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THE CHILLING EFFECT OF COPYRIGHT PERMISSIONS ON ACADEMIC RESEARCH: THE CASE OF COMMUNICATION RESEARCHERS

Patricia Aufderheide, Phd[1]

ABSTRACT

Communications researchers in the U.S., who routinely analyze copyrighted material, both qualitatively and quantitatively, face challenges from strict copyright. The doctrine of fair use permits some unpermissioned use of copyrighted works. Survey research shows that researchers routinely need access to copyrighted material; that they are often unsure or confused, even unknowing, about fair use; and that this lack of knowledge and/or familiarity leads to both failure to execute and failure to initiate, or "imagination foregone." Creating a best practices code has improved knowledge but more institutional change is needed for knowledge to inform action.

[1] University Professor, School of Communication, American University. Thank you to the International Communication Association for hosting the initial survey and to the ICA's Ad Hoc Committee on Fair Use and Academic Freedom, especially Bill Herman, the lead author on the first paper discussed in this essay. Thank you as well to Prof. Aram Sinnreich, School of Communication at American University, lead author of the second paper discussed. Finally, thank you to Prof. David Park, Department of Communication, Lakeforest College, the chair of the ICA's Ad Hoc Task Force on Fair Use.

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INTRODUCTION

In the Covid-19 crisis, when researchers are homebound while trying to produce work and collaborate remotely on it, the power of copyright exceptions, especially the general and flexible U.S. exception of fair use, becomes especially visible. And conversely, what also becomes visible is the cost of not knowing or understanding the power of such exceptions. The case of communications researchers in the U.S. is a sobering one.

Communications research is a field in which unpermissioned access to currently-copyrighted material is critically important. Whether the researcher is working in an experimental mode (e.g. excerpting copyrighted material to test subjects' reactions), a content-analysis mode (e.g. the frequency and kind of reference to a demographic group in popular films), a quantitative approach (e.g. the importance of Black Twitter in the Black Lives Matter movement), communications research refers directly to the process of generating culture through communication.

Communications researchers in the U.S. have addressed the cost of copyright limitations and, perhaps more important, copyright confusion in doing their work. Their history shows that knowledge of exceptions can improve the quality of research, but that knowledge must continue to circulate within the field for the improvement to be maintained.

I. COMING TO AWARENESS

The first stage, coming to awareness, resulted in a report circulated to the research community. Clipping Our Own Wings: Copyright and Creativity in Communication Research (Ad Hoc Committee on Fair Use and Academic Freedom, 2010), was conducted in combination with an ad-hoc committee of the International Communication Association, one of the largest professional associations in the field, with Ford Foundation support. I launched the request to ICA and led design of the 2009 survey, and also edited the report, which was launched on the website of my (then) Center for Social Media. While international in its scope (with members from at least 87 countries), the ICA

membership is also majority-US researchers. A survey issued through ICA netted results from 387 members (a 9% response rate). While only 69% were from the U.S., there was no significant statistical difference between answers of U.S. and international researchers.

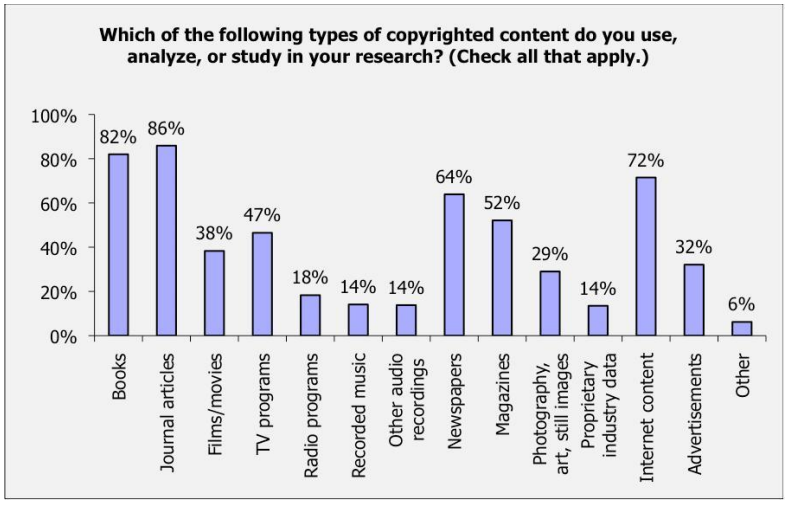
The report, whose principal author was Bill Herman, was never published in academic venues. Thus a summary of its main findings may be useful here.

