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Copyright and the Academic Library: The Ambiguities of Fair Use

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Copyright compliance presents a number of challenges to academic libraries including providing electronic access to materials to patrons and colloquia members, serving as copyright experts to faculty, negotiating advantageous licensing agreements, and keeping up with continually changing federal and international standards (American Library Association 2008a). Currently, digitization and electronic dissemination of materials dominate the academic library discourse regarding copyright. These technologies were not anticipated by the original *Copyright Law* (2008) and have yet to be effectively included (Gould, Lipinski, and Buchanan 2005, 183). Today's students and scholars want to access quality information from their home, offices, coffee shops and other Internet connected areas (Carter 2007, 2). Digitization and electronic communication make this possible and academic libraries certainly feel the pressure to improve electronic holdings and service delivery (Ferullo 2004, 36). However, one of the primary challenges is the continually changing face of copyright law and imprecise, inconsistent, and fluctuating judicial precedent interpreting existing copyright law (Menell 2008). Current laws such as the *Digital Millennium Copyright Act* (DMCA), Section 108 library and archives exemptions to the *Copyright Law (*Section 108), and the *Technology Education and Copyright Harmonization Act* (TEACH Act), all of which are intended to establish guidelines for librarians and educators, simply highlight the law's shortcomings (Ferullo 2004). The exemptions and guidelines these rules create do not address all possible scenarios forcing librarians to turn to Section 107 of the *Copyright Law* (2008), the vague fair use balancing test. Thus, librarians are left to decipher the law with little Congressional or judicial guidance (Gould, Lipinski, and Buchanan 2005, 196). As a reaction to rampant infringement in the music and cinema industry

recent modifications to the *Copyright Law* (2008) have strongly favored copyright owners and creators over users (Ferullo 2004, 29). Consequently many libraries lack satisfactory internal copyright policies and may be over limiting copyrighted works or under protecting them (Gould, Lipinski, and Buchanan 2005, 182; Kelley et. al. 2002, 262). To add to the confusion several important developments occurred in copyright law in October of 2008, which will impact academic libraries' fair use copyright policies: the passage of the *Prioritizing Resources and Organization for Intellectual Property Act* (PRO IP), the filing of *Cambridge University Press et. al. v. Patton et. al*. (hereinafter Georgia State University Case), and Google's settlement of multiple lawsuits targeting their Google Books project (hereinafter Google Books Cases).

The *Copyright Law:* 1790-2008

When ratified, the Constitution granted Congress the right to regulate copyright (U.S. Constitution). Copyright seeks to balance creators rights to ownership, distribution, copying, exclusion, and selling of creative works with the need for information access that supports "the progress of science and useful arts" and continued innovation for society and the marketplace (U.S. Constitution; Chon 2007, 807). Based on English law but incorporating new free market principles, Congress exercised their Constitutional right and passed the first *Copyright Law* in 1790. It applied only to books and granted authors fourteen years of protection (Merges, Menell, and Lemley 2000, 347). Advances in technology quickly began testing the original *Copyright Law*, and many modifications to the original text became necessary. One of those changes was the development of the fair use doctrine. The fair use doctrine is an affirmative defense to copyright infringement. It developed in common law through the courts as a means of balancing users and owners rights when the existing laws were deficient (Merges, Menell and Lemley 2000, 350). Congress codified fair use in the 1976 revisions to the *Copyright Law* under Section

107 creating a four part balancing test to aid courts in determining whether an activity was infringing or within the bounds of fair use (*Copyright Law* 2008). However, new technologies presented unforeseen challenges to Section 107 (Armstrong 2006, 51). Through the eighties and nineties Congress attempted to rectify the situation with numerous laws incorporating international standards and recognizing technology's role in the changing copyright landscape.

The past ten years have been the most active by Congress regarding copyright. In 1998, Congress passed *The Sonny Bony Copyright Term Extension* Act (C.T.E.A.) and the DMCA. The C.T.E.A. extends copyright life to seventy-five years from fifty years after the death of the creator. The DMCA prevents circumvention of digital rights management (DRM) technologies embedded in digital material and entered the United States into the World Intellectual Property Organization. Then in 2002, the TEACH Act passed creating copyright guidelines for distance learning courses. In addition to these laws court cases and precedent has increased, creating another legal layer (Gould, Lipinski, and Buchanan 2005, 184; *Copyright Law* 2008).

