



chapter nine

Managing Copyright in the International Campus Library

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Managing copyright for an international campus library is not a simple task, but it becomes much less onerous when best practices are adopted. By enacting a university-wide copyright policy, learning the relevant local laws, and aiming for the most restrictive path of action, the librarian responsible for managing copyright can achieve an effective balance between supporting patron research and operating within the dictates of the law. The ultimate goal is to create a culture of compliance that reaches across borders to every location of the global university.

Introduction

As Librarian for Scholarly Communications for a large research university, I am responsible for managing copyright for a library system that includes full campuses and academic sites in every corner of the globe. It is not uncommon for me to receive an email query from my colleagues in Shanghai at 4:30 a.m. (EST)—just before they leave the library for the day, still a few hours before I set foot in my office—with a question about the application of fair use. Likewise, it is no surprise for me to check my email one last time before going to bed to find that an academic coordinator in Tel Aviv needs help finding the university-wide policy on using copyrighted materials in research and teaching for distribution to faculty members before the start of a new semester. While I may be located in a university library in the United States, my work extends far beyond my corner of the globe.

Managing copyright for an international campus library requires a global focus. My colleagues in Shanghai need more than a standard U.S. answer about the

application of fair use; fair use in the People's Republic of China is entirely different. Fair use in the U.S. is based on a flexible four-factor test that balances the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the work used, and the potential market effect of the use.¹ In China, fair use is far more concrete; it goes beyond the balancing of four factors to detail twelve specific instances where a work may be used without permission, including to translate the work from the Han language to a minority dialect or to convert the work into braille for the visually impaired.² My response to my Shanghai colleagues needs to bear in mind the differences between these two copyright regimes and consider how those differences could play out for a U.S. university operating on Chinese soil with resources and material being used and posted online.

The same dual-jurisdictional considerations must inform my response to the academic site coordinator in Israel. While the university-wide policy on using copyrighted material may apply to all faculty and staff, there are certain country-specific considerations that have to be weighed in any copyright-related communication to faculty working overseas. In Israel, for instance, copyright law is largely similar to that of the U.S., including the exceptions that exist for libraries and other educational institutions. Israel even adopts a fair use analysis nearly identical to that of the U.S. four-factor test.³ However, one clear difference between Israeli copyright and U.S. copyright is the protection of moral rights. In Israel, moral rights, or rights of attribution, subsist in all copyrighted works (artistic, literary, musical, or dramatic), whereas in the U.S., moral rights only subsist in visual works.⁴ Thus, faculty and staff working in Israel need to know that part of their responsibilities as users of copyrighted material includes respecting the moral rights of rights holders and attributing work they use appropriately. Failing to do so would be an actionable infringement of the owner's copyright.

These issues are just two examples of the many and varied challenges that can arise when managing copyright compliance and education for an international campus library. With so many different legal jurisdictions involved, not to mention the added complication of digital materials and online teaching and course management, it can be difficult to imagine a wholesale method for effectively approaching and dealing with copyright in a global university library. What kind of guidelines and best practices can a copyright specialist adopt when dealing with a subject that depends so heavily on location and specific circumstances? This chapter will address this question by taking a broad view of best practices for managing library copyright across borders. While it is true that copyright differs from one jurisdiction to the next, there are a number of common practices—from developing an official university-wide copyright policy to providing easily accessible resources on copyright guidelines—that are essential to ensure all campus libraries, regardless of location, operate well within the auspices of the law.

Enact a University-Wide Policy

The first and perhaps most crucial step is to develop and enact a university-wide policy on the use of copyrighted materials. While this endeavor will ultimately rest in the hands of university administration and counsel, libraries, as the largest providers of copyrighted material to the university community, are essential stakeholders in the development of such a policy. So much of the work that a library does—from providing access to materials to providing guidance on the lawful use of those materials—overlaps with the practices and guidance that will naturally form the body of a university copyright policy.

