Chapter 2

Copyright, Plagiarism, and the Law
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Authorship extends like an invisible hand through all parts of Composition Studies, affecting decisions about the texts that people read and write, the way Compositionists teach their students to write, and the values imparted about quoting, paraphrasing, and acknowledging sources. Authorship can be thought of as "invisible" because both copyright law and plagiarism policies often remain hidden, neither thought about nor discussed until someone suspects a transgression. Today copyright and plagiarism are often thought of as two parts of a single whole. Yet copyright is a set of federal and international laws protecting authors' rights to profit from their words, whereas plagiarism is a moral offense of appropriating words or ideas, and its only "laws" are local rules or prohibitions—school policies or regulations drawn up by professional organizations.

Definition of Copyright

U.S. copyright law originates in Article I of the Constitution, which gives Congress the power "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" (sec. 8). Conceived of as a form of intellectual property (which also includes patents and trademarks), copyright is specifically regulated by a federal
statute protecting "original works of authorship fixed in any tangible medium of expression" (sec. 102). The statute gives copyright owners the exclusive right to reproduce their work, prepare derivative works based on it, distribute copies of it, and perform it or display it publicly under the specific terms of the statute.

Copyright is defined as the exclusive ownership of and right to use a literary, musical, or artistic work for a specific period of time. The purpose of copyright law is to advance knowledge for the public welfare by keeping creative works in circulation as freely as possible. To do so, copyright creates a so-called intellectual commons, a public domain (or "free area") unprotected by the law where creative works—Shakespeare's plays are just one example—circulate as the common property of everyone and can be reproduced at will. At the same time, however, the law recognizes that writers, artists, and publishers need an incentive to produce and publish original creative works. The law therefore grants limited monopolies—copyrights. In protecting "original works of authorship fixed in any tangible medium of expression" (sec. 102), copyright law recognizes the start-up costs for producing works. The law therefore prevents others from unlawfully "copying" original works without first allowing creators and publishers to recoup their expenses. During the limited monopoly—the period of copyright protection—consumers are allowed limited or "fair use" of copyrighted materials based on certain statutory rules. Thus, in establishing an exchange value for information, copyright law can be seen as governed by an underlying economic principle, one that balances the rights of creators, their publishers, and users.

In addition to the economic rationale for copyright in the United States, a second principle, known as author's rights, not only forms the legal basis of copyright in Europe today but also plays a significant, if often unacknowledged, role in U.S. copyright law. Eighteenth-century philosopher John Locke argued that individuals have a moral right to the fruits of their labor. Author's rights laws extend Locke's ideas and assert that writing is intellectual labor and should therefore also be protected. A focus on author's rights creates copyright policies that are often protectionist in nature, tipping the balance of copyright in favor of creators rather than users.

A legal case involving the Disney Corporation illustrates the importance of the author's rights theory of copyright. Faced with the imminent expiration of its copyrights on Mickey Mouse, Donald Duck, and Goofy in 1998, Disney joined other corporate "authors" in lobbying Congress to extend the term of U.S. copyright protection by twenty years. Because the European Union had already extended its copyright protections by a similar number of years, Disney, Microsoft, and other conglomerates argued that it was more important to protect authors' rights than to open up the public domain. Their efforts resulted in the 1998 Sonny Bono Copyright Term Extension Act: whereas in 1970, the first U.S. copyright law protected authors for fourteen years, the 1998 law protects works owned by corporations (and any created before 1978) for ninety-five years—an increase of twenty years over the previous version of the law. Copyrights held by individuals remain in force until seventy years after the creator's death. According to the economic justification for copyright, the intellectual commons has shrunk, thwarting the public intent of copyright. According to the author's rights justification for copyright, a natural outgrowth of authors' inalienable rights to private property has occurred, even when the "author" is a corporate entity.

