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Navigating the Copyright Maze

by Jeannie Ferriss

Introduction

Fines, infringement, imprisonment; these words are resounding with librarians, faculty and students all over the country as they try to navigate the maze of copyright laws. With the opening scene of almost every DVD threatening huge fines and jail time, court cases such as the Harper v. Maverick Recording Company, where a 16-year-old could be liable to pay \$750-\$30,000 per infringement for downloading music on their computer (Brooks, 2011, p. 234), or the on-going Google Books case, a suit that began in 2005 by the Author's Guild over 20 million scanned books (Pike, 2012); no wonder people are apprehensive about using the works of others.

There is help available to all who seek to understand how, when, and how much of another's work they can use in creating original works, furthering research, and enhancing classroom presentations or assignments. This paper seeks to identify the major copyright issues and pitfalls, and then looks at solutions and aides for librarians, faculty members or students who wish to stay within the copyright laws.

One of the reasons copyright seems so complicated is lack of knowledge. Howard (2011, p.1) describes the results of a survey taken at the University of Minnesota Libraries by Nancy Sims, a lawyer and librarian; where only 30 percent of the faculty knew the answer to basic questions on how one acquires copyright and how long copyright lasts. Sims surmises that many faculty members did not know their rights as authors or how negotiations about their own copyright might affect their scholarly goals (Howard, 2011, p.2). Possessing an elementary understanding of what copyright is, how to establish a copyright authority within the university or college setting, and the rights given to students or faculty to protect their own creations or use the work of others

in the classroom, is critical to comprehension of the peripheral issues that make copyright so difficult. There are several areas which may aid in learning about copyright in the academic setting including:

Creative Commons, Open Access, the conditions and uses of Fair Use, copyright law and its effects on print

and non-print resources (including Web 2.0 tools) and examples of library resources which may be of assistance to librarians dealing with copyright issues.

Copyright is not only a legal issue. Pressman (2008, p. 89) states that "discussions of fair use frequently focus on fair use as a legal concept. But also inherent in the doctrine, as the word fair suggests, is an ethical concept of fair use." Librarians are confronted with copyright issues on a daily basis as they deal with electronic reserves, people making copies on the library copy machine, students using library computers to download and share files and music for reports, and trying to prevent infringement of e-book contracts. Pressman also expresses concern with two conflicting sides of values expressed by the American Library Association. She sees "providing service to users and facilitating access to information" as one side, and holding on to "the importance of upholding copyright and other intellectual property rights, though not fair use specifically" as the other side (2008, p. 100). In some cases, lack of experience and copyright knowledge may lead librarians to refuse to answer any questions about copyright, which could foster an atmosphere of fear within the academic community. That was not the original intent of copyright in the United States Constitution, which states in Article I, section 8, paragraph 8, that Congress has "the power to grant exclusive rights to authors and inventors to promote the progress of science and the useful arts" (Brooks, 2011, p. 232).

Copyright is not meant to stifle the creative process, but to protect it. Librarians will find there is a great deal of information in the public domain to assist them in navigating the copyright maze.

Literature Review

A Definition of Copyright and Author's Rights

Copyright is a legal right obtained by the author at the moment the copyrighted work has been "fixed in a tangible medium" (Blixrud, 2011, p. 549). For example, when someone draws a picture, saves a short story to a computer hard drive, prints a novel, or records an original song to a CD, it has become fixed in a tangible medium thus making copyright protection automatic.

Copyright protection then gives the author “the exclusive right [...] to reproduce the copyrighted work in copies... to prepare derivative works based upon the copyrighted work [...] to distribute copies [...] to the public by sale or other transfer of ownership, or by rental, lease or lending and to perform copyrighted work publicly... in the case of sound recordings... by means of a digital audio transmission” (United States Congress, 2000, Section 106 (2) as cited in Wyatt & Hahn, 2011, p. 305). Blixrud states that U.S. copyright law provides the author of an original work “the exclusive rights to reproduce, distribute, adapt, publicly perform, and publicly display the copyrighted work” (Blixrud, 2011, 549). The author retains these rights for a given time period, unless he/she decides to transfer them to someone else, when at that point, the author no longer may exercise those rights. An author can transfer all or a few of the rights in any combination or form (Blixrud, 2011).