There are two related outcomes for creating a university-wide policy on copyright: the first is to ensure consistency across the research community and the second is to provide a layer of protection for the university. Having a universal policy regarding the use of copyrighted materials sets the tone for what is and is not permitted in the course of university business. When these boundaries are well established, the copyright concerns of stakeholders both within and without the university can be met. As it relates to external stakeholders, a universal and well-defined policy informs them of the university's stance on copyright compliance within its community. For internal stakeholders, a clear policy provides much needed guidance on how to comply with copyright restrictions while still fulfilling the educational and research mission of the university. What is more, there are some copyright allowances that require the presence of a university-wide policy before being applied to certain educational uses. For example, the Technology, Education, and Copyright Harmonization (TEACH) Act in the U.S. allows for certain face-to-face instruction activities to be applied in an online context, but only in a nonprofit educational institution that has an institutional copyright policy in place.⁵

While any university-wide copyright policy for a U.S.-based institution will likely be based on U.S. copyright law, it is important that the policy apply equally to all university faculty, students, and staff regardless of their location. Understanding local copyright law is essential (as discussed in the next section of this chapter), but having a university-wide policy helps to set a baseline for copyright considerations and decisions. A universal policy—even one based solely on U.S. law—provides a starting point for faculty, students, and staff, regardless of their location, to begin thinking and talking about copyright and how it applies in an educational setting. There is a delicate interplay between U.S. and local rules when dealing with copyright in an international campus library. Beginning with a clear statement on U.S. policy facilitates that interplay.

With this in mind, it is imperative that the university policy be detailed and elaborative, going beyond a mere exhortation to follow the dictates of the law. NYU's Policy Statement on Educational and Research Uses of Copyrighted Materials was expressly created "to support NYU's educational mission and rights un-

der copyright law, while minimizing the risk to the NYU community of copyright infringement claims”; and to that end, the Policy aims “to assist members of the NYU community in determining answers” to their copyright questions in an educational and research context.⁶ The Policy paints a broad picture of U.S. copyright law, as it relates to education and research, with a discussion of general copyright principles followed by an overview of the public domain, fair use and safe harbor guidelines, classroom performances, and licensed and open access materials. The appendices to the Policy contain more in-depth explanations of fair use and the classroom safe harbor guidelines, with practical examples of their application. Thus, the Policy serves the dual purposes of protecting the university and providing copyright guidance for a global research community.

Learn Local Library Limitations and Exceptions

The second practice to adopt for effectively managing copyright in the international campus library is to learn the local copyright law, particularly as it applies to libraries and educational institutions. With a clear university copyright policy based on U.S. law in place, the natural next step is to ensure a sufficient understanding of the limitations and exceptions provided for information and cultural institutions in the local nation. It is not necessary to become an expert on all aspects of local copyright law, rather the goal should be to become fairly well-versed in the specific ways in which local copyright law expands or restricts the functions of the academic library.

By far, the best resource for national copyright laws relating to libraries is Kenneth Crews’ *Study on Copyright Limitations and Exceptions for Libraries and Archives*, compiled for the World Intellectual Property Organization (WIPO) in 2008 and again in 2014.⁷ Crews reviewed the copyright laws of a total of 186 countries, finding library exceptions in 153 national statutes. In particular, he looked for the following exceptions to copyright protection:

- General library copying
- Copies for research or study
- Copies for preservation or replacement
- Document supply or interlibrary loan
- Copy machines on premises
- Limitation on remedies
- Circumvention of technological protection measures

The majority of library exceptions existed in the areas of copies for research or study, copies for preservation or replacement, and document supply or interlibrary loan; however, there were areas of exception worth noting. For example, several EU (European Union) and non-EU countries adopted an EU directive

allowing libraries to create and make available digital copies of materials at dedicated on-site terminals. In addition, several nations created library exceptions to their relatively new statutes on anti-circumvention of technological measures. On the other hand, Crews noted that between 2008 and 2014, fewer statutes focused on providing exceptions for library copy machines or limitations on remedies. Clearly, the focus of worldwide library exceptions to copyright has been shifting away from the physical to the digital collection.

In addition to providing a broad overview of common trends and developments in national copyright laws, the *Study on Copyright Limitations and Exceptions for Libraries and Archives* contains detailed descriptions of the library exceptions in force in each country studied, as well as citations to the relevant statutory provisions. Crews' Study is an invaluable tool for any professional managing copyright for one or more international campus libraries. It is a one stop shop for learning about local copyright laws and how they affect the day-to-day functions of the academic library.

