
GENERAL COUNSEL NOTE

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Copyright presents an interesting set of issues for our community as it touches many of the activities central to the mission of the university. The Office of the General Counsel frequently receives questions from faculty and staff about how copyright law applies to their teaching, research, and business or transactional activities. The following discussion is an overview of the scope of copyright issues Vanderbilt deals with on a regular basis. This paper is not a comprehensive set of answers to all situations that may arise, but our office can answer additional questions not covered here.

I. The Scope of Copyright Protection

The Copyright Act is a federal statute that governs the rights of those who create tangible, creative works. Works are protected automatically from the moment they are fixed in tangible form and need be neither registered nor accompanied by the copyright symbol © in order to enjoy copyright protection. Sufficient originality is a condition of a work's protection under copyright law. Works that are mere aggregations of data involving no originality or creativity, such as the alphabetical listings of names with phone numbers in the white pages of a telephone directory, do not qualify for copyright protection.

The kinds of creative works protected under copyright law include literary works, such as stories, poems, essays, and books; visual art works; musical compositions; dramatic works; films and audio-visual works; architectural drawings; computer software; as well other kinds of creative works. Ideas or thoughts that are not put into tangible form are not protected under copyright law.

Copyright law provides that a copyright owner may make certain exclusive uses of his or her creations. Owners of copyright have five specific rights with respect to their works: the right to make copies, distribute copies, make derivative works, and in the case of dramatic, musical and artistic works the rights to publicly display and publicly perform the works. Derivative works should be understood to include revisions, alterations, and modifications of the original work. A second or revised edition of a scholarly work, for instance, would be a derivative work.

Works Made For Hire. Generally the copyright owner is the person or persons who create such works. When an author creates a work in the course of performing his or her job duties for an employer, however, the employer owns the work as a work made for hire. When works are created by employees but not in the scope of their job duties – as when Vanderbilt faculty members write scholarly books and articles – then the owner of copyright is the individual or collective creators of the works.

Likewise, when the creator is not an employee at all but, say, an independent contractor working for the University, then the law views the creator as the copyright owner. This means that in some circumstances the University has to expressly acquire use or ownership rights it does not have by virtue of the automatic application of the law. There must, in other words, be a transfer of rights, typically through an assignment or license agreement. This is what happens, for instance, when the University hires software companies to develop custom applications for the institution's use under the terms of a purchase or development agreement.

An interesting situation can arise when a University employee performs work for another department and is paid for the additional work as an independent contractor. In this setting the additional work is not necessarily within the scope of the original employment, and the payment method would tend to show the person was treated as an independent contractor.

For these reasons it is important here to have in place an agreement defining the nature of the University's rights to the work completed.

Infringement. To make use of the copyright owner's exclusive rights without permission constitutes an infringement of copyright. Infringement of copyright is a basis for a civil damages claim and, when willful, the basis of a federal felony.

Those liable for infringement can be assessed monetary damages ranging from \$750 - \$30,000 per infringed work, or when willful up to \$150,000 per infringed work, plus attorneys fees.

Persons who willfully infringe the copyrights of others may be held responsible under federal criminal law and may be imprisoned for up to 6 years per offense.

Fair Use. The fair use doctrine provides a defense to claims of infringement. Because the copyright law tries to balance the value of certain kinds of uses, such as scholarship, news reporting, and educational uses with the exclusive rights of copyright owners, it allows those accused of infringement to defend themselves by showing that the alleged infringing uses qualify as fair use. When a use is fair use no permission need be obtained from the copyright owner to make use of the work. The purpose of the doctrine is to allow certain uses of creative works which lawmakers have judged to be too important to be excluded by the monopoly of the copyright holder.

Because it is an affirmative defense, defendants who claim fair use as a defense have the burden of showing that it applies in their particular instance. In adjudicating claims of fair use, courts rule on a case by case basis and consider several factors in reaching a decision. The four most important factors are the nature of the use made of the work (a new use that is creative or different from the original use is preferred), the kind of work used (artistic works are valued more highly than factual or descriptive works); the portion of the work used (less is fairer than more), and the economic effect of the use on the copyright owner (if the owner is deprived of royalties the use will less likely be fair use).

By using these factors we can try to predict how courts would resolve certain claims. Because the courts exercise judgment and make case by case determinations, and also because of the uneven history of fair use decisions by federal courts, our predictions in these matters lack certainty, however, and involve risk. These concerns have guided Vanderbilt's academic administrators in developing policies pertaining to copyright such as those described below.

