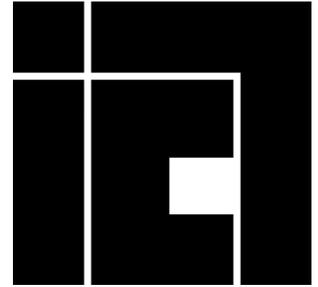




March 2010



# Clipping Our Own Wings

## Copyright and Creativity in Communication Research

*By the Ad Hoc Committee on Fair Use and Academic Freedom, International Communication Association*

*Sponsored and endorsed by the Media and Communication Policy Task Force, International Communication Association*

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## CLIPPING OUR OWN WINGS: COPYRIGHT AND CREATIVITY IN COMMUNICATION RESEARCH

### EXECUTIVE SUMMARY

Communication scholars need access to copyrighted material, need to make unlicensed uses of them in order to do their research, and often—especially within the United States—have the legal right to do so. But all too often they find themselves thwarted.

A survey of communication scholars' practices, conducted by the Ad Hoc Committee on Fair Use and Academic Freedom in the International Communication Association (ICA), reveals that copyright ignorance and misunderstanding hamper distribution of finished work, derail work in progress, and most seriously, lead communication researchers simply to avoid certain kinds of research altogether.

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.

These results demonstrate that scholars in communication frequently encounter confusion, fear, and frustration around the unlicensed use of copyrighted material. These problems, driven largely by misinformation and gatekeeper conservatism, inhibit researchers' ability both to conduct rigorous analyses and to develop creative methodologies for the digital age.

Communication scholars can benefit by developing best practices standards for the most ample and flexible copyright exemption permitting unlicensed use of copyrighted materials: fair use. While non-U.S. members will not be able to apply this doctrine directly to work done outside the United States, having this interpretation established for U.S. scholars will expand opportunities within a large area of communication research, encourage international scholars to explore their own nations' copyright exemptions, and provide an important benchmark for non-U.S. scholars looking for models as copyright reform proceeds.

*Copyright confusion hobbles scholarly research design, hampers distribution and, worst, leads scholars to avoid certain kinds of research.*

## INTRODUCTION

Effective use of copyright exemptions, such as fair use, fair dealing, and right of quotation, has been shown to have direct links to the quality and nature of creative work. When creators fail to understand or make use of exemptions that permit quotation of existing (and usually copyrighted) culture, they typically suffer from a failure not only to complete work but a hobbling of the imaginative and creative process itself. This has been shown in the research conducted by Profs. Patricia Aufderheide and Peter Jaszi at American University in conjunction with practice communities of documentary filmmakers, media literacy professors, dance archivists, and designers of open courseware (Aufderheide and Jaszi, 2004; Aufderheide, 2007; Flynn & Jaszi, 2009; Jaszi, 2007).

This multi-method research with creative communities has built upon insights from legal scholars such as Lawrence Lessig (2005, 2008), William Fisher (2004), and James Boyle (1996, 2008); it has deepened scholarly understanding with rich situational data. Furthermore, this research has been a platform for solutions. In all these projects, the creation of codes of best practices interpreting the U.S. doctrine of fair use has vastly expanded creative options (Boulton, 2009; Designing the public domain, 2009; Tushnet, 2008).

This is because U.S. fair use, among international copyright exemptions, is uniquely flexible and adaptable. While most copyright exemptions create rules applied to specific media in specific situations, fair use establishes the right to use unlicensed copyrighted material when the social benefit of cultural creation is greater than the cost to the copyright holder. Although the law offers some general considerations, that general logic has no hard-and-fast rules; rather, reasoning is applied on a case-by-case basis, with clarity brought by interpretation within communities of creation and use. Shared interpretations become community norms, respected by judges. In turn, these interpretations in practice help shape future expectations. Thus, the U.S. doctrine of fair use creates a clear opportunity for communities to match the exemption to the practices of the field and in the process identify the specific needs of cultural actors for exemptions. These needs can in turn be shared with non-U.S. policymakers addressing copyright reform.

This report explores the link between creative scholarly decisions and copyright knowledge in communication scholarship.

## METHOD

To better understand the role that copyright plays in shaping communication research in ICA, an anonymous survey was designed, using Survey Monkey. All ICA members were requested to participate via email, with repeated reminders. The instrument had 56 questions, as developed and vetted by the full committee. Most questions were multiple choice—some of which allowed multiple answers. Several follow-up questions were open ended.