Definition of Plagiarism

The apparent growth in author's rights, based on a moral belief in individual labor as property, moves copyright law closer to the principles that define plagiarism, defined as an author's failure to either transform written material and make it "original" or to attribute it properly to its source. Derived from a Latin word meaning "to kidnap," plagiarism is widely regarded as a moral offense against society, a taking or "stealing" of someone's words or ideas that, unlike copyright law, usually assumes an immoral or unethical intention on the part of the offender. As seen in the high-profile plagiarism charges against Pulitzer prize-winning historian Doris Kearns Goodwin, who copied paragraphs verbatim from another author—and her public apology on Time.com as well as her resignation from the Pulitzer Board—the public takes plagiarism seriously, even though plagiarists violate no federal or state laws. As Stearns points out, "People despise plagiarism because it is a form of cheating that allows the plagiarist an unearned benefit" (7). In apologizing for her plagiarism (which had occurred more than ten years earlier), Goodwin offered an explanation that Composition students might offer as readily as do professional writers: that her transgression resulted from faulty notetaking procedures, ones Goodwin claims she has now corrected by using new technology.

Copyright law and plagiarism policies have significant, if sometimes invisible, effects on Composition classrooms. Understanding the history
of copyright and plagiarism can help teachers and scholars understand the effects of copyright and plagiarism and make them visible. How did these ideas develop, what do they mean for Composition Studies, and what importance do they have for writers and authors in classrooms and elsewhere?

History of Copyright

Supreme Court Justice Breyer argued in a 1970 *Harvard Law Review* article that copyright laws are unnecessary in most instances. He proposed restructuring copyright based on what he saw as the power vested in publishers and entrepreneurs rather than in authors ("Uneasy"). Although Breyer's proposal struck some as radical when he wrote his article, it was actually grounded in deep roots in the complicated history of U.S. copyright law, a history that extends back to English law.

When the first copyright appeared in England in the sixteenth century, less than a century after the advent of the printing press, it was designed to protect not authors, but the booksellers, printers, and bookbinders who belonged to a craft guild known as the Stationers’ Company. The Licensing Act of 1662 gave printers a virtual monopoly over the British book trade and also gave them the power to censor authors' materials. (In those days, the government used censorship as a way of controlling public opinion.) The Licensing Act of 1662 gave no rights to individual authors.

When the Licensing Act expired, the era in which copyright was tied to censorship also ended. So the London booksellers came up with an ingenious replacement: they asked for copyright to be given to authors rather than to booksellers. In 1710, the Statute of Anne became the first statute to create an author’s copyright. Yet the statute did initially benefit publishers more than authors because of one key provision: under this new law, copyrights could be assigned by authors to booksellers. If authors wanted to get paid for their writing, they first had to agree to assign their copyright to booksellers. The ingenious part of this new law was that the booksellers again had a monopoly over written works.

Despite this initial advantage in favor of booksellers, the Statute of Anne, entitled "An act for the encouragement of learning by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned," gradually succeeded in ending the stationers' monopoly. The Statute of Anne limited copyright to a term of fourteen years—renewable by the authors during their lifetime—instead of granting the perpetual copyright the booksellers had previously enjoyed. In the long run, then, the law ended the booksellers’ monopoly and promoted free trade not only by limiting the duration of copyright, but also by promoting copyright for the purpose of learning, by opening copyright to everyone, and by instituting price-control provisions (Patterson and Lindberg 29). Through its limiting provisions, then, the Statute of Anne effectively created what is now called the public domain, where once-copyrighted works are open to free use by anyone—one of the most important principles underlying U.S. copyright today.

After the Statute of Anne, the process of defining the author’s interests in copyright involved some of the most famous writers in English literary history, including Daniel Defoe, Joseph Addison, Alexander Pope, John Milton, and Charles Dickens. Addison, for example, published a widely read essay in the well-known newspaper *The Tatler*, in which he asserted the rights of authors. Addison writes, “Authors have even had a Property in their Works, founded upon the same fundamental Maxims by which Property was originally settled, and hath been since maintained” (qtd. in Rose, *Authors* 53). Alexander Pope was the first author to passionately defend his own copyrights, a practice that came to light when he sued Edmund Curll over the publication of Pope's private letters. In *Pope v. Curll*, the court found that the copyright in letters belongs to the writer, and the case remains one of the foundational decisions in English and U.S. copyright law.