Aim for the Path of Most Restrictiveness

Once the university-wide copyright policy is in place and there is a basic understanding of how local copyright law affects the function of the international campus library, the next step is to achieve a legally sound balance between the U.S.-based university policy and the mandates of the local national law. In that regard, the best practice is to aim for the path of most restrictiveness when determining where a particular use of copyright material would be permissible.

As with any copyright determination, the ultimate goal is to engage in an accurate risk assessment to weigh the importance of the use against the chances of a formal claim of infringement. This type of assessment becomes even more complicated by the fact that much of what all libraries do, whether in the U.S. or abroad, takes place in an online environment. It is no longer a simple matter of making physical copies of a book at a copy machine in a particular library location. Materials are constantly being shared in the cloud, across any number of physical boundaries. The international campus library can share in the collection of the U.S. campus library just as easily as if it were located in the same zip code because of the Internet.

This being the case, copyright infringement claims in an online context have no clear jurisdictional boundaries, making it difficult to conduct a fully accurate assessment of risk. Copyright owners, as potential plaintiffs, have their pick of jurisdiction when dealing with claims of infringement that span across jurisdictional lines in an online environment. For instance, if a copyright owner claims

that the Tel Aviv campus library of a New York-based university has unlawfully posted her material online, she can choose to sue the university in Israel or the United States under either Israeli or U.S. law. For the professional responsible for managing copyright for both the New York and Tel Aviv campuses, there would be no way of guessing when or from where a potential complaint would arise. As Kevin Smith notes in his book *Owning and Using Scholarship: An IP Handbook for Teachers and Researchers*, “[T]he online environment can be a very uncertain place, posing the risk of having to account for many different national laws when contemplating an Internet presence or online activity.”⁸

Never is this truer than for the U.S. university with a campus and library overseas. While the U.S.-based university copyright policy helps to set a baseline for discussions and considerations of copyright issues, national law plays an equally important role in assessing the risk of any online activity. The challenge lies in balancing the two so that there is a manageable level of risk on both fronts, in the U.S. and abroad. With this goal in mind, the best practice to adopt is to aim for compliance with the most restrictive of the relevant copyright provisions. By ensuring the highest required level of compliance for any particular online activity, the risk of an infringement claim becomes markedly reduced. For example, in China, posting full-text copies of others’ scholarly material online is a practice that is rarely met with reprisal in terms of copyright protection. Copyright holders are not known for being litigious, and the reproduction of scholarly work online is such a common practice as not to raise any calls of infringement. In the U.S., however, this practice would most certainly cause trouble for the university. The copyright infringement suit against Georgia State University by several large scholarly publishers serves as a prime example.⁹ Thus, for the Shanghai campus of our U.S.-based university, we strongly discourage instructors, librarians, and other scholars from posting full-text material online, especially on the open web. Instead, we encourage them to provide permalinks from relevant databases or to use carefully chosen excerpts in keeping with U.S. standards of fair use. Ultimately, our goal is to aim for the most restrictive copyright practices in any given situation by combining the mandates of both U.S. and local law.

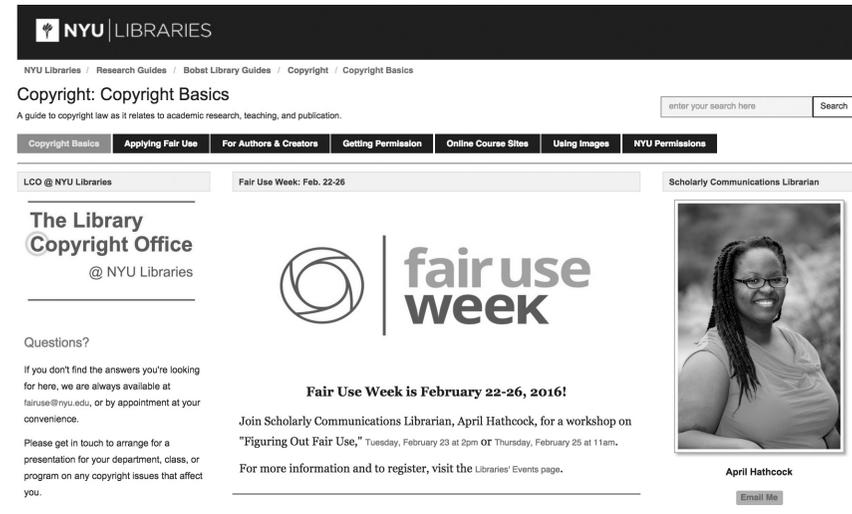
It is important to note that this practice of aiming for the most restrictive path is only feasible when addressing activities on a case-by-case basis. It is not reasonable to expect to comply with the most restrictive of copyright laws at all times and under all conditions. Nothing would ever get done! Rather, by encouraging members of the library staff (and the overall campus community) to check in regularly for guidance on the use of copyrighted materials, each use can be evaluated in light of its location, jurisdiction, and other surrounding circumstances to determine the best course of action for a manageable level of risk. The key is to make it easy for people to seek guidance while aiming for the path of most restrictiveness.