In addition to five demographic questions and an open-ended invitation to share any thoughts at the end of the survey, we asked three kinds of copyright-related questions. First, we asked what kinds of uses members tend to make of copyrighted works. Second, we asked how much members

know about copyright, as well as whether and where they seek guidance. Third, we asked how copyright had deterred, slowed, or changed members' research. (The survey is available online at [centerforsocialmedia.org/fairuse](http://centerforsocialmedia.org/fairuse).)

Some 387 members participated, a response rate of 9 percent. The margin of error for any given answer is approximately 4.7 percentage points. This level of error is acceptable for the nature of conclusions drawn from the data. ICA members who live in the United States made up 69 percent of respondents; the next best-represented country was Canada, with 4 percent. A few questions elicited responses with statistically significant differences between U.S. and non-U.S. respondents, as noted below, but most were not significantly different. These results show the problems of copyright confusion and conservatism affect communication research around the world.

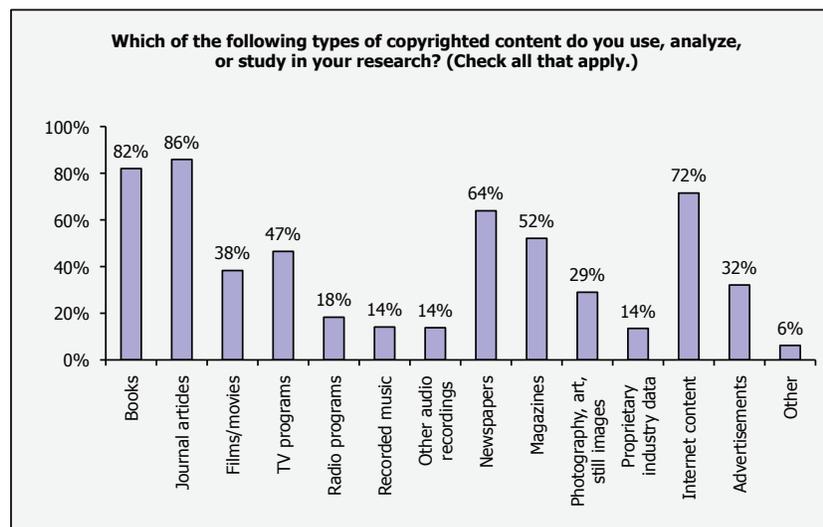
The report includes many quotations from respondents' answers to open-ended questions; some of these were edited to correct typographical errors or to remove details to further ensure respondents' confidentiality.

## RESULTS

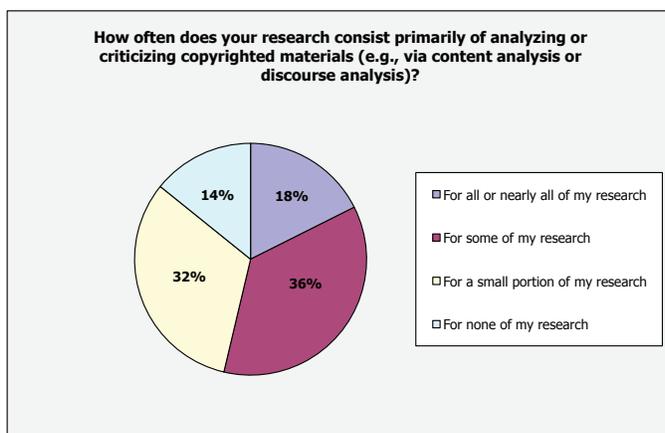
### *Uses of Copyrighted Works*

Communication scholars make frequent use of copyrighted works. This includes not only traditional scholarly resources, such as books (82%) and journal articles (86%), but also Internet content (72%), newspapers (64%), magazines (52%), TV (47%), and film (38%). See Figure 1.

**Figure 1: Copyrighted Works Used, by Medium**



This heavy use of copyrighted works across multiple media fits well with researchers' choices of methods. Analysis of media content is a vital method for many communication researchers; 18 percent of respondents analyze or criticize copyrighted works for all or nearly all of their research. Another 36 percent do so for some of their research, and 32 percent do for a small portion of their research. See Figure 2.

**Figure 2: Analysis or Criticism of Copyrighted Works as Core Research Work**

In addition to or instead of analyzing media content, a good number of researchers use media content in some other way. We asked how often they use copyrighted materials during the research process when their research does not consist primarily of analyzing or criticizing those materials; for example, researchers might show movie excerpts in an experiment about media effects, or include clips from television shows as part of an online survey. Ten percent do so for all or nearly all of their research, 29 percent do so some of the time, and another 29 percent do so for a small portion of their research.