In the United States, copyright and fair use were provided for in the Constitution and first enacted in a 1790 law that underwent a number of nineteenth-century revisions. These culminated in a major revision of the Copyright Act in 1909 that then controlled copyright for much of the twentieth century. The 1909 law had to be updated in 1976 because of the revolution in the communications industry that occurred in the intervening years. While some argue that other important revisions in copyright law will soon be necessary because of the dramatic changes brought about by the Internet and its related technologies, the 1976 law, though amended in 1998, remains fundamentally intact.

History of Plagiarism

Plagiarism’s force today stems in large part from Western culture’s celebration of the author as an original genius who works alone and without help from others (in contrast to a collaborative model that had described
authorship in the Middle Ages). Before the eighteenth century, as Martha Woodmansee explains, the “author” was regarded as a craftsman who manipulated available rules and materials to produce specific goals defined by the author’s audience (“Genius” 427). Occasionally, authors produced works that were seen as “inspired,” but even in those instances, they were regarded as subject to a higher power, a muse or God, and their works received no protection from others because of perceived originality. Woodmansee and Peter Jaszi propose that the author as the “sole creator of unique ‘original’ works” emerged from the economic necessity of eighteenth-century Romantic poets. Working in a saturated literary market, these writers responded by emphasizing the innovative aspects of their work (“Law” 769).

At the time that William Wordsworth and other Romantic poets were writing, England had already passed the 1710 Statute of Anne, which gave a renewable fourteen years of copyright protection to authors. Yet it was the economic situation in Germany, where writers found it difficult to make a living from their work, which led Enlightenment philosophers to redefine the nature of writing. While the dual construction of an author as both craftsman and muse-inspired vessel existed during the first part of the eighteenth century, Edward Young asserted in 1759 that a conception of the author as “original” and not merely as a vessel or “craftsman” ought to prevail. In Conjectures on Original Composition, he wrote, “The man who reverences himself will soon find the world’s reverence to follow his own. His works will stand distinguished; his the sole property of them, which property alone can confer the noble title of an author” (430; emphasis added). Thus, Young linked the originality of the author to the property right with which such original work became associated.

In his review of the conflict between literary and legal approaches to authorship, Peter Jaszi argues that one of the most important theorists on authorship in the twentieth century is Benjamin Kaplan. As a legal theorist, Kaplan anticipated the growth of collaboration and the modern critique of plagiarism. In his influential book, An Unhurried View of Copyright, Kaplan writes, “[If] man has any ‘natural’ rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown. Education, after all, proceeds from a kind of mimicry, and ‘progress,’ if it is not entirely an illusion, depends on generous indulgence of copying” (2). Kaplan urges lawyers to reconsider the profession’s growing protectionism against unlicensed imitation and also argues that the law’s attitude toward imitation stems from an “obsession with ‘originality’” associated with Romantic literary criticism (Jaszi 30).

Despite Kaplan’s urging, however, neither copyright law nor plagiarism policies have acknowledged the importance of imitation, collaboration, and intertextual borrowing that Kaplan, a noted legal scholar, urges.

In Composition Studies, scholars such as Shamon and Burns contend that “originality is probably an extremely small element of most texts, and originality may be less important in most student texts than imitation, repetition, application, and rehearsal” (190). Arguing that in order to be rhetorical and participate in a conversation, a text “must partake of the language, subject matter, issues, and authorities recognized by those holding the conversation” (190), the authors suggest that imitation is a normal part of the authorial process.

Implications for Composition Studies

While each statutory element of copyright has been interpreted through case law, the protections for “original” works and for “expression” (as opposed to ideas) are most important to Composition Studies. Furthermore, a key exception to the statutory protection, known as the fair use doctrine, also has important implications in the field. Issues of fair use directly affect how college teachers can distribute texts to their students. General ideas about copyright also affect the ways in which teachers describe their expectations of source attribution in students’ work—even though students’ work seldom infringes upon authors’ ability to profit from their work and therefore does not violate copyright. Plagiarism policies add another element to teachers’ expectations of students: they demand that students attribute the sources not just of words but also of ideas. According to copyright law, ideas are in the public domain; according to plagiarism policies, they are owned by authors and must be attributed. And the emphasis on originality that provided fuel for copyright laws prompts many teachers to demand “original” writing from their students.