II. Copyright Issues in Teaching

Class Paks and Electronic Reserves. One such policy is the requirement of the Provost's Office that before the University makes and distributes copies of materials used in teaching, through Class Paks or electronic library reserves for instance, that permission is obtained and royalties, if any are required, be paid. Legal precedent in our federal judicial circuit has made clear that the systematic print reproduction of course pack materials constitutes infringement unless permission is granted from the owners of the copyrights affected. While infringement claims have not been tested in the arena of electronic class packs, Vanderbilt's policy is to treat them in the same manner as print course packs for purposes of copyright. The University's "Policy on Copyright Fees for Materials on Electronic Reserve" adopted by the Provost's Office is published at <http://www.library.vanderbilt.edu/copyright/ccannounce.shtml>.

Acquiring permission to use a work often, but not always, involves paying a royalty or fee to the copyright owner. Under Vanderbilt's current practices, the cost of royalties for print Class Paks is included in the price of the Class Pak charged to purchasers. In the case of electronic course reserves the permission fees are paid by the schools and colleges.

In-Class Use of Materials. Faculty also make use in other ways of a variety of creative works in their teaching. Faculty members copy and display text and graphic materials in teaching presentations, distribute print or digital copies of readings, reproduce and display art images from books and other sources, create course web sites with materials from other parties, and perform musical compositions and sound recordings in classes. These actions in many cases will involve the fair use of copyright protected materials.

Certain of these practices are explicitly recognized under the 1976 Classroom Teaching Guidelines as consistent with fair use for teaching purposes. (see <http://www.publishers.org/conference/copyguide.cfm>) These Guidelines arise from a negotiated agreement between publishers and the higher education community about the minimal scope of fair use in face to face classroom teaching situations. Though they do not limit the scope of fair use in teaching, they represent certain safe harbors upon which teachers can rely. Efforts have been made to extend these guidelines to electronic materials and the changed nature of the digital teaching environment, but no comparable agreement has been reached for the use of digital works in teaching. As a result the application of fair use to many activities in teaching is uncertain.

Progress in eliminating uncertainty has been made through one of the recent amendments to the Copyright Act, however, which permits the performance of audiovisual works in classroom teaching. Section 110 of the Act now expressly provides that audio-visual works may be performed in the context of the teaching environment.

Student Assignments. Another area where copyright issues can arise in teaching is through the assigned use by students of copyright protected material to produce new works. In some courses students are assigned to use existing third party film, video, or other material and put it to new uses, e.g. in the creation of instructional or artistic films or in critical scholarship or informational materials. Such student projects likely qualify as fair use, especially where the works are displayed or performed only in the context of the classroom for completion of the assignment. Where assignments require students to publish their work on the Internet, or perform or display it in public arenas, or make and distribute copies of the new work then the application of fair use becomes more questionable.

For more information about how to obtain rights to use materials for teaching purposes or to discuss how fair use may apply to your teaching activities, you should contact the Vanderbilt Copyright Clearance Office or the Office of the General Counsel.

III. Copyright Issues in Research

Scholarly Publication. Much of the scholarship produced by Vanderbilt faculty depends on the use of material protected by copyright. Scholarly publication frequently involves the citation, quotation, or reproduction of others' work. Conventions of scholarly attribution are typically worked out within each academic discipline and do not implicate copyright law. While the use of selections of works for the purpose of scholarship and criticism often is protected under the fair use doctrine, the use of *entire* works in the context of scholarly publications, can pose problems. These can arise where entire literary works, such as poems, are reproduced, or where graphic or visual art works are reproduced in their entirety for purposes of scholarship. Vanderbilt faculty, for instance, frequently have to deal with acquiring the right to reproducing entire poems, photographs, or art images for inclusion in their scholarly monographs or other publications.

One practical factor in this scenario changes when scholarly writing is published through a publishing entity, e.g. a university press, because that publisher will have an interest in judging whether or not the use of third party materials qualifies as fair use. Publishers generally require authors to warrant that they have acquired all necessary rights from third parties to publish the material that is the subject of a publication agreement. This means that authors have the burden of acquiring and, if needed, paying for, the rights to use such third party right material. Publishers can decide not to rely on the fair use defense and may refuse to publish works in those cases where they do not want to risk a potentially adverse ruling on the issue.

As a practical aside, authors should gauge the cost of third party rights before promising to acquire them for a publisher. Since publishers typically reap a greater portion of a publication's proceeds than does an author, it is fair for authors to consider sharing or shifting the cost of third party rights acquisitions either directly through direct reimbursement or through an appropriate royalty rate.