Scholars in all fields quote other works of scholarship, but a large proportion of communication scholars also need to quote or reproduce part or all of other copyrighted works in their research—from film dialogue and song lyrics to photographs and magazine covers. Communication scholars often need to include such reproductions in a final research report, such as a term paper, a conference paper, a journal article, a book, a thesis, or an audiovisual media production, and our survey results reflect this. A substantial number of respondents regularly reproduce or excerpt copyrighted works, either for all or nearly all of their research (14%) or some of their research (25%), and another 31 percent do so for at least a small portion of their research.

Some (16%) have even reproduced or quoted an entire creative work—such as a song lyric, a poem, a photograph, or a music video—in their research. Some kinds of criticism require reproducing an entire work. Several respondents wrote that they view the reproduction of such visual works as photographs and visual advertisements to be particularly important. For instance:

- “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.”

In order to effectively convey their message, sometimes it is necessary for researchers to reproduce part of a copyrighted work in a final research report, and sometimes it is necessary to reproduce the entire work.

Archiving materials is another important activity to many communication researchers; 61 percent collect or archive materials for their research. Of those who do, the vast majority (89%) are keeping at least some of these materials on computers, but printed copies (67%) and physical audiovisual materials, such as optical discs or audio or videotapes (32%), still remain popular. Over 60 percent of those who archive are also sharing these materials with at least some colleagues. Archiving materials is often an essential step in the research process. For instance, methods such as content analysis and discourse analysis generally start with gathering a collection of materials to be analyzed, and keeping these materials often enables future research. This is especially true for materials that are not already being carefully archived and catalogued by others, such as broadcast radio and television or online content. Even methods such as experiments that use copyrighted materials as stimuli often require researchers to excerpt, keep, and share copyrighted materials.

#### *Knowledge of Copyright and Seeking Help*

The great majority of researchers are less than fully confident in their own knowledge of copyright, want to learn more, and often seek help to know how best to proceed when using copyrighted works. Nearly half of them rated their own understanding of copyright as fair (31%) or poor (12%). Only 17 percent rated their knowledge as excellent, although another 40 percent rated it as good.<sup>1</sup> Those who have a fair or poor understanding are not generally satisfied with this and want to know more. Of this group (43%), 16 percent have a very strong and 45 percent have a moderately strong desire to know more about such copyright exemptions as fair use. Nineteen percent of all respondents say that they have had concern or anxiety when they have included unlicensed copyrighted work in their own published work.

Whatever their self-rated knowledge of copyright exemptions, most respondents have sought out answers to their copyright-related questions, whether by consulting written legal materials or speaking to other people. When they have a question about their right to use copyrighted materials without permission, most respondents seek advice at least some of the time. A remarkable 15 percent always seek out guidance on the matter, 24 percent usually do so, and 37 percent do so at least occasionally.

When researchers do seek help, they turn to librarians (39%), written legal materials (37%), university counsels (15%), and administrators (13%). Informal advice by colleagues is far and away the most common source of help; this includes help from colleagues at one's college or university (64%) and colleagues at other institutions (36%).

They also receive unsolicited advice. A third of respondents report that their library or administration has made them "aware of limitations on insertion of copyrighted material into dissertations or theses."<sup>2</sup> While responsible education about copyright is a valuable part of preparing scholars to produce scholarship, these warnings against including copyrighted materials often overstate the rights of copyright owners and understate the rights of new users and can lead to confusion and unnecessary conservatism.

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<sup>1</sup> U.S.-based respondents were more confident in their knowledge of fair use than other respondents were in their knowledge of similar exemptions—they were slightly more likely to rate their knowledge as excellent, and slightly less likely to choose poor.  $\chi^2 = 8.47, p = .037$ .