Originality

In order for a work to gain protection under the Copyright Act of 1976, it must be “original.” In interpreting what meets the test of originality, courts typically look for two elements: the author must create the work independently, as opposed to copying it from other preexisting works, and the work must possess at least a minimal degree of creativity (a “modicum” will suffice). An infringement occurs when someone with known
access to the author’s work reproduces it in a way that is “substantially similar” to the original. The requirement of originality has been important in copyright law because it is often interpreted to mean that a work, especially if it borrows from another work already protected by copyright, must somehow “transform” the material it appropriates, that is, change it in some recognizable way.

Originality links copyright and plagiarism in that a prohibition against “wrongful copying” stands at the heart of both. Paradoxically, however, plagiarism, which is not a law and involves only a loose set of local rules and prohibitions, treats the originality requirement much more stringently than copyright law does. In fact, originality lies at the heart of plagiarism’s prohibition against copying an author’s work without giving the author the credit for original thinking or transforming the work enough for it to be considered “original” anew.

One way the difference between copyright’s and plagiarism’s views on originality becomes clear is through their respective treatment of intention. Copyright does not consider the intent of the person who infringes on the work of another. If a person’s work is deemed to be substantially similar to an author’s “original” expression then that person is held strictly liable for copyright infringement. In other words, in determining whether someone has infringed an author’s copyright, courts will look at the amount of wrongful copying, but whether the offender copied intentionally or unintentionally is of no consequence. With plagiarism, on the other hand, the intent of the person who appropriates a text is an element of the wrongdoing, one reason why plagiarism is sometimes called an “intentional taking.” The necessity of a specific intent associates plagiarism with criminal activity, like forgery or kidnapping, which requires that a perpetrator have the mental status necessary for wrongdoing.

Under the originality requirement, courts have held that works must possess a modicum of creativity. There is both a short and a long explanation for this, and both are important to an understanding of how copyright and plagiarism impact the field of Composition Studies. The short explanation is that originality merely insures the protection of creative work for economic reasons. Thus, as Yen suggests, copyright in the United States exists to provide the necessary economic incentives for the production of creative work (161). If copyright did not exist, people might simply copy an author’s work, and the author would consider the economic returns too small to justify producing any work. The incentive of giving authors a limited copyright interest in their work is actually a kind of trade-off because the real intent of the law is to encourage the free flow of ideas within the public domain. Thus, within copyright, a work need only possess a small amount of creativity because any variation is enough for a work to satisfy the underlying intent of the statute.

The originality requirement does not imply a purely economic basis to copyright law, however. As this chapter has explained, in Europe, the basis of copyright finds its justification in what has been called author’s rights, that is, the idea that copyright vindicates creators’ moral rights to “own” the fruits of their labor. This theory, while not the explicit basis of U.S. copyright law, certainly underlies Western notions of plagiarism in important ways, is closely allied with the “Romantic” notion of authorship, and underscores a different standard of “creativity” for plagiarism offenses than for copyright infringement. As a field, Composition has been heavily influenced by the notion of the “Romantic” author—the solitary genius who works independently, producing works from what is assumed to be divine inspiration, without any borrowing, collaborating, or intertextual allusions to authors or texts from the past.

In the postmodern theories that Composition has embraced in recent years, however, the idea of the solitary genius is at odds with most of what Compositionists have come to believe about writing: for instance that it is a social, collaborative act. Paradoxically, then, the idea of originality has created a two-tiered view of authorship: as copyright, the standard applied in the business world, it connotes only a minimal transformation of original material. Composition classes, however, attribute exclusive ownership of writing to individuals and, through plagiarism policies, zealously guard the already written, regardless of how derivative it may be, often assuming that student authors are inherently “unoriginal.” This policy allies plagiarism with the European-centered author’s rights theory of copyright. Furthermore, it means that as a field, Composition effectively sets higher standards for work within the classroom—that is, for student work—than for work done outside the classroom, a phenomenon that Composition scholar Candace Spigelman describes.