Overall, the report found that:

Nearly half the respondents express a lack of confidence about their copyright knowledge in relation to their research. Nearly a third avoided research subjects or questions and a full fifth abandoned research already under way because of copyright concerns. In addition, many ICA members have faced resistance from publishers, editors, and university administrators when seeking to include copyrighted works in their research. Scholars are sometimes forced to seek copyright holders' permission to discuss or criticize copyrighted works. Such permission seeking puts copyright holders in a position to exercise veto power over the publication of research, especially research that deals with contemporary or popular media.

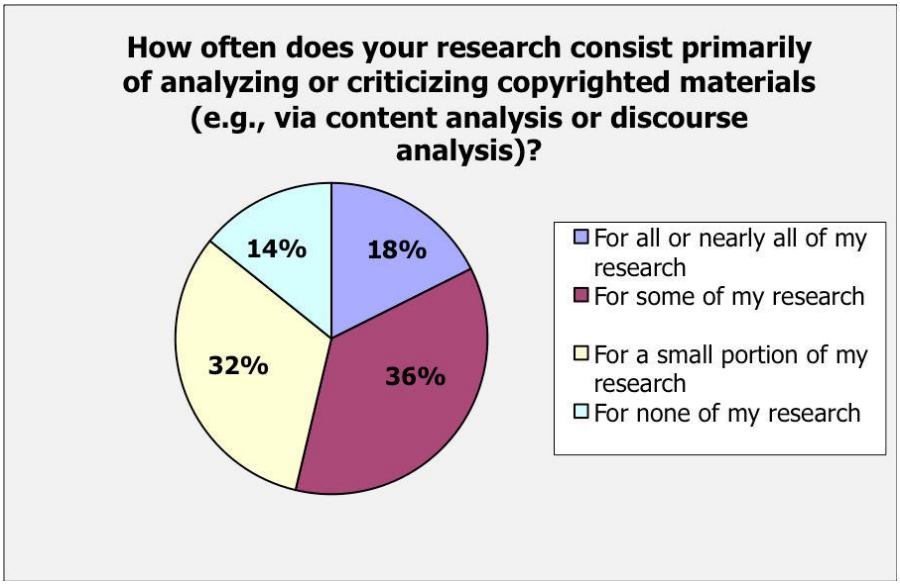
The report confirmed the prevalence of use of copyrighted material in the field. Researchers used a wide variety of copyrighted media:

Fig. 1



These materials were central to research in the majority of cases:

Fig. 2



Scholars also used copyrighted materials for other purposes, e.g. nonconsumptive analysis, experiments, reproduction of images, video or text in a survey, or illustrations in reports. Seventy percent said they did so, and 16% had quoted an entire creative work, for a range of reasons, as the report noted:

