Fed. Cir. B.J. 319
 - ▶ See, also: ARTICLE, The False Claims Act and Data Rights: What Plaintiffs' Lawyers Need To Know But Do Not Want To Hear, 43 Pub. Cont. L.J. 467
- ▶ National Security Data

(continued)

Who Owns “Data”/Protection/Transfer³¹ (2)

- ▶ Grants
 - ▶ See, for instance: ***Bd. of Regents of the Nev. Sys. of Higher Educ. v. United States***, No. 16-376C, 2017 U.S. Claims LEXIS 763 (Fed. Cl. July 5, 2017)
- ▶ Data produced in non-government situations or with no government funding
- ▶ Data regimes and laws around the world
 - ▶ IP Rights in Data Handbook – September 2014 DLI PIPER (Wilks, ed.)
- ▶ Research issues – See:
 - ▶ https://ori.hhs.gov/education/products/n_illinois_u/datamanagement/dotopic.html

Protecting Trade Secrets

- ▶ No Government registration process
- ▶ A matter of practice and agreement
- ▶ General principles of trade secret law are established in similar ways in most countries – BUT few common rules or regulations about enforcement
- ▶ Trade secret disputes are usually individual, so they do not become part of the public debate

Trade Secrets

▶ **Uniform Trade Secrets Act (UTSA)**

- ▶ Uniform Act of the United States
- ▶ Enacted by 47 states, and by the District of Columbia, Puerto Rico and the U.S. Virgin Islands
 - ▶ Many of the states have modified the language in their statute

▶ "Trade secret" means:

- ▶ Information, including a formula, pattern, compilation, program, device, method, technique or process, that:
 - ▶ Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
 - ▶ **Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy**

▶ **While universities and other research institutions often say they have no trade secrets that is WRONG**

TRIPS Agreement

34

- ▶ World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994)
 - ▶ International standards for protecting secrets (called “undisclosed information”) were established in 1995
 - ▶ Article 39 of the Agreement provides that:
 - ▶ Member states shall protect “undisclosed information” against unauthorized use “in a manner contrary to honest commercial practices” (this includes breach of contract, breach of confidence and unfair competition)
 - ▶ The information must not be generally known or readily accessible, must have value because it is secret, and must be the subject of “reasonable steps” to keep it secret
 - ▶ This general formula for trade secret laws has been adopted by well over 100 of the 159 members of the World Trade Organization

(continued)

TRIPS Agreement (2)

- ▶ Articles 42 to 49 of the TRIPS Agreement cover enforcement, requiring that civil judicial proceedings be available to enforce all IP rights and that “confidential information” be protected from disclosure
- ▶ Enforcement of trade secret rights is uneven
- ▶ Is “undisclosed” the same as a Trade Secret?

Thank You!

36

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