Ideas and the Public Domain

Copyright law protects an author’s expression of ideas, but not the ideas themselves. Because one of the underlying purposes of copyright law is to keep ideas in the public domain, it has been important to ensure that only the unique expression of an idea—and not the idea itself—receives protection. This dichotomy is codified by the 1976 Copyright Act, which
states, “In no case does copyright protection for an original work of authorship extend to any idea, procedure, system, method of operation, concept, principle, or discovery” (sec. 102(b)). In situations in which the expression of an idea is inseparable from the idea itself, courts have found the expression as not protected by copyright, a rule known as the “merger doctrine.” Sometimes, the subject matter of a work can be expressed in a limited number of forms of expression, and here copyright protection protects only against verbatim or near verbatim copying.

While copyright preserves the intellectual commons by guarding against the copyrighting of ideas, plagiarism policies offer no similar protection. Often, the kinds of rules that teachers pass on to students are unclear versions of “property” lines that should not be crossed. For example, the Modern Language Association (MLA) statement on plagiarism assumes that ideas are often the property of another person, rather than belonging to an intellectual common:

Using another person’s ideas, information, or expressions without acknowledging that person’s work constitutes intellectual theft. Passing off another person’s ideas, information, or expressions as your own to get a better grade or gain some other advantage constitutes fraud. [...] The most blatant form of plagiarism is to obtain and submit as your own paper written by someone else.

Other, less conspicuous forms of plagiarism include the failure to give appropriate acknowledgement when repeating or paraphrasing another’s wording, when taking a particularly apt phrase, and when paraphrasing another’s argument or presenting another’s line of thinking. (Gibaldi 66, 70-71)

MLA’s plagiarism policy comes close to protecting ideas as well as expression. While the policy prohibits the appropriation of developed thought patterns and original expression, its prohibition against adopting a line of thinking, for example, may actually encourage Composition scholars to feel they must cite ideas that are common knowledge. For instance, a student researching the controversy about downloading copyrighted music from the Internet may believe after reading MLA’s prescription that the historical precedents that have led to the uncertain state of the law constitute a “line of thinking” when they amount to nothing but facts available to any researcher. This result would be similar to copyright law protecting not simply the original expression of ideas, but the ideas themselves. Thus, MLA’s policy does not clearly articulate plagiarism in a way that encourages the free flow of ideas within the public domain.

**Fair Use**

If any part of copyright law has been perplexing for Composition scholars, it is the fair use doctrine, which allows for the use of copyrighted materials in educational contexts. The Copyright Act of 1976 codifies the fair use doctrine, which allows for the fair use of copyrighted work “for purposes such as criticism, comment, news reporting, teaching [...] scholarship, or research” (sec. 107). In determining what constitutes fair use, Congress specified four factors. They include

1. The purpose and character of the use (for example, whether it is for educational purposes);
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the work as a whole;
4. The effect of the use of the copyrighted work on the potential market for or value of the copyrighted work.

Composition scholars and the university community in general started to pay attention to fair use in 1991 when a federal district court in New York issued its decision in *Basic Books, Inc. v. Kinko’s Graphics Corp.* The court found that Kinko’s had violated the fair use doctrine and infringed copyright when it photocopied “coursepacks” and sold them to students as class texts. The court found that most of the fair use factors did not apply to Kinko’s, especially because of Kinko’s profit motive in making the copies. While the court intimated that coursepacks may not constitute fair use under different circumstances, the Kinko’s decision brought about substantial changes in the way articles and book materials are put together, and it forced universities and copy services to exercise tremendous caution in reproducing copyrighted materials. In a potentially precedent-setting case, *Princeton University Press v. Michigan Document Services, Inc.* (MDS), a panel of the Sixth Circuit Court of Appeals in 1996 initially ruled that, under the provisions of the fair use doctrine, an off-campus, for-profit copying business could make coursepacks that included substantial portions of copyright-protected books and sell them to students without obtaining publisher permission or paying publisher royalties. The decision was important because it directly contradicted the earlier New York appellate court’s ruling in the Kinko’s case. However, after rehearing the MDS case en banc, the entire Sixth Circuit Court of Appeals vacated the panel’s earlier decision and ruled in favor of Princeton University Press and the other copyright holders, denying
MDS's claim that the copying was for a "noncommercial" use. Relying on past case law, the court stated, "[T]o negate fair use, one need only show that if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work." Given that the U.S. Supreme Court declined to hear the case on appeal (cert. denied 117 S. Ct. 1336 (1997)), the MDS case, especially when considered in conjunction with the Kinko's ruling, appears to impose a rather narrow definition of fair use for the academic uses of copyrighted material.