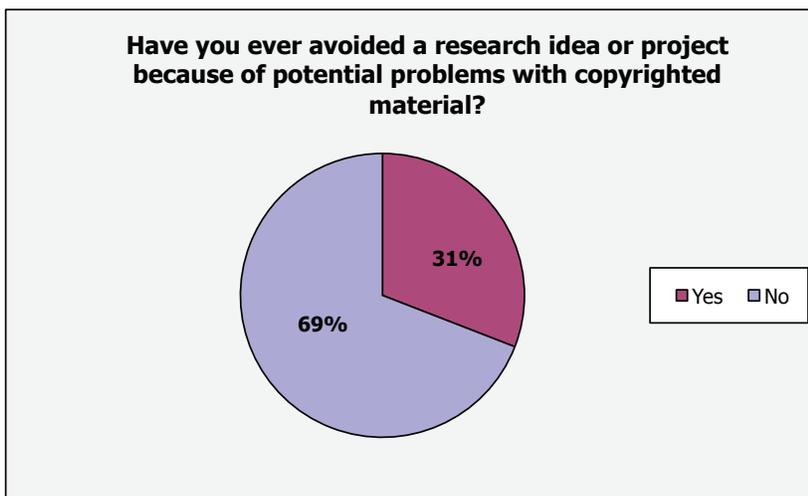
<sup>2</sup> Scholars from outside the United States were somewhat more likely to have been told to limit such uses of copyrighted works in dissertations and theses than U.S. scholars ( $\chi^2 = 6.51, p = .011$ ).

Researchers often know too little about their legal rights to make use of copyrighted works, leading to fear, confusion, and unnecessary self-censorship. Likewise, institutions such as universities and publishers are also often unwilling to take advantage of the limitations on copyright holders' exclusive rights. Copyright confusion and conservatism among both scholars and institutions is a real obstacle to successful communication research at each stage of the research process. Unnecessary fear of copyright problems can deter or discourage research before it even begins, slow research that is already under way, and negatively impact the process of publishing completed research.

#### *Avoiding and Abandoning Research Projects*

Fear that potential copyright problems might surface later often deters certain kinds of research before it even begins. Nearly a third of respondents have avoided a research idea or project because of potential problems with copyrighted materials. See Figure 3.

**Figure 3: Avoiding Research because of Potential Copyright Problems**



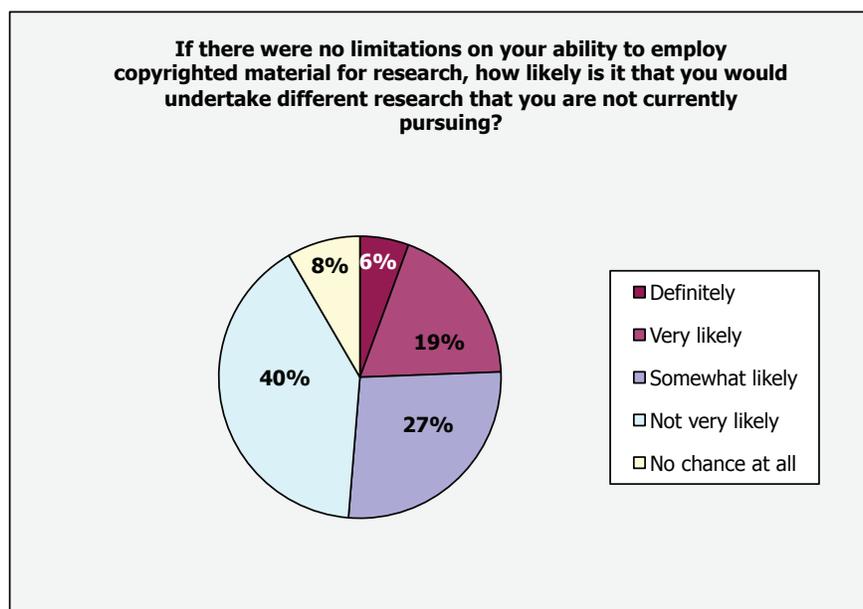
Asked to say more about the kinds of research they have avoided, many of the respondents described activities that are likely fair uses; these include “analysis of television news,” “extensive analysis of films,” “online gaming environments,” “media effects research involving motion pictures,” and research analyzing political cartoons. One respondent writes, “I have stayed away from scripted programming, which is a shame because there is a wealth of information to be gleaned there, but obtaining permissions is a labyrinthine process I don’t have the ability to undertake.”

Copyright concerns sometimes block research that is already in process as well. Because of copyright obstacles, 20 percent of respondents have abandoned a research project that was already under way. As with respondents who avoided research projects, respondents who describe their abandoned projects were often engaged in activities that are highly eligible for fair use. These include “research examining

mental illness discourse in popular culture,” “experimental studies of anti-smoking materials,” and “historical analysis of film.” One respondent writes, “I had initiated a line of research examining mental illness discourse in popular media, but abandoned it when I realized copyright issues would make presentation and publication complicated and expensive.”

