

Copyright FAQ's

April 24, 2003

1. What is the basis for copyright?

The United States Constitution gives Congress the power to make laws:

“To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” *Article I, §8, paragraph 8*

Congress has passed several copyright statutes, and the most recent major revision was in 1976.

2. What makes something protected under federal copyright law?

Your work must be “original” and “tangible” and have a modicum of creativity in order to obtain copyright protection. Originality is not measured by artistic merit, but by creativity – your work must be your own, not copied directly from another source. To be tangible your work must exist in a fixed form that makes it reproducible. Examples of works eligible for copyright protection are a book, CD-ROM, photograph, painting, or online Web page. Spoken words, conversations, and performances usually do not fall under copyright unless they have been recorded or videotaped/filmed.

3. Do I need to use the symbol © or abide by other formalities in order to obtain copyright protection?

No. Current copyright law requires no formalities for the work to be copyrighted.

There are, however, still advantages to observance of formalities since it notifies readers who should be credited for the work and who to contact for permission to use the work. In those few cases in which one might anticipate “copying,” it is worthwhile filing the paperwork and paying the modest filing fee to register the copyright with, and provide a copy to, the copyright office. If a copyright is registered within three months of publication, the opportunity to collect money damages may be increased.

4. If I circulate a draft paper at a conference without copyright notice, have I forfeited any intellectual property rights?

No copyright rights are lost, but patent rights may be lost if the paper describes patentable subject matter and is circulated prior to a filing with the Patent Office. A copyright notice on a work is not necessary to secure ownership of the draft expression of your work. You hold copyright in the draft because it fixes your work in a tangible expression. Copyright, however, does not protect your ideas. Those to whom you have circulated your paper are free to use your ideas immediately in their work. They may also use your draft expression under fair use or other exceptions in the copyright law.

5. Are there significant exclusions or limits to copyrights?

There are several limits and exceptions to the exclusive rights of a copyright owner, as well as material that is not subject to copyright. Just a few of the most relevant exceptions in higher education are listed below:

- a. Ideas: Your ideas are not covered by a copyright, only your “expression” of those ideas. The copyright statute provides “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” *17 USC §102*
- b. Facts: Facts presented in your work are not covered by copyright no matter how much time and effort you spent in collecting them. A copyright only protects your original expression of those facts.
- c. Independent Creation: There is no protection or recourse if another person working independently happens to create a similar work, or even a duplicate of the copyrighted work. Copyright protects against copying. (For those familiar with patent law, it is important to note that there are innumerable differences between patent law, where independent creation is no defense to infringement, and copyright law.)
- d. Fair Use: “Fair Use” consists of making limited use of copyrighted work for such purposes as criticism, teaching, scholarship, research, or news reporting. This does not constitute infringement because copyright owners are legally regarded as consenting to fair use. This is a very narrow and limited exception to the usual right of a copyright holder to authorize use of a work. Fair use is essential to all scholars in higher education. The circumstance when a scholar or educator may copy portions of a copyrighted work without the permission of the copyright holder is an extraordinarily complex topic addressed in a companion document.

This brief list is by no means exhaustive; for example, titles to songs and books are not subject to copyright protection.

6. What rights does the copyright holder of a work have?

A copyright holder enjoys five “exclusive rights:”

- a. Reproduction Right: This means that you have the right to duplicate, replicate, or imitate your copyrighted work in a tangible form.
- b. Derivative Works Right: You have the right to modify your work in order to create a new work based on your pre-existing work.

- c. Distribution Right: This means that you hold the right to issue copies of your work to the public, through rental, lease, sale, or lending.
- d. Public Performance Right: This means that you may show or perform your work in a public forum. If the work is a film or other audio/visual work “performing” consists of showing the images in sequence.
- e. Public Display Right: You may “display” your work in a public space using slides, film/video, or other projected image.