Future Directions

In Composition, the primary questions about intellectual property have to do with conflicts between the law of authorship and postmodern theory. On one hand copyright law seems to be moving in protectionist ways that validate the rights of individual and corporate authors while further restricting the public domain. Similarly, plagiarism seems to be gaining greater attention in the field, as evidenced by the proliferation of online services like Turnitin.com, which focus on detecting student plagiarists. On the other hand, scholarship in the field of Composition Studies seems to be moving toward greater collaboration, embracing social theories of writing that can include imitation and patchwriting (see Howard, Standing). Composition Studies as a whole seems to favor the idea of Michel Foucault's author-function, which refers to the body of work attributed to an author and the cultural significance attached to that body of work. Regardless of who is actually "authoring" a work, Foucault argues, the author-function operates by neutralizing contradictions within a work and giving it a unity that perhaps it does not deserve. He argues that a work is not defined by its spontaneous attribution to the creator, but to a series of procedures that the creator follows in order to "author" the work. In addition, Barthes posits the death of the author, the premise that once a work is written, it is the reader rather than the author who determines the meaning of the text. This "birth" of the reader implies the ability of readers to interpret texts and change or transform them when they read so that the texts become something else—regardless of what the author may have intended.

The law, however, does not acknowledge the death of the author; instead, it promotes living authors through laws that have increased writers' individual stakes in copyright protection. While the economic basis of copyright law seems to align with Foucault’s notion of the author-function (see Bain in Chapter 6), which promotes the free circulation of texts, the reality is that the author-function contradicts the very notions of property that U.S. copyright law works to protect. This becomes evident in the extension of the copyright act to protect works for greater periods of time, in the apparent limitation on the fair use doctrine, and in U.S. copyright laws' basis in author's rights.

While legal restrictions on copyright seem at odds with these postmodern theories, part of the problem may stem from a fundamental conflict between the "author" and the "author-function," which Foucault does not adequately explain. In his article "What Is an Author?", Foucault, while suggesting that an author’s works eventually become associated with an "author-function" rather than with the author himself, argues nonetheless that certain influential authors, like Marx and Freud, are "initiators of discursive practices." In using this term, Foucault means that the effect of some authors’ work is so profound that their name does not merely connote a body of work; it is important to return to these authors in order to fully understand the meaning of their work. Is the "initiator of discursive practices" any different from the original idea of the author—the actual person—him or herself? It seems that even Foucault feels the need to acknowledge certain authorial integrity, the idea of an author as a kind of "legal" authority. To extend this idea slightly, if the author is no longer important, why do Composition teachers caution students to be suspicious of Internet sources? Clearly, Barthes’ insistence on the author’s death is premature. As a field, Composition will have to reconcile the appropriation of texts that it supports in the context of the author-function with the tendency, in plagiarismism policies, to return to a solitary author with a great legal status. This is one of the important questions about authorship that remains to be addressed in the discipline of Composition Studies.

As the Internet has opened up more opportunities for "wrongful copying," some scholars in Composition have begun to wonder about the future of copyright law. Just as technological developments brought about the need for substantial revisions in copyright, which led to the 1976 Copyright Act—and subsequent amendments to copyright law in Europe during the 1990s paved the way for greater acknowledgment of author’s rights approaches in U.S. copyright law—so the Internet may require other important changes to copyright and plagiarism standards. As a field, Composition should look ahead to the kinds of reform it wants to see made in both copyright law and plagiarism policies in order to have a role in guiding the invisible hand of authorship.
Applying the Concepts

1. What is your department/university plagiarism policy? How might you critique it in light of the issues raised in this chapter?
2. Write a plagiarism or academic honesty policy that you think would work well. What actions did you focus on? What words and phrases did you grapple with as you named academic standards?
3. How might the concepts in this chapter be applied in one or more of the courses you are now taking?

For Further Reading