Create a Culture of Compliance

The ultimate goal in managing copyright for the international campus library—from enacting a university-wide policy to learning local laws and aiming for the path of most restrictiveness—is to create a culture of compliance that extends beyond the library to the campus community at large. The best way to do so is to provide plentiful and easily accessible resources that allow staff and the research community to find answers to their copyright concerns. Library staff and users need to know where they can turn for help with all their copyright questions, from the most basic to the most complex.

At NYU, we have a number of resources available to respond to the copyright education needs of the Global Network University. In addition to the university-wide copyright policy discussed earlier, there are two copyright research guides—one for copyright basics and the other for authors and creators—that provide a starting point for exploring questions about copyright.¹⁰

Figure 9.1. Screenshot of “Copyright Basics” research guide. <http://guides.nyu.edu/copyright>.



The guides are based in U.S. law, but they also provide links for contact directly with me or with our Fair Use listserv. Through the Fair Use listserv, members of the NYU research community, regardless of location, can seek guidance from me, as moderator, and other librarians and administrators on the use of copyrighted material and the protection of their own copyrighted works. When necessary, we

refer questions to the University Office of General Counsel with which the Division of Libraries enjoys a close and effective working relationship. Thus, international campus faculty, students, and staff, both within and outside of the library, are surrounded with the resources they need to navigate the complexities of copyright in a U.S. university operating abroad.

Managing copyright for an international campus library is not easy, but the task becomes much less onerous when the best practices discussed in this chapter are adopted:

- Work with university administration and general counsel to build a robust university-wide copyright policy.
- Take the time to learn how local copyright law addresses the functions of the academic library.
- Assess each potential activity with a view to taking the path of most restrictiveness, especially for online activities. In some cases, that will mean applying U.S. law in a foreign context.
- Create a culture of compliance by providing easily accessible resources to address copyright questions and concerns.

With these steps, any librarian can attain an effective system for copyright management in the international campus library and throughout the global university.

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 2. Copyright Law of the People's Republic of China, promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective Jun. 1, 1991, art. 22 (2010).
 3. Copyright Act of 2007, 2199 LSI 34, § 19 (2011).
 4. Copyright Act of 2007, § 45 (Isr.); Copyright Act of 1978, § 106A (U.S.).
 5. Copyright Act of 1978, § 110(2).
 6. New York University, *Educational and Research Uses of Copyrighted Materials Policy Statement* (New York: NYU, 2014).
 7. Kenneth Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives* (New York: WIPO, 2008); Crews, *Copyright Limitations* (New York: WIPO, 2014).
 8. Kevin L. Smith, *Owning and Using Scholarship: An IP Handbook for Teachers and Researchers* (Chicago: ACRL, 2014).
 9. Cambridge Univ. Press, et al., v. Patton, et al., Nos. 12–14676 & 12–15147 (11th Cir. Oct. 17, 2014).

10. April M. Hathcock, *Copyright Basics*, last modified February 4, 2015, <http://guides.nyu.edu/copyright>; Hathcock, *Copyright for Authors and Creators*, last modified February 4, 2015, <http://guides.nyu.edu/copyrightforauthors>.

Biography

April M. Hathcock is Librarian for Scholarly Communications at New York University. She received her J.D. and LL.M. in International and Comparative Law from Duke University School of Law and her MLIS from the University of South Florida. After a career in private practice specializing in intellectual property and antitrust law, she currently works to educate members of the research community on issues relating to access, ownership, and control.