Communication scholars often have clear ideas of what projects they would undertake if they believed that copyright policy permitted it. Asked, “If there were no limitations on your ability to employ copyrighted material for research, how likely is it that you would undertake different research that you are not currently pursuing?” more than half indicated that they would pursue research they presently will not consider. As shown in Figure 4, 6 percent answered definitely, 19 percent chose very likely, and 27 percent would be somewhat likely to pursue different research.<sup>3</sup>

**Figure 4: Likelihood of Undertaking Different Research If No Copyright Concerns**



Respondents mention a wide range of projects:

- “I would edit video (film or TV footage) and use it in experimental studies more often.”

<sup>3</sup> There were statistically significant differences between U.S. and non-U.S. respondents ( $\chi^2 = 13.67, p = .008$ ). There was not a clear monotonic relationship, as U.S. respondents were more likely to choose both definitely and not very likely, while non-U.S. participants were relatively more likely to choose very likely, but this was with a modest number (14) choosing definitely.

To see if there was a monotonic relationship, we collapsed this question’s 5 answers into 3, combining definitely and very likely into one group, and combining not very likely with no chance at all. The cross-tabulation for U.S. versus non-U.S. participants was still significant ( $\chi^2 = 8.87, p = .031$ ). A relatively smaller share of U.S.-based participants say they would be very likely to pursue different research were copyright not an obstacle. A relatively larger share of non-U.S.-based participants say they would be very likely to pursue different research. Put differently, non-U.S. respondents are more likely to see copyright as preventing them from pursuing their chosen research strategies.

- “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.”

Researchers are also commonly stymied by lack of access to needed materials. Researchers may not be able to afford access, or it may not be available at any price. Nearly 59 percent report having some problems gaining access to copyrighted works. These problems include the difficulty of obtaining permissions (37%), prohibitive costs (34%), lack of convenient options for accessing (33%) or copying (22%) materials, and such technological barriers as encryption (12%).

#### *Gatekeeper Roadblocks*

Researchers face resistance to using unlicensed material from gatekeepers as well. Journal and book publishers often refuse to publish scholarship because of copyright concerns, even when including the materials in question clearly falls under fair use.

Nearly 17 percent of respondents have encountered journal publishers’ resistance to using copyrighted materials without permission. See Figure 5.

**Figure 5: Facing Resistance from Journal Publishers to Using Copyrighted Materials**

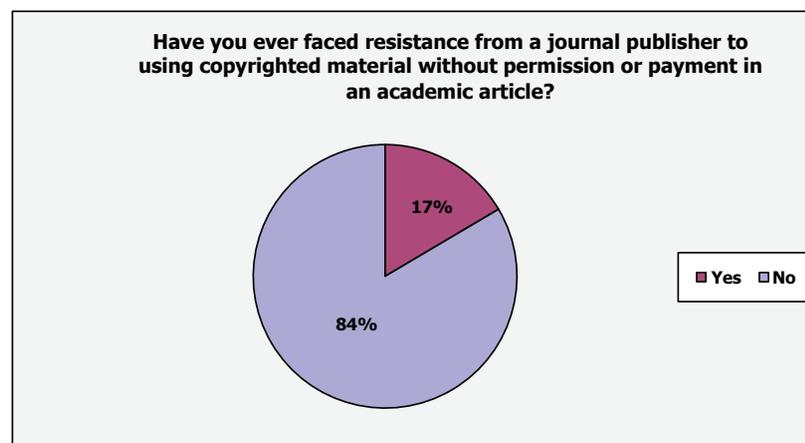
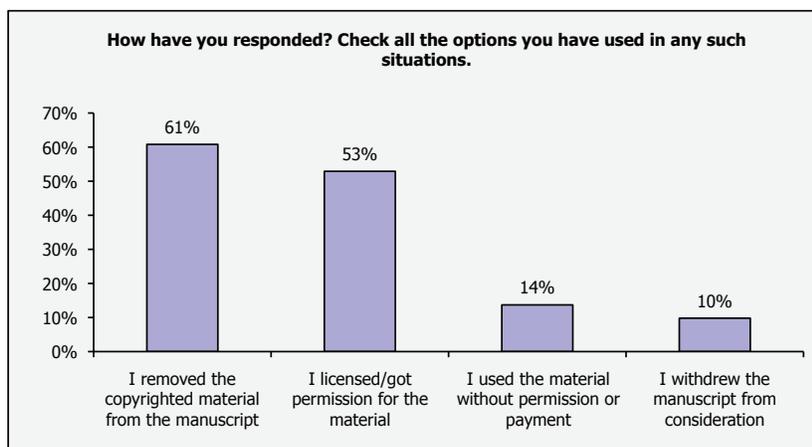


Figure 6 highlights how those affected have responded. Of these, 61 percent simply cut the material in question from their manuscript, though 53 percent were able to license at least some copyrighted content.

