

Copyfraud and Classroom Performance Rights: Two Common Bogus Copyright Claims

Brandon Butler, Director of Public Policy Initiatives, ARL

Introduction: Misrepresenting Copyright

Negotiating copyright law can be challenging even when basic facts are not in doubt. It becomes unnecessarily difficult when publishers, distributors, and even some libraries misrepresent basic facts: which works are under copyright, and which rights a library must purchase to support teaching and learning. Unfortunately such misrepresentations are widespread. This article will describe two common misrepresentations about copyright law: “copyfraud” and “public performance rights” for classroom uses.

Two important limitations to the copyright monopoly are its limited duration¹ and the exception for classroom performance and display of copyrighted materials.² The limited duration of copyright ensures that once authors have had a reasonable time (and then some) to exploit their creations, works will rise into the public domain and be set free to circulate without copyright restrictions. The classroom performance exception frees teachers to screen films and other works based on pedagogical goals rather than legal technicalities. In addition to reducing the technical and economic barriers to effective teaching, the classroom exception ensures that rights holders cannot use copyright as a tool for censorship, e.g., by withholding permission to use works in courses where the filmmaker’s point of view is criticized.

Two varieties of misrepresentation are undermining these important features of the law. First, publishers and other distributors of public domain materials are using copyright notices that suggest falsely that public domain materials are in

fact subject to copyright. Second, distributors of audiovisual materials are misrepresenting “public performance rights,” claiming that special fees must be paid to acquire these rights for classroom use, an outcome the law is expressly designed to prevent.

Copyfraud

In his exhaustive law review article on the topic,³ Jason Mazzone describes a wide variety of practices that constitute “copyfraud”—falsely claiming copyright in a public domain work. The most common species of copyfraud is the blanket copyright notice attached to a printing of a public domain work. A

The limited duration of copyright ensures that once authors have had a reasonable time (and then some) to exploit their creations, works will rise into the public domain and be set free to circulate without copyright restrictions.

typical notice takes the form “© Example Press 1986,” and is often followed by a warning along these lines: “No part of this publication may be reproduced without express permission of the publisher.” While these notices are often included as a matter of routine in the front matter of published works, they are plainly false

where the underlying work is in the public domain. Such misleading notices almost certainly deter perfectly legal uses of public domain works. It is particularly troubling that some of the publishers using these misleading notices are academic and university presses.

A legal technicality may explain (but not excuse) at least some of these misleading notices. Until recently, it was necessary to include a copyright notice on all published works in order to retain copyright protection.⁴ Works published without proper notice could rise (or fall, from the publisher’s point of view) immediately into the public domain. Because many reprints of classic works are accompanied by critical introductions, new cover art, editorial notes, and the like, which are not in the public domain, notices may have been necessary to preserve copyright in those new materials. A blanket notice in these contexts is deeply misleading, however, as it suggests ownership of the entire work. It is better practice to specify the portion of the work covered by copyright, e.g., “Introduction © 1986 Example Press. Translation © 1975 Edward X. Ample.” Unfortunately, there is little legal incentive for a publisher to specify the parts of a work to which the notice applies, and many still use blanket notices.

Here are some examples:

1. The 2006 Penguin Classics Deluxe Edition of *The Complete Novels* of Jane Austen, all of which are in the public domain, includes the following warning on the copyright page:

The scanning, uploading, and distribution of this book via the Internet or via any other means without permission of the publisher is illegal and punishable by law. Please purchase only authorized electronic editions, and do not participate in or encourage electronic piracy of copyrighted materials. Your support of the author's rights is appreciated.⁵

2. The widely assigned *Oxford Anthology of English Literature* contains the blanket notice, "Copyright © 1973 by Oxford University Press, Inc."⁶
3. An edition of Jane Austen's *Sense and Sensibility* published in 2006 by Cambridge University Press contains the following notices:

© Cambridge University Press 2006

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.⁷

4. Oxford University Press's World's Classics edition of Jane Austen's *Emma* contains a more detailed notice, following the better practice of claiming copyright only in the newly added portions of the book, but then includes the following misleading warning:

"No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford University Press, or as expressly permitted by law, or under terms agreed with the appropriate reprographic rights organizations."⁸

A reasonable reader would be forgiven for thinking that, unless she can find some specific exception in the law, she needs permission from Penguin, Oxford, or Cambridge to reproduce part or all of the classic works included in these anthologies and reprints. In fact, the opposite is true; almost all of the underlying works can be copied freely, even in their entirety, without asking or paying anyone.⁹ This is not due to a "statutory exception," nor is it "expressly permitted by law" (*per se*); it is the upshot of the work no longer being protected at all.