In 2004 Google attempted to stretch the bounds of fair use with its Google Books Search Service and Google Library Project launch. Google formed licensing agreements with university and public libraries that would provide search features and potentially access to books scanned through the Google Books Search Project. Under the original agreements, libraries provided books in and out of copyright to Google for scanning and digitization. Libraries were to receive copies of the scans, with the caveat that copyrighted copies could not be distributed, sold, or reproduced for third parties (Vaidhyanathan 2007, 1215-6).

Not surprisingly, in 2005 the Google's project received multiple legal challenges (*Authors Guild Inc. et al. v. Google Inc*. 2005). Copyright scholars and stakeholders hoped the outcome of these lawsuits would result in concrete rules for digitizing copyrighted materials.

Others were concerned the outcome of this case would not only deeply affect our current understanding of copyright, but also that if the publishers' won, it would strike a death knell for the fair use rights of digital materials for lending institutions (Vaidhyanathan 2007, 1230). Disappointing scholars, in October 2008 Google and publishers filed a settlement agreement (Books Rights Registry 2008). The settlement creates an economically advantageous situation for both Google and the publishers, and the fair use questions continue unanswered. Establishing an I-Tunes like framework, Google will continue scanning books but will limit search and viewing capabilities. Customers may then purchase digital copies of the books with Google and publishers splitting the profits. Libraries will no longer receive the scanned copies of copyrighted texts they were originally promised (American Library Association 2008b).

The dissolution of Google's lawsuit will redirect focus to the Georgia State University Case. Publishers filed suit against Georgia State University in April of 2008 alleging faculty members infringed on their copyrights by distributing course material for face-to-face courses electronically (Hafner 2008). If the courts decide the case, the decisions may clarify aspects of fair use for classrooms in the digital environment. Another recent development is the passage of the PRO IP Act in October 2008 (Schwankert 2008). It creates greater oversight of copyright violations and stricter penalties for infringement. Additionally it creates an aggressive discovery process favoring plaintiffs, further shifting the copyright balance away from users to copyright owners (Gross 2008).

Challenges for Academic Libraries

With information available digitally or easily converted to digital format, the current fair use doctrine no longer adequately addresses the myriad of questions that arise in the academic

setting (Carter 2007, 2). Libraries have the difficult tasks of managing their patrons' needs while appeasing the growing concerns of publishers and copyright holders about the digital dissemination and storage of their works. Rules established by Section 108, the TEACH Act, and the DMCA fail to provide adequate guidance leaving academic libraries to rely on the vagaries of fair use (Ferullo 2004). As a result, academic libraries either develop policies that are overly restrictive policies, or not restrictive enough (Schlipp 2008, 18). Preserving and replacing copies in theory should be easier with digital technologies, but the *Copyright Law* directly allows libraries to digitize their collections. Popular services such as electronic reserves and electronic delivery of information create a host of problems and are highly controversial (Carter 2007, 2). Finally, licensing agreements for growing bodies of electronic media generate another layer of difficulties, particularly for interlibrary loan departments because libraries, unsure of their legal rights, often unwittingly contract away their fair use rights (Croft 2005, 43).

New technologies provide for efficient copying and digitizing of books, audio/video media, and journals (Howard 2008). It is not always discernable whether these actions in a particular circumstance constitute a fair use (Menell 2008, 1038). Section 108 does permit libraries and archives certain copying privileges not available to the average user. For example libraries can produce paper copies for the purposes of preservation, libraries can copy published works if reasonable efforts have been made to "obtain a replacement at a fair price,"and libraries may make digital copies of certain recordings, but those copies are only protected if they are non-circulating (*Copyright Law 2008;* Menell 2008, 1035). Libraries must strain their budgets to replace copies for users by purchasing updated versions or lose circulating access for their patrons. Additionally, libraries usually may not store licensed electronic content. Publishers may discontinue database or subscription services for a variety of reasons and discontinue a library's

access or create a disruption negatively affecting patron access and service (Ferullo 2004, 37).