7. How does the copyright holder authorize others to use these rights?

Each of the five exclusive rights may be granted to another party. The grant should be in writing and can be for a limited purpose or time (a license). Exercise of the five exclusive rights is independent and may be transferred on an exclusive or non-exclusive basis. Copyright law is extremely flexible in allowing the sharing of these rights in almost any way imaginable. For example, a copyright holder can exercise each of the five exclusive rights independently. So, a copyright holder is perfectly free to convey the right only to distribute the work on particular terms and withhold any of the other rights, such as the right to modify the work, i.e., the power to control the permission to authorize a “derivative work.”

Of course, all of these rights may be permanently transferred by assignment in writing to another party. Such assignments may also be subject to a specific reservation of rights. A copyright owner may also place their work in the public domain.

8. How long does copyright protection last?

For works owned by individuals, current law states that a copyright term is the life of the author plus 70 years.

For works owned by employers, the copyright vests in the employer and has a copyright term of 95 years from the date of publication, or 120 years from the date of creation, whichever date occurs first. This rule applies to all staff at the university.

9. If I hire a consultant to assist in a project, will the university or I have copyright to the consultant’s contribution?

This is major trap for the unwary. Unless this issue is specifically addressed in a written agreement with the consultant, the consultant owns the copyright and the party who paid the consultant has a right to use the work for the precise purpose for which the work was commissioned. The consultant is free to transfer various rights to another party and is not required to consent to a request to make some new use of the work. Accordingly, Rutgers has a standard “consultant agreement” under which a consultant assigns all rights to the university.

10. What are the most frequent copyright problems that faculty members encounter at Rutgers?

- a. Problems are created when students (not acting in an employee capacity) and consultants participate in the creation of a work and there is no written agreement to assign all copyright. This has led to frustrating experiences of a student or consultant claiming the legal right to use the material in competition with the faculty member or making unanticipated monetary demands to relinquish all the rights that the faculty member may have expected.
- b. There is a growing problem of faculty receiving academic work which has been “cut and pasted” from the web. This can be a copyright infringement (if not fair use) as well as plagiarism, if proper attribution and quotation marks are not used.

11. Is there anything in the proposed copyright policy that could curtail my ability to publish scholarly work?

No. The copyright policy preserves the traditional faculty right to publish scholarly works in all circumstances. This is true even when external funding requires university ownership of research results. The university office of research and sponsored programs reviews all externally funded research grants and contracts to verify that the agreement acknowledges the right to publish. The university will not enter into research agreements without this assurance.

12. Why is the university reviewing its copyright policy now?

Recent and ongoing developments in digital technology have created new venues for the creation, distribution, and use of copyrighted materials. The traditional works created within the academy, the monograph, journal, musical score, poetry, play, painting, have been expanded to include such items as the website, home page, interactive tutorial, electronic journal, digital music, and CD-ROM. In addition, these new works often involve many individuals in their creation and do not correspond neatly to the traditional forms of scholarship with which we are familiar, and about which we have a common understanding of copyright ownership, use, and attribution.

13. Has there been a corresponding change in copyright law?

Realizing that copying and distribution take on new meaning in the digital environment, the federal government has updated the Copyright Act of 1976 from which we have, up to the present, drawn our principles and interpretation of copyright law. Similarly, Rutgers University has established a Committee to Review University Copyright Policy to review its own copyright policy and recommend appropriate changes within the scope of US copyright law.

The Digital Millennium Copyright Act of 1998 brought major revisions that demonstrate that many of the changes in the copyright law are driven primarily by the interests of the entertainment industry. Most significantly, the penalties for willful infringement now border on sanctions usually associated with criminal acts. The copyright statute provides a copyright owner with the potential to recover \$150,000 for a single act of willful infringement.

On the rare occasion that original material from a website of a member of a university appears inappropriately in material posted to a website at another institution, the infringement is often resolved by a phone call and removal of the material without exercise of the right to obtain monetary damages against the infringer. This custom can lull us into failing to recognize that these academic values and behaviors are not shared throughout the commercial world that surrounds us. Willful copyright infringement exposes you to very dramatic penalties. Not all copyright owners exercise the courtesy and restraint to which we in higher education may have become accustomed.