The notice on *Sense and Sensibility* is perhaps the most shocking, as it states unqualifiedly, “This publication is in copyright,” when, in fact, the novel at the heart of the book (like all of Austen’s published works) is not.

Simply conducting a Google Books search reveals that publishers are consistently using similar notices on their reprints of works in the public domain.¹⁰ Mazzone’s article shows these misleading notices are also found on textbooks, sheet music, websites, and reproductions of museum art.¹¹ One publisher even asserts rights over the US Constitution.¹²

A similar species of copyfraud exists where the creator of a digital or a microfilm scan of a work claims copyright in the scanned version. In reality, simply scanning or photographing a work adds nothing new to the work, and where the original work is in the public domain, so, too, are any scans or films that merely reproduce the work.¹³ Mazzone documents vendors, such as ProQuest, who improperly claim rights to microfilm scans of public domain newspapers and the like, but a recent study suggests that libraries themselves are making unnecessarily broad or confusing claims about rights in scans they create.

In 2009, Melanie Schlosser examined the publicly available digitized collections of 29 members of the Digital Library Federation and found several disturbing trends in the notices that accompanied these collections.¹⁴ In over 40% of the collections, the library provided little or no information about the copyright status of the collection—whether items were in the public domain, protected by copyright, or if the status was unknown—leaving users to fend for themselves. Of the collections that bore statements about copyright, “[q]uite often” collections that included public domain materials, and even some collections made up entirely of public domain works, were accompanied by Creative Commons licenses or claims of rights to the digital image as distinct from the original. Some collections were encumbered with acceptable-use terms that were in conflict with copyright, i.e., that purported to limit uses of public domain materials. Less than 10% of the notices mentioned either the public domain or fair use.

Schlosser’s findings present an opportunity for libraries to evaluate their copyright policies and engage in new efforts to educate users about the rights they have to copy, use, and share materials the libraries posted to the web. In an interview published in the October 2009 issue of *Research Library Issues*, Cornell University’s Senior Policy Advisor Peter Hirtle describes the Cornell University

Library's decision to remove all restrictions on use of the library's public domain works.¹⁵ As Hirtle explains, making this material freely available is consistent with the library's educational mission and values, and the costs of controlling access may well have exceeded expected revenues from charging for access. It was also valuable for the library to have a consistent message about the importance of wide access to materials as it moved forward on open access and other policy initiatives.

To be sure, libraries are entitled to control access to the materials in their collections, and, under certain circumstances, to charge for services in connection with providing access to materials. Some of the policies Schlosser describes seem to be based on these theories. But, as the interview with Peter Hirtle shows, there may be considerable value in foregoing these limitations in favor of a more open policy.

Public Performance Rights for Classroom Uses

A second variety of misleading copyright claim is the oft-repeated assertion that showing audiovisual materials (i.e., films) in a classroom setting requires a special "public performance" license, or the purchase of an "institutional" copy. This claim is based on the existence of a performance right under the Copyright Act, which is intended to give rights holders control over public exhibitions of their works.¹⁶ Because of this right, mere ownership of a copy of a DVD, for example, does not necessarily entitle the owner to stage a public showing of the film. Indeed, a separate license is required for most public performances (i.e., showings) of audiovisual materials to groups larger than family or friends.

This right is limited, however, by another provision in the law that states that the performance right does not apply to:

performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction...¹⁷

All that is required for these teaching uses is a lawfully made copy of the work (i.e., the copy cannot be a bootleg or otherwise illegally created). In a nutshell, this provision tells libraries that, unlike other users, they do not need to acquire additional performance rights for in-class performances (and analogous teaching uses) of legitimate copies. If a teacher finds the DVD she needs at Target for \$5 (or at a garage sale for 25¢), she can buy it and show it in class;

indeed, that is exactly what the law intends to empower her to do, to use materials in class without having to seek out special rights or editions. Staging a film festival or showing a movie for a student club may require special licenses, but teaching uses are clearly exempt from performance rights requirements.