Interlibrary loan (ILL) is a particularly challenging forum for fair use. Academic libraries generally cannot afford to purchase all potentially useful material in a given field and must rely on library sharing to fully serve their patrons (Oye 2007, 17). Recognizing this problem, under the Clinton Administration the Conference on Fair Use (CONFU) convened to create clear fair use guidelines for digital materials for libraries and schools, however the participants failed to reach an agreement (U.S. Working Group on Intellectual Copyright in the Electronic Environment 1998; Hilyer 2002, 41). Thus, libraries must still develop their ILL policies following guidelines established in 1978 by the U.S. National Commission on New Technological Works (CONTU), which only directly addresses photocopying. CONTU (1978) guidelines are limiting in today's information rich environment by failing to account for the number of sources available or needed to conduct research (Hilyer 2002, 41). Additionally, the CONTU (1978) guidelines were designed to guide the use of paper copies of physically held and owned material not anticipating electronic delivery or licensed material. Publishers owning electronic databases responded to this problem by creating and enforcing strict licensing agreements. Academic libraries generally come to the licensing table as the weaker party and contract away many rights that may be permissible using the fair use balancing test. Additionally, licensing agreements can be highly complex and library staff may not always understand the terms, which puts the library as whole at great risk for infringement (Croft 2005, 44; Ferullo 2004, 36.)

Electronic reserves (e-reserves) and electronic course packet delivery, once thought to be a useful service that would improve the quality of access, has now become a troubling aspect of copyright law for academic libraries and publishers. The TEACH Act (2002) offers some library

and education exemptions for electronic delivery and access to course materials, but it only applies to materials required for distance learning courses and does not exempt supplemental material, material digitized for the purposes of e-reserves, or material for face to face courses (TEACH Act 2002; Ferullo 2004, 32). Libraries must make their own determinations based on fair use interpretations to decide if a professor's e-reserve request or electronic delivery request may be infringing. This often results in policies created based on institutional standards rather than legal ones (Gould, Lipinksi, and Buchanan 2005, 182; Bridges 2007, 317). One approach is to assume that all materials owned by the library fall within the scope of fair use for e-reserve purposes (Ferullo 2004, 36). Other more cautious libraries use organizations such as the Copyright Clearing Center (CCC) to gain copyright permission and potentially pay for extended licenses if necessary (Oye 2007; Ferullo 2004, 35). With the recent litigation brought against Georgia State University and the aggressive PRO IP Act, more libraries may begin taking the cautious approach rather than assuming the fair use doctrine will apply. If the Georgia State University Case is decided, libraries may have clearer instruction on how the fair use doctrine applies to course packets and e-reserves. However, the litigation process began in the spring of 2008 and will take several years to reach its final stages. If the case is settled, libraries will have no clearer direction than they did with the outcome of the Google Books Cases. This may cause many libraries to strain their resources obtaining unnecessary permission, paying unneeded fees, or unnecessarily refusing to place materials on e-reserve (Bridges 2007, 317).

Stakeholders and Interests

The market place the original *Copyright Law* sought to both promote and protect no longer exists and a new balance will need to be determined soon (Menell 2008, 1017; Chon 2007, 810). Primary stakeholders in these evolving questions are publishers, library directors, access service librarians (ILL, e-reserves, and electronic document delivery), university administrators and patrons. Advocates on both sides of the issue see the Constitutional protection of the promotion of the "progress of science and useful arts" to be at stake (Carter 2007, 2; Ferullo 2004, 25). Publishers and creators feel their ownership and work increasingly threatened as growing Internet and technology use allows misappropriation to easily occur. They only need to reflect on the music industry's struggles to have these fears validated (Ferullo 2004, 27). Publishers certainly see their bottom line threatened by new technology and posit that more stringent protections and the application of DRM technologies will actually protect use and innovation. Arguing that if work is not properly protected, there will be no incentive to produce and innovation and scholarship may suffer (Armstrong 2006, 51).

For libraries and patrons, new technology has improved the quality of access and education (Ferullo 2004, 24). Students and faculty no longer need to attend or visit the schools with the largest or most well endowed libraries to have access to quality academic literature. This, they argue, "promote(s) the progress of science and useful arts" by improving the equability of access (Carter 2007, 2). Supporting publishers' rights over academic libraries and users' rights would negate many of the advantages technology provides users. Beyond the philosophical considerations, libraries are financial stakeholders as well. They constantly face shrinking budgets and if the fair use balancing test is tipped too far in favor of publishers, many libraries will not be able to afford access to needed materials for their patrons. Additionally, with

increasing fines and punishments for infringement, libraries will not be able to afford to make a mistake in judgment (Bridges 2007, 317).