14. Who is covered by the university copyright policy?

The university copyright policy applies to all the Rutgers faculty, staff, and students. Anyone who uses university facilities is covered, including visitors. The use of commonly available resources to all or most faculty, however, does not by itself result in a university claim to copyright.

15. Is the fundamental purpose of the new university copyright policy to provide the university with the opportunity to commercialize faculty work?

No. On the contrary, the policy reaffirms faculty ownership of scholarly materials, an important value for a major research institution like Rutgers. The university is primarily “in the business” of expanding knowledge and making it freely available to the public. It would be incompatible with this fundamental purpose for the university to pursue commercialization of its primary functions.

16. Why does the copyright policy have a section on commercialization?

The faculty and the university often do have various appropriate commercial opportunities. For the faculty such opportunities are most typically pursued through consulting arrangements. Another familiar example is writing a textbook.

The limitation on these arrangements is that they should not interfere with the faculty member’s academic university work. Therefore, to avoid a “conflict of commitment” consulting time must be limited. These matters are also generally subject to conflict of interest laws and university regulations; for example, it is important that these arrangements do not inhibit in one way or another the faculty member from pursuing his or her academic work.

The university will sometimes have the opportunity to “commercialize” certain works. The nature of these works is highly varied, as are the circumstances under which they are created. Because of this variety, the purpose for entering a commercial arrangement also varies (e.g., financial return may be more or less important). Obviously, the terms of any individual transaction with a commercial entity vary. A couple of examples illustrate some of their variation. There will be occasions when the university will facilitate distribution of work developed at Rutgers when the financial motivation for distribution is secondary or incidental. For example, an elaborate electronic “workbook” as a supplementary study or training material may

be developed as part of a specially-funded project to create these materials. If a textbook publisher were to license these materials to prepare a CD supplement to the text, then it is quite possible that the university motivation for pursuing commercialization would be primarily to increase visibility of the academic unit at which the materials were developed. In that case distribution arrangements would be guided by associating with a prestigious publisher with established high quality textbooks; “commercialization” might be primarily to obtain broad circulation with modest or minimal financial return. In a few instances, copyrighted material that serves no educational function may have primarily a commercial application. One example is the development of a commercialized Web search engine.

17. If I post my course syllabi, course outline, and course notes on the Web, will I hold the copyright to them?

You will continue to hold the copyright to your course syllabi, course outlines, or lecture notes that you post on the Web through the university network. Making these materials available through use of the university networking infrastructure is not a use of substantial university resources.

18. If I use the resources of the Teaching Excellence Center to create supplemental educational materials or interactive course content, will the university hold the copyright to them?

No, you will continue to hold the copyrights to supplemental educational materials or interactive course content you create. Using the services of the Teaching Excellence Center, commonly available to all faculty, does not constitute the use of substantial university resources in considering university ownership. The university has constructed a state of the art computing network and provided facilities and services that are available to all faculty for research activities and the development of course-related materials.

19. If I write a scholarly article or a scholarly book based on research supported by substantial university resources, who will hold the copyright?

You will hold the copyright. Regardless of the amount of university resources used to create traditional scholarly or artistic works, such as books, journal articles, art work, musical compositions, etc., whether they are in print or electronic form, the copyright will remain with the faculty creator unless he/she assigns the rights elsewhere. This includes articles or books that result from grant-funded or contract research.

20. Are there any circumstances when the university will assert copyright in my work?

When substantial university resources are used in the creation of a work, the university **MAY** assert copyright. The copyright committee reviewed numerous university copyright policies and determined that the tradition and nearly universal practice among research universities is for the university to assert copyright when substantial university resources have been used for the creation of copyrightable materials. The Rutgers description is similar to many policies from other public institutions and members of the Association of American Universities. The university

intends that the substantial public resources contributed to it be devoted to the creation of scholarly and instructional works for the broadest public good. The university may assert copyright ownership when substantial investments have been made in the creation of the work to ensure that the works created are used for the broadest public good, as, for example, effective use at the university or as a return on investment of public funds that can support further university research and instructional efforts.