Publication agreements go further and often ask authors to indemnify publishers for the breach of warranties, including, among other typical warranties, that the rights to third party material have been acquired. In agreeing to such terms authors accept financial risk. In the event that a copyright owner objects to the use of material, the author may become liable for the legal defense costs and damages incurred by his or her publisher. Since a faculty member's publication activities are not generally viewed as performed in the course and scope of his or her job, the University's insurance does not cover such risks. It is important in such cases for authors to work closely with publishers in assessing this risk and agreeing on a fair means of sharing it.

Author's Insurance. Publishers typically maintain insurance that covers the publisher, but not necessarily authors, from claims of copyright infringement. It may be helpful to note, for cases where this becomes a worrisome possibility, that the insurance market offers coverage to authors for copyright infringement. Such insurance is available for private purchase. The Office of Risk Management or the Office of General Counsel can direct interested persons to sources of additional information upon request.

Copies for Archives or Group Distribution. In some disciplines it has been a standard practice for researchers to systematically make copies of articles from professional journals, such as technical scientific publications, to save for future reference and use in research. Similarly, some offices at Vanderbilt, for instance, may subscribe to a single copy of a journal and photocopy its articles for wider distribution to interested employees. This kind of distribution, whether for the purposes of creating an archive of materials or for sharing copies of important articles widely within a practice area can amount to copyright infringement. Since journal publishers expect to receive royalties for the systematic copying of articles and have created a market for the licensing of these rights, courts have recognized the right of publishers to demand a royalty for such copying. A distinction can probably be made between the copying that an individual faculty member might do for his or her personal reference, and copying done at the instance of a university administrator for distribution in the service of an institutional purpose, the latter being less like fair use than the former.

IV. Contracting for Creative Work

Finally, attention to copyright is important when Vanderbilt acquires the right to use creative work through the purchase of goods and services. This happens typically in a few different ways.

One way is through the purchase of creative services from independent contractors and consultants who produce items such as web page designs, reports, software applications, and graphic works for the University. When these items are purchased from a vendor it is important that the terms under which they are acquired provide for the sufficient transfer of rights to the University that will be needed for the uses the University intends to make of the deliverables.

A good example is the growing use of electronic technology as the preferred medium through which Vanderbilt chooses to disseminate officially published statements. To produce electronic publications the University calls on the services of web designers and programmers to make electronic publications possible. Purchases of this sort can arise in the context of hiring consultants or outside vendors to produce reports, text, web design, or software under a contract with Vanderbilt. Under these circumstances, since the creative work is not performed by an employee, it is not necessarily viewed by the law as a work for hire relationship, and Vanderbilt does not automatically acquire the needed rights simply by remitting payment.

When tangible creative work is produced for Vanderbilt by people outside of the university, e.g. independent contractors, consultants, and vendors, then the default status of the law is that they own the copyright to their work. While it may be understood that the consultant intends to convey some or all of the rights to the creative work, unless the work is acquired under the terms of an agreement explicitly defining the rights acquired by the University, the scope of those rights are potentially in dispute.

It is therefore a wise idea, for the sake of both purchaser and vendor, to clarify in a written document the scope of rights which Vanderbilt is acquiring when tangible creative work is purchased from outside parties. It is not only in Vanderbilt's interest to clearly define the copyright interest that is the subject of the engagement, it is equally in the contractor's interest to know what rights are being given up in return for the promised compensation. The consequence of having no agreement is that the creator may contend he or she continues to own rights in the work and deprive the University of the needed scope of use.

Rights may be obtained through a written agreement that provides for either the license or assignment of rights from the vendor to Vanderbilt.

Departments that need assistance in obtaining rights from vendors for creative work should consult with the Procurement Office or the Office of General Counsel.

Publication of Scholarly Journals. Many departments at Vanderbilt are also involved in publishing scholarly journals. When such publications include material contributed by writers or artists from outside of Vanderbilt then the University needs to acquire the rights to publish their work. Unless these rights are clarified in the context of a license or publishing agreement the scope of Vanderbilt's authority to publish their work, e.g. whether through the Internet or only in print, may be open to question.

In order to publish the work of scholars and authors an agreement should be executed that provides for the permission of the writer or artist to have the work published by Vanderbilt in all applicable media. The agreements should recite whether or not the contributors of creative work are entitled to any compensation for Vanderbilt's use of their work and whether the University may re-use or re-publish the work in other contexts.

V. For More Information

As faculty and staff encounter the need to use and acquire material protected by copyright it is important that the issues be addressed in professional and competent ways consistent with Vanderbilt's policies. It is important to learn what is expected in your area with regard to the use of copyrighted materials involving teaching, research, publication, or contracting.

The University makes available several additional resources to provide further information about copyright and contracting to obtain applicable intellectual property rights.

Those contacting the Office of the General Counsel with copyright questions should ask for Kevin Davis or Leona Marx.

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