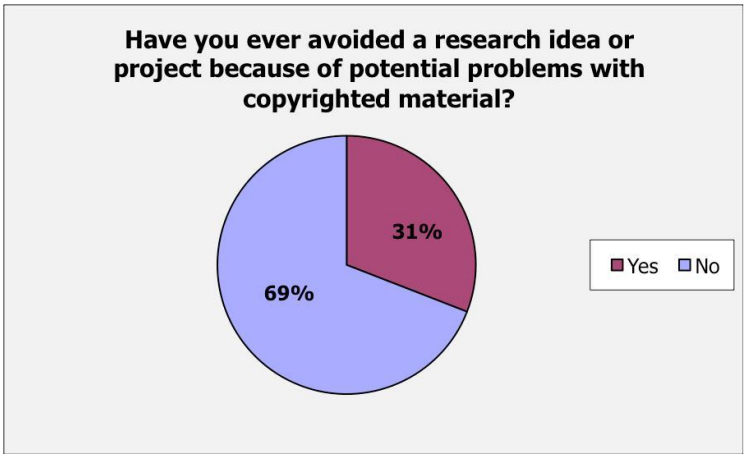
- "It's fairly impossible to critique an advertisement or a photograph without including the image in the critique."
- "I needed to present a complete narrative, as portrayed in a video."
- "Commentary on visual materials such as photographs and advertisements would be impossible without inclusion of the entire work. There is no logical way to excerpt just part of a magazine advertisement, for example."

As well, researchers archived copyrighted materials (61%), and 60% of those had shared those resources with colleagues.

Researchers were often unsure of copyright law in general; 44% said their knowledge was poor or low. When they needed advice, they got it from colleagues informally. They often received unhelpful or erroneous advice, including strong messaging to get permissions for all materials in dissertations and theses.

As a direct result of ignorance and confusion, communication scholars often self-censored in developing research projects.

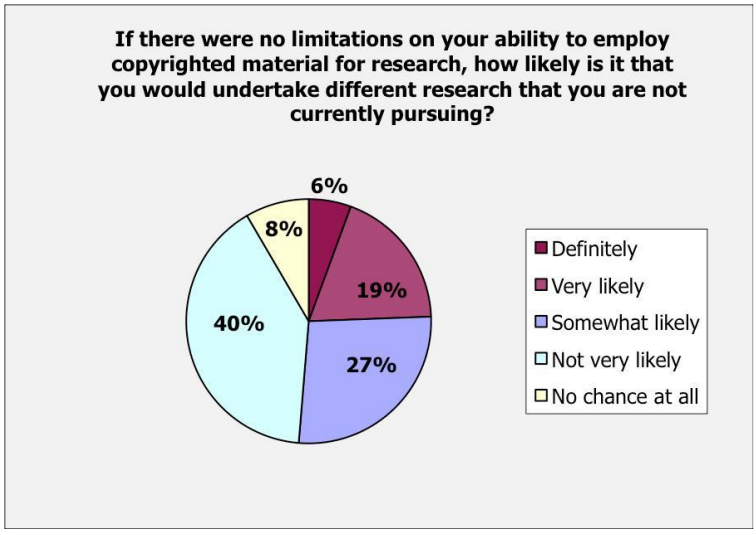
Fig. 3



Another 20% had abandoned projects in progress, because of copyright considerations. Nearly ¬æ (71%) cited problems with permissions specifically.

Half the respondents could imagine projects they could accomplish in an imaginary world with no copyright limitations.

Fig. 4



Interestingly, when asked for specifics, the answers were typically projects that can currently be accomplished employing fair use:

- "I would edit video (film or TV footage) and use it in experimental studies more often."
- "I [would] analyze TV series, which currently are hard to analyze due to copyright laws."

- "We would run our own emulated [multiplayer online game] server on which we would run laboratory experiments exploring how people behave and coordinate in online environments."
- "I might do more research inside online social environments such as Facebook, Second Life, etc., if I knew for sure I could capture and store images of the applications while I was working."
- "[I would create] web-based critical essays with embedded film clips."

While by far the most important gatekeeper or actor inhibiting work was researchers' own concerns, confusion and ignorance, about 17% had faced publisher demands to get permissionson all copyrighted works used. This routinely led to researchers either getting clearance or dropping the copyrighted work from the published project. A few-7%--gave up on publishing the work.

The report concluded, "Possibly the most important result from the survey is the finding that many scholars have refused to entertain even the notion of certain kinds of research because it might entail copyright issues" Thus, this report echoed earlier studies, summarized in Reclaiming Fair Use (Aufderheide & Jaszi, 2018), of the loss due to the chilling effect--"imagination foregone."