Library Copyright Policies, Outreach, and Compliance

Fair use principles are determined by judicial precedent, which varies from one district court and appellate court to another. Many cases have reached the U.S. Supreme Court, but the Court has been reticent to create explicit rules or numbers, instead offering case by case analysis that libraries must attempt to apply to their circumstances (Gould, Lipinski, and Buchanan 2005). Therefore policies are not consistent from university to university. Of seventy-eight research universities studied in a 2005 study, only thirteen had copyright monitoring committees or specialist in place to assess difficult fair use issues and reevaluate the copyright policy. The others followed arbitrary policies with little explanation for the numbers they enforced (Gould, Lipinski, and Buchanan 2005). In a study of sixty-eight universities with distance education enrollment over two thousand it was found that twenty-nine schools did not have a policy. Additionally, of those who did, forty-one percent did not believe their policies were adequate (Kelley et. al. 2002). If the returns of these studies are indicative of academia in general, there are an alarming number of universities with inadequate copyright policies or lacking policies altogether.

If copyright is confusing for librarians who encounter questions everyday, it is even far more so for faculty and students asked to abide and understand these policies or lack of policy. Many campus libraries simply post policies in areas where patrons will see them or attach copyright disclosures to materials (Gould, Lipinski, and Buchanan 2005, 195). The Association of Research Libraries provides a number of instructional materials for librarians to utilize with faculty, but providing access to these materials to faculty and administration is often not enough

(Association of Research Libraries 2008; Schlipp 2008, 18). Schlipp (2008), a librarian for Northern Kentucky University (NKU), outlines NKU's successful outreach program. One of the interesting components of their program was the development of a copyright librarian, someone whose responsibility it is to manage copyright issues, stay current on changing laws, policies and legal decisions, and organize campus outreach. NKU also coordinates with other institutional bodies that are copyright stakeholders, such as information Technology, Legal Counsel, and the Professional Organization Development Center. Together they develop workshops and instructional materials for faculty and students. Their program has been well received and highly successful (Schlipp 2008, 19).

Even with these measures mistakes may occur. Karen Oye (2007), a librarian for Case Western Reserve University, describes how her library employs a number of integrated software features to aid library staff in understanding copyright license limitations. CCC information is imbedded into the ILL and reserve system to help answer questions quickly. They also develop close relationships with publishers and have integrated copyright restrictions from licensing agreements into their electronic access systems. This avoids the situation Croft (2005) describes of many library employees having to search through countless lists and databases to determine if an act infringes on copyright or violates a licensing agreement (44).

Recommendations

If budgets allow, academic libraries should consider employing a copyright specialist or creating a copyright committee (Gould, Lipinski, and Buchanan 2005, 195; Schlipp 2008, 19). Court opinions shape copyright law everyday and monitoring these changes and crafting policy around them will amount to a full-time position. Though the extra salary may be costly, it is far less costly than an impending lawsuit. Copyright specialists may also help draft advantageous

licensing agreements reducing the waiver of fair use rights (Croft 2005, 43). Several sections of the *Copyright Law* (2008) require libraries to have policies posted for patrons. This however is not enough since a university may be held liable for an employee's infringing action. Proactive outreach programs similar to those implemented by Northern Kentucky University, Case Western Reserve University, and outlined by the Association of Research Libraries (2008) will also serve a campus well and aid in assuring compliance (Oye 2007; Schlipp 2008). Of course campus outreach will not be effective without clear policies. Copyright experts should draft policies in order to ensure the greatest benefit for the library with the greatest protections against infringement, and policies should be regularly monitored and revised as the law changes (Gould, Lipinski, and Buchanan 2005, 183). Policies, while practical, do not solve the overarching issue of developing legal guidelines that meet the needs of both libraries trying to serve patrons and publishers protecting their financial interest. Academic libraries and librarians can be a part of policy making through active involvement in consortiums and professional organizations such as the American Library Association, Association of College and Research Libraries, and the Association of Research Libraries. It may also be time to organize another Conference on Fair Use to make recommendations to Congress. Libraries and publishers need to set aside their often adversarial relationship and truly consider how copyright laws will continue "promote the progress of science and useful arts" in the new technological landscape.

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