Although the Copyright Act unambiguously absolves teachers (and, by extension, libraries) from paying special performance fees for classroom uses,

Libraries may consider buying these rights for other uses, but vendors who claim licenses are required for classroom teaching are not making it easy for librarians to determine which license is right for them.

any librarian who acquires audiovisual materials can tell you that vendors present them with a dizzying variety of “rights” and tiered pricing schemes based on the opposite notion: that libraries and schools are required by law to shoulder costs not required of normal users. Laura Jenemann has assembled a nice group of examples in

a recent paper on the subject.¹⁸ Jenemann documents misrepresentations by major educational film distributors, including Women Make Movies,¹⁹ Direct Cinema Limited,²⁰ and Bullfrog Films.²¹ Each of these distributors uses “public performance rights” to partially justify price discrimination, i.e., charging different prices to different users for the same content. Vendors suggest that libraries are getting something more for their inflated price; indeed, they tell libraries that to make the classroom uses that their teachers need, the more expensive product is required. In reality educational users simply do not need these rights for classroom uses. Libraries may consider buying these rights for other uses, but vendors who claim licenses are required for classroom teaching are not making it easy for librarians to determine which license is right for them.

Vendors are entitled to set whatever prices they like for their products. Vendors who sell unique products exclusively to institutional customers often charge higher prices across the board compared to retailers that sell mass-market goods to the public. Sellers are even free to charge different types of users different fees for exactly the same product. Software vendors do this when they charge students lower prices than standard or commercial users. They can use license agreements to enforce these pricing schemes by having buyers represent in a contract that they will not use the product in circumstances that exceed the license, e.g., that a “home use” copy will not be shown in a classroom. Although similar licenses have come under criticism from legal scholars for creating unnecessary limitations on legitimate uses, courts have typically enforced them.

Libraries should understand, however, that copyright law is not the basis for the limitations in these contracts; when libraries sign these licenses, they are agreeing to limit their rights despite the law's preference for educational use.

Four Things Libraries Can Do to Stop (or Alleviate) Misleading Copyright Claims

The law provides very little in the way of disincentive for copyfraud and misrepresentation of copyright law,²² but there are things libraries can do to minimize the negative impact of these bogus claims:

Know your rights. The evidence shows that many rights holders simply are not providing accurate information when they make claims about the scope of copyright and the availability of important exceptions for users. When a book or a digital scan is inscribed with boilerplate copyright language, that can be the beginning of an inquiry about its copyright status, but it may be worthwhile to dig deeper to determine whether these representations are accurate. When a vendor tries to sell you "rights," remember that they have their own reasons to try to extract as much money as possible from users; "caveat emptor" should be your watchword here, as in any market transaction.

Read before you sign. Vendors and other content aggregators cannot change the law by misrepresenting it on their websites, but they **can** tie your hands with a license that takes away rights that the law has given you. Before you agree to limit the uses your institution will make with a "home use" version of a film, remember that by default the law says a teacher can show any lawfully made work in class without paying a special fee.

Don't buy more "rights" than you need. If there is no license agreement, or if the license agreement for a "home use" version of a film does not specifically limit your right to use the work for teaching, consider taking advantage of your legal rights and buying these cheaper versions rather than paying for "rights" or "editions" you do not need. The Bullfrog Home Use license, for instance, appears to be perfectly adequate for teaching uses, despite what the company's website claims. While performance rights may be useful for film festivals or student clubs, they are not necessary for the core teaching and learning uses that most research libraries support.

Be part of the solution. Libraries themselves can perpetrate all of the copyright misrepresentations described in this article. More and more libraries are making the effort to be more transparent about these issues, however, and the policy arguments for doing so are compelling. Several institutions have adopted policies that could serve as good models for others in the community.²³