II. Code of Best Practices for Fair Use in Communication Research

The ICA's Ad Hoc Committee met after release of the study to ICA members, to discuss action. The Committee decided that, while researchers had reported problems with both research and teaching, they could easily repurpose for teaching the Society for Cinema and Media Studies' best practices code on fair use in teaching film and media studies (2008). They therefore decided to focus on clarifying terms of employing fair use for research.

Ad Hoc Committee members met with facilitators—Prof. Peter Jaszi of the Washington College of Law at American University (and founder of the Program on Information Justice and Intellectual Property) and myself—to deliberate about terms, and a legal advisory board of independent legal scholars and practicing copyright lawyers vetted the work. Within the same year, the Code of Best Practices for Fair Use in Communication Research (2010) was issued by ICA, with the National Communication Association, another major organization in the field, endorsing it. Both organizations placed the document on their websites.

The code has four major categories of communication practices in which fair use might apply, with guidance on how to determine the limits of such use:

1. Analysis, Criticism, and Commentary of Copyrighted Material

2. Quoting Copyrighted Material For Illustration

3. Using Copyrighted Material to Stimulate Response, Discussion, and Other Reactions During Research

4. Storing Copyrighted Material In Collections and Archives

The guidance is appropriate for both qualitative and quantitative projects, for both consumptive and nonconsumptive use of copyrighted works.

III. MEASURING KNOWLEDGE

In 2014, communication scholar Aram Sinnreich and I conducted another survey through ICA and NCA, to find out if scholars were aware of the code and using it. 350 researchers answered the survey.

In comparing the 2015 survey with the 2010 survey, we could see greater awareness of copyright and fair use issues, up 15% from 2009. Their confidence in their own fair use knowledge as either good or excellent had increased by 30%, to 87%. In the U.S., 59% rated fair use "absolutely necessary" for their work, with the overwhelming majority of the rest ranking it "very useful."

However, other responses suggested their actual knowledge was less strong than their confidence and positivity. Many came up with creative research projects they would do without copyright restrictions—substantially more than in 2009, demonstrating a heightened awareness of strict copyright's limitations. As before, however, most of these fell within what is permitted under today's law, employing fair use. And as before, many avoided projects employing copyrighted materials, because of their own concerns.

The results also showed that the academic associations had not publicized the existence of the code. Two-thirds of respondents (68%) were entirely unaware that they had a code of best practices through the very institutions that were serving up the survey. However, that number was slightly less (61%) for the most senior members of the field, suggesting that the more seasoned members of the group had paid more attention.

We argued for greater awareness in the field, concluding, "Communication scholars, on the front lines of media production as well as analysis and critical reception, can escape the trap of stifled creativity using tools already at their disposal and by emphasizing their core value and greatest strength: education." We chose to publish our work in the leading open-access journal, International Journal of Communication, edited by Prof. Larry Gross, a former member of the Ad Hoc Committee and former president of ICA (Sinnreich & Aufderheide, 2015).

A later incident renewed both awareness and institutional efforts. Two communication researchers, told by their publisher to pay the New York Times for excerpted material clearly available under fair use, launched a

kickstarter to publicize their outrage (Wang, 2016). The ICA formed a new ad hoc task force, which undertook greater publicity among its members with a two-year-long awareness campaign.

CONCLUSION

Academic researchers, often unbeknownst to themselves, suffer the chilling effects of strict copyright. They need a better understanding of the exceptions and limitations they have, and institutions need to support them in that. While academic associations can contribute, they cannot be the sole agents of change. Academic associations largely exist to provide academics with opportunities to interact with each other professionally, mostly at conferences. They are typically loose federations of different interest groups, run on a volunteer basis by the members themselves. Universities, libraries, archives, and funding organizations need to create awareness with standards, best practices codes, teaching modules, and expectations, to build the norms that give individual actors the reassurance that they can do what is entirely possible.

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