**Figure 6: Responding to Resistance from Journal Publishers**

Another 10 percent withdrew the manuscript from consideration.

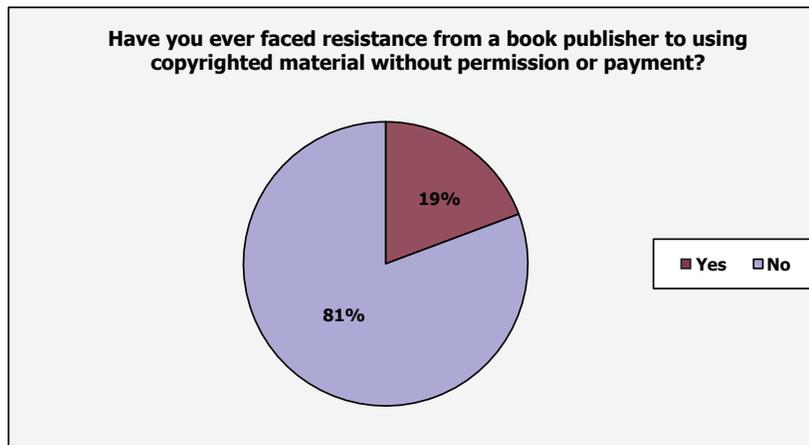
Resistance from journal publishers is one important reason that respondents have abandoned research projects already under way. One writes:

I have shelved several projects (e.g., comic strips, songs, music artists, cancelled TV shows) because it has been impossible to get permissions, or the permissions have been outrageously expensive. I was unable to publish a journal article on comic strips because the total cost to reprint the strips would have been in excess of \$8,000!

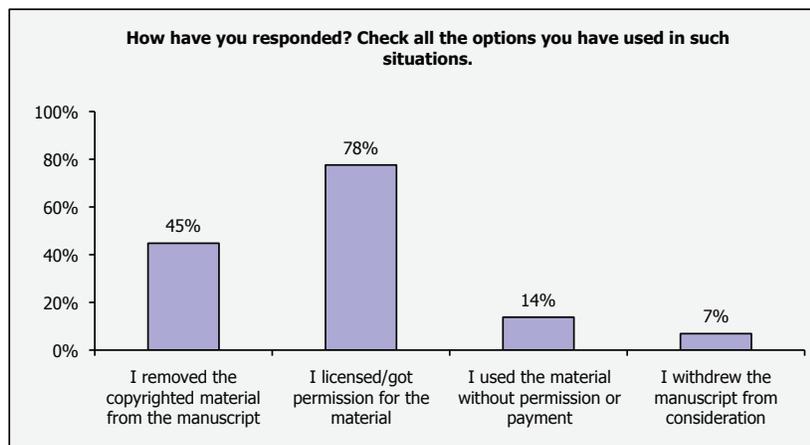
Abandoning research at the publication stage is a particularly disconcerting outcome; the scholar has already invested all of the time and effort to conduct and write up the research, the journal's editor and reviewers find it worthy of publication, and concerns about copyright keep this work from ever seeing the light of day.

Communication scholars face similar treatment from book publishers. A fifth of respondents have faced resistance to including copyrighted material in books. See Figure 7.

*Publishers and librarians often resist incorporating copyrighted material into research results.*

**Figure 7: Facing Resistance from Book Publishers to Using Copyrighted Works**

Relative to those who faced resistance from journal publishers, more respondents who confronted this problem with book publishers were able to license some or all of the materials in question (78%). See Figure 8.

**Figure 8: Responding to Resistance from Book Publishers**

Almost half the respondents who had this problem cut at least some of the materials in question, altering their scholarly goals to fit copyright understanding—and misunderstanding. One respondent writes:

I have a forthcoming monograph that examines advertisements, and it would have been wonderful if the images could have been included, but the company denied me permission. Obviously they did not want my negative critique to accompany their product images. The editor was not at all willing to even consider fair use or have a discussion.