21. Is my ability to publish my work affected when the university asserts copyright?

No, university copyright assertion does not interfere with the ability of faculty members to publish freely the results of their scholarly work. Where university ownership may be exercised, the committee has described rights that may be returned and/or shared with creators; and where revenue may be generated, appropriate compensation to creator(s).

22. Can I find out before beginning a project if the university will assert copyright in my work?

Should faculty members be unsure of copyright ownership or wish to pursue copyright ownership of materials they create where the use of substantial resources may be involved, they should request clarification, copyright ownership, and/or sharing of rights with the appropriate university administrator(s).

23. If I develop an online course, who holds the copyright?

You will hold copyright in any course materials that you create using normal resources, such as the Teaching Excellence Center. The development of a robust online course (delivered exclusively online without face-to-face classroom time) with currently available technology is labor intensive and requires special technical skills. Such an endeavor, therefore, is almost always a collaborative process under the leadership of the faculty with substantial monetary funding requirements. There may be instances where the university asks a faculty member to create an online course and specifically provides resources for doing so (technical staff, release time, purchase of software, research assistants, etc.) or where the faculty member seeks substantial resources to create an online course. In these cases the University will normally own the course-as it has been developed as a package-but the creator will retain rights to the intellectual content, so that the creator may build on it for future work, and may have other rights as well. The university's interest in these cases is to ensure that, once the investment is made to develop the course, the university can actually deliver the course in a variety of venues and, at the same time, protect the online course from being delivered elsewhere in competition with or as a conflict of interest with the university.

24. Are my lectures copyrighted?

There is no federal statutory copyright in the spoken word, unless the lecturer records the lecture. That is, if you record your lectures, then they are copyrighted.

25. Do lecture note services infringe my copyright in my lectures if I record them?

Probably not. Facts and ideas are not copyrightable subject matter. Probably the summary of a lecture represented in notes sets forth only some of the facts and ideas discussed in the lecture. In that case, there is no infringement. On the other hand, in the very unlikely case that a note taking service were to transcribe and publish significant portions of a recorded lecture, that would probably be copyright infringement.

26. Why isn't there a defined policy on revenue sharing like the patent policy?

The patent policy deals with exploitation of practical ideas that are the byproducts of research. The licensing of patents presumes that a significant effort will be made by the licensee to generate as much income as possible, with some being returned to the university as royalty. Arrangements for patent licensing to commercial firms is routine and proceeds following customary business practices, with the goals always being the same for each instance: 1) to assure that the research benefits the public and 2) to generate revenue.

Copyrighted works, on the other hand, are not developed primarily as commercial products but as educational resources for internal use at the university or as scholarly works for sharing knowledge. Because copyrighted materials are as varied as the approaches used in the educational institution, we do not have a routine practice to follow. Commercialization is currently underway for computer assisted learning projects where the primary goal is not to achieve commercial success but to showcase the excellence of the sponsoring departments. To reap the benefits of broad distribution through commercial channels, these projects required individual negotiation with the faculty developer and department. The experience of three years of online course development has proven that this system of negotiation has served the individual faculty developers, their departments, and the university well.

27. Why is there a statement on publicly accessible electronic archives?

The Committee felt it important to encourage faculty members to provide the broadest exposure to their scholarship for the development of new knowledge, to benefit society, and for their own recognition. While publishers perform a valuable service in making information available, the price of some commercial journals has become so exorbitant that many institutions cannot afford to purchase them, thus making scholarship less available, the very opposite of the goal of publication. Additionally, some publishers demand all rights to a work, thus eliminating the possibility of your posting it on a website or personal Web page or creating a derivative work. Many less-expensive dissemination options providing broader exposure are emerging in academe as outlets for scholarship, such as public/open archives.