- ¹ 17 U.S.C. §§ 301–305. This feature is also grounded in the US Constitution, which requires copyrights to be “for limited times.” U.S. Const. art. I, sect. 8, cl. 8.
- ² 17 U.S.C. 110(1).
- ³ Jason Mazzone, “Copyfraud,” *New York University Law Review* 81, no. 3 (June 2006): 1026–1100.
- ⁴ Although protection is no longer conditioned on proper notice, there are still some legal benefits to including a copyright notice, so publishers continue to do so.
- ⁵ The copyright page can be previewed on the Google Books website: <http://books.google.com/books?id=a6LokmcqqSEC&lpg=PP1&dq=inauthor%3Austen&pg=PR4#v=onepage&q&f=false>. While scanning and uploading the entire book would capture supplemental material that is under copyright, it would be easy to exclude this material and scan only the novels, which are in the public domain. The author’s rights in the novels have long ago expired.
- ⁶ This example is described in Stephen Fishman, *The Public Domain: How to Find & Use Copyright-Free Writings, Music, Art & More* (Berkeley: Nolo, 2010), 80. Of course, the anthology includes new material created by the editors, and that new material is protected by copyright. The bulk of the anthology, however, consists of anthologized public domain material.
- ⁷ The copyright page for this edition is available on the Google Books website: <http://books.google.com/books?id=wzVeU1tb59kC&lpg=PR49&dq=inauthor%3Austeninpublisher%3ACambridgeinpublisher%3AUniversityinpublisher%3APress&pg=PR6-v=onepage&q&f=false>.
- ⁸ The copyright page for this edition is available on the Google Books website: <http://books.google.com/books?id=imFN4KxN3n4C&lpg=PP1&pg=PR4#v=onepage&q&f=false>.
- ⁹ A few of the works anthologized in the *Oxford Anthology of English Literature* are still under copyright, but the vast majority are not. Critical introductions and editorial notes are copyrighted, but the core works are in the public domain.
- ¹⁰ An advanced search of Google Books using authors like Austen whose works are out of copyright and publication dates in the last two or three decades consistently turns up reprints with inaccurate notices and warnings.
- ¹¹ See Mazzone, “Copyfraud,” 1040ff.
- ¹² *Ibid.*, 1028.
- ¹³ Indeed, the Supreme Court addressed microfilms specifically in *New York Times Co., Inc., v. Tasini*, 533 U.S. 483, 502 (2001), explaining that they are a “mere conversion...from one medium to another.”
- ¹⁴ Melanie Schlosser, “Unless Otherwise Indicated: A Survey of Copyright Statements on Digital Library Collections,” *College and Research Libraries* 70, no. 4 (July 2009): 371–385, <http://crl.acrl.org/content/70/4/371.abstract>.
- ¹⁵ Peter Hirtle and Tricia Donovan, “Removing All Restrictions: Cornell’s New Policy on Use of Public Domain Reproductions,” *Research Library Issues*, no. 266 (Oct. 2009): 1–6, <http://publications.arl.org/rli266/2>.
- ¹⁶ 17 U.S.C. § 106(4). This allows rights holders to profit from movie theater uses, for example.
- ¹⁷ 17 U.S.C. § 110(1).
- ¹⁸ Laura Jenemann, “Public Performance Rights Management in Academic Libraries” (presentation, IFLA General Conference and Assembly, San Juan, Puerto Rico, Aug. 2011), <http://conference.ifla.org/sites/default/files/files/papers/ifla77/161-jenemann-en.pdf>.

- ¹⁹ The Women Make Movies website explains that “institutional” pricing “includes public performance rights for classroom, organizational or library use.” See Women Make Movies, “Pricing: Universities, Colleges & Institutions,” <http://www.wmm.com/filmcatalog/pricing/institutions.html>. In fact, public performance rights are not required for classroom use and may not be required for library use, depending on the context.
- ²⁰ Direct Cinema Limited claims on its website that if you buy a DVD, “you are not allowed to show it in a classroom, library or any other public place without a Public Performance License.” See Direct Cinema Limited, “Details: Public Performance License,” <http://directcinemalimited.com/details.html#public>. In fact, § 110(1) allows showing in a classroom, library, or other “similar place devoted to instruction” without any additional rights or license.
- ²¹ The Bullfrog Films site suggests that showing films in a classroom would be a “public performance” and steers educational users away from the “home use” versions of films as they do not include additional performance rights. At the same time, their license agreement for home use films specifically recognizes that § 110(1) allows performance of films in teaching regardless of whether “performance rights” have been acquired. See Jenemann, 3–4.
- ²² It is a criminal offense to falsely claim copyright “with fraudulent intent,” but that intent requirement makes the offense virtually impossible to prove; accused publishers can easily argue that misleading notices are innocent mistakes. Consequently, there are very few prosecutions under the statute. It does not help that the penalty, even for a proven fraud, is “not more than \$2,500.” Copyright infringement, by comparison, has no intent requirement, and can involve damages of up to \$150,000 per work infringed. There is a striking imbalance between the extraordinary protections afforded to copyright holders and the practically nonexistent protections for the public domain. See Mazzone, “Copyright,” 1036ff.
- ²³ See, e.g., “Guidelines for Using Public Domain Text, Images, Audio, and Video Reproduced from Cornell University Library Collections,” Cornell University Library, <http://cdl.library.cornell.edu/guidelines.html>; “Publication Policy and Copyright,” Columbia University Libraries, Rare Book & Manuscript Library, http://library.columbia.edu/indiv/rbml/usingcollections/copyright_permissions.html.

© 2011 Brandon Butler



This article is licensed under a Creative Commons Attribution-Noncommercial-Share Alike 3.0 United States License. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nc-sa/3.0/us/>.

To cite this article: Brandon Butler. “Copyright and Classroom Performance Rights: Two Common Bogus Copyright Claims.” *Research Library Issues: A Bimonthly Report from ARL, CNI, and SPARC*, no. 276 (September 2011): 20–28. <http://publications.arl.org/rli276/>.