This example illustrates the dilemma facing many communication scholars: They need to cut unlicensed materials at the behest of the publisher, but doing so substantially harms the final product's intellectual

rigor. Faced with this choice, a small minority of respondents who faced similar resistance from book publishers withdrew their manuscripts from consideration (7%). One explains this decision:

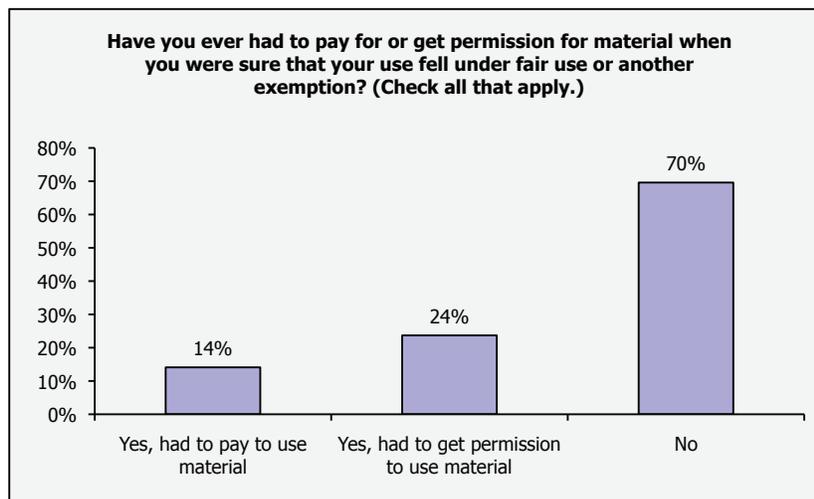
I (and two colleagues) was offered a contract with [a publisher] for an edited volume . . . on popular culture. [The publisher] refused to treat media quotations as fair use. It insisted that our contributors would have to pay for any permissions fees for such quotations. It offered no budgetary support for such fees. It refused to allow us to use any such quotes in the final manuscript without formal permission—even in cases where good faith efforts to secure such permissions went unanswered.

In short, [the publisher] wanted us to produce a volume where somewhere between 30–40 essays would potentially have to be vetted for hundreds of quotations—quotations that wouldn't need any such vetting had we been producing a comparable [volume] on, say, Postmodern Theory—and we decided that their rules would either make the project far too cumbersome and expensive to produce or they would make it far too intellectually weak to be worthwhile, since our authors wouldn't be able to quote the various texts that were the focus of their work.

As with journal articles, withdrawal of book manuscripts represents a terrible outcome for everyone involved. The publishers and the public miss out on a worthy product, and researchers must take the product of years of work elsewhere, risking that it will never be published at all.

Because of publishers' confusion and fear about making unlicensed uses of copyrighted works, respondents were often forced to seek permission for uses that they knew to be fair uses. See Figure 9.

**Figure 9: Forced to Seek Permission or Pay for Already Legal Uses**



Over 14 percent have needed to pay for copyright clearances even though they were sure that their uses fell under fair use or another exemption. Additionally, 24 percent have needed to obtain unpaid permission even when they knew the use was a fair use or otherwise exempt.

Getting permission for uses that are clearly or likely fair is a common theme among many participants. Illustrative responses include:

- “[Our] project compared editorial cartoons. [The] cartoons were important to [the] project. [We] secured permissions from the owners.”
- “It was important to analyze artwork and photos to highlight a key point in the overall argument. I did obtain copyright permission in the cases in which it was reproduced.”
- “[We wrote a] paper on photojournalism that made no sense without reproducing the originals, for which we paid copyright fees.”
- “I critique magazine covers, for example, so I needed to show the cover. I secured permission to publish the image. In other cases, when I critiqued ads, I was denied permission, so I could not reproduce them.”

These researchers and many others find themselves seeking permission for uses, sometimes obtaining permission, sometimes paying for clearance, and sometimes simply not using materials that would aid their research.

## DISCUSSION

This survey demonstrates that communication researchers are heavy users of copyrighted works and regularly seek more information about how to use works without violating copyright. It also found that these scholars run into problems with unlicensed use of copyrighted work at every step of the research process. These problems both hamper the research they do and inhibit them from undertaking the research they wish to do.

### *Seeking Clarification: Few Good Options*

The survey reveals respondents’ great anxiety about copyright compliance, evidenced in the very high level of checking with authorities on copyright decisions. Authoritative sources of help at a scholar’s home institution, such as general counsels, administrators, or librarians, often address these questions with an eye toward minimizing risk to the institution. This predictably leads to conservative advice.

Scholars’ common reliance on informal advice from colleagues for information on copyright exemptions creates two additional problems. First, it means researchers’ ability to make legally defensible uses of copyrighted works depends in part on whether their campus or their professional network includes somebody with enough knowledge to give accurate advice. Second, it entrenches highly conservative policies passed down over the years; each negative experience reverberates throughout these informal networks, having a disproportionate influence on scholars’ decisions. Among the informal advice often given is to fly below the radar, leading many scholars to seek to “get away” with doing their work quietly and in poorly circulated forums that can shelter them from closer scrutiny but that also limit scholarly exchange.

### *Obstacles to Access*

Access to copyrighted materials and publishers’ fears about using copyrighted materials are also substantial obstacles to communication scholarship. They block imagination at the start. Not all problems with accessing copyrighted material are related to copyright exemptions, of course. In some

cases, researchers needed to purchase expensive databases that were the sole sources of materials, for example. But scholars' confusion about copyright contributes to concerns about access; many of those who report problems seeking permission to use or copy materials may be seeking permission they do not need if they have unfettered access to the copyrighted materials. (This problem was not explored well enough in the study to ascertain under what circumstances scholars experienced access problems.) Some problems, where scholars have independent free access to material, could be resolved by a better understanding of fair use. Many scholars forego projects that are legal under U.S. law, and only researchers' and intermediaries' confusion and conservatism prevent these projects from going forward.

#### *Obstacles to Publication*

Scholars' own doubts about using copyrighted works are compounded by limitations put upon them by gatekeepers. About a fifth of the respondents had encountered journal and book publisher resistance to including unlicensed copyrighted materials, typically as illustrative matter, and in such cases, the majority of the respondents cut out material to accommodate their gatekeepers' concerns. Scholars who want to do something as simple as quote the dialog of a popular television show—let alone reproduce political cartoons or photographs—are often told to get permission or forget it. The permission-seeking process is often expensive and time-consuming, and it leaves scholars in the position of asking for permission to criticize. Many respondents seek permission even for fair uses, and if they cannot obtain it or cannot afford licensing fees, they often remove the material in question. Several have even removed manuscripts from consideration.

#### *Clipping Our Own Wings*

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. This shows that a large and unmeasured cost of copyright confusion is “imagination foregone,” when people do not even begin the process of conducting research, because they believe that copyright issues would never allow their research to come to completion. This conclusion is reinforced by the fact that more than half of the respondents said that if they could employ copyrighted materials for their work, they would be at least somewhat likely to pursue research they presently will not consider. This self-censorship often arises from confusion and lack of knowledge of new users' rights under U.S. copyright law.

## **CONCLUSION**

The use of copyrighted works is a vital part of the research strategies of a large portion of the ICA community, and that use is being harshly constrained. This is not a problem soluble by better licensing techniques. The problem is not merely that licensing work is onerous and expensive. Nor is it just that some licensors may simply deny or ignore requests. Rather, scholars often have the right under law to make unlicensed uses of copyrighted works. The application of these exemptions is something that must be done on a case-by-case basis, but in the United States at least, many of the uses described above are at least eligible for consideration as fair uses.

These results highlight how communication scholars are not making full use of their rights under the law. Researchers are dogged by fear, uncertainty, and the lack of reliable information, which creates obstacles at every step of the research process, from designing projects and gathering data to publishing and

distributing results. That fear and uncertainty lead directly to the stifling of communication research. And the problem is international in scope. Respondents from outside the United States were about as likely as U.S. scholars to let copyright concerns inhibit their research. If anything, the few results with significant differences actually suggest that those outside the United States may face even worse problems: They exhibited less confidence in their knowledge of copyright exemptions, they were more likely to have been warned by their home institutions against using copyrighted works in dissertations and theses, and they would be more likely to choose different research projects were it not for copyright fears.

## NEXT STEPS

Many of the problems outlined above will be mitigated if the communication scholars can collectively establish their own interpretation of the broad and flexible U.S. doctrine of fair use, as other communities have done in creating codes of best practices in fair use.

We suggest, based on the range of problems evidenced in this report, that the ICA create a code of best practices in fair use. While non-U.S. members will not be able to directly apply this doctrine to work done within the bounds of other countries, having this interpretation established for U.S. scholars will provide an important benchmark for non-U.S. scholars looking for models as copyright reform proceeds. It may also encourage ICA members in different countries to explore the opportunities now available to them under their country's copyright exemptions, to educate themselves about them and to make use of them.

*Academic self-censorship results from confusion and lack of knowledge of researchers' rights.*

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