The Rights of the User

The rights of the person wishing to use copyrighted material is the center of the copyright quagmire. How much can one use? What is infringement and what is not? Who will be prosecuted in court if there is infringement? These are questions being asked by librarians and scholars alike. Why are some librarians afraid to answer copyright questions for their users? Copyright is a complicated legal issues and librarians are afraid that they or their parent institution might be held liable or be charged as providing legal advice without being a licensed lawyer (Zabel and Hickey, 2011, p. 10). Zabel and Hickey go on to question if this fear is causing librarians to just avoid copyright challenges, issues, and questions altogether instead of trying to provide information the users need (p.10). This attitude can disrupt the library profession’s commitment to “information literacy” or aiding students and faculty in the research process of finding, assessing, and “ethically and effectively” using information (p. 10).

The first step for users in discovering their rights to information is to understand what copyright infringement means. Copyright infringement is when users take copyrighted material and use it without permission. This does not mean that everything a user wishes access to must have written permission

from the author or copyright owner. There are several ways to access material that require minimum effort and little or no cost. The first of these alternatives is the “Fair Use” provision.

Fair Use

The current United States’ Copyright Act of 1976 replaced the early law established in 1909. The revision was necessary due to the impacts of technology and the necessity to bring the U.S. into compliance with international copyright standards. The Copyright Act of 1976 gives protection to the author for the length of their life plus 50 years. Works done for hire are now protected for 75 years. (Blixrud, 2011, p. 544-5). Fair Use is decided on by assessing the use of the work on the following four factors: “1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”; 2) if the nature of the work is factual or creative; 3) how much of the work is used, and how much of it is used in comparison to the entire body of the work; and 4) the effect on the market value or use of the work (Schlipp, 2008, p. 20). Permission must be obtained if less than half of the factors apply. Librarians or users can check with the Copyright Clearance Center (www.copyright.com) first to see where to apply for permission (p.20). Schlipp also mentions several other checklists and sites to search for permission and information, including “A Checklist for Fair Use” at <http://extended.unl.edu/pdf/fairusechecklist.pdf> (p. 20).

Without the concept of fair use, scholars will find it too expensive and too labor intensive to use copyrighted materials to serve their readers (Blixrud, 2011, 545). Under Coalition for Networked Information (CONTU) guidelines, educators can use excerpts of ten percent or less of copyrighted material in their educational settings according to Wyatt and Hahn (2011, p. 306). Fair use is not the only course available to educators. Any work published before 1923 in the United States is considered a part of the public domain, most United States government documents and common knowledge does not require copyright permission (Schlipp, 2008,p. 21). For example, a scholar creating a chart of countries and their capitals, would not require permission.

Creative Commons

According to Kleinman (2008), "Creative Commons is a nonprofit organization that created a set of simple, easy-to-understand copyright licenses. These licenses do two things: They allow creators to share their work easily, and they allow everyone to find work that is free to use without permission" (p. 594). The unique aspect of Creative Commons is the variety of choices authors have in relinquishing their copyright. Instead of an all or nothing scenario, Creative Commons offers six major licenses that use some mixture of the four basic requirements. The first of the four basic requirements according to Kleinman (2008, p. 595) is *Attribution*, where the authors allow the copy, distribute, display and performance of a copyrighted work, or work derived from the copyrighted material. Attribution requires that the user of the copyright material credit the work to the owner in a way previously designated by them. Every license from Creative Commons includes this factor. The second requirement is *Non-Commercial*, that allows others to use a work and derivatives based on it for non-commercial purposes only, such as education in a classroom. The third requirement is *No Derivatives*, which lets others use the work as long as they make no changes in any form and distribute, display and perform only the original form of the work. This would apply to someone who wanted to perform a song or produce a play, by making the user perform the exact original content, the authors do not have to worry about others changing the content or meaning of their work. The last requirement is *Share Alike*; this section is more restrictive and only allows usage when the user distributes derivative works under a license identical to the governing license of an author's work (p. 595).

Creative Commons is easy to use and avoids extended time consumption in securing copyright permission from original publishers or authors. Kleinman (2008, p. 596) also brings up three key facts about copyright that important to the working of Creative Commons. First, "copyright happens automatically;" second, "copyright is a bundle of rights;" and thirdly, "most everything is copyrighted but the creators may not want or need all of those rights." The negative side of Creative Commons is that any creator who signs away their rights through Creative Commons has no recourse but to ask

someone who is using their material inappropriately to stop. If the person does not stop, then they must resort to legal action, which can be very expensive (Wyatt & Hahn, 2011, p. 308). Because the rights transferred to Creative Commons have no statute of limitations, authors must be sure that they are happy with the agreement.

Creating a Copyright Information Center

With all of the complexities of copyright information, many universities are setting up copyright offices to answer questions about copyright, deal with faculty reserve requests, and assist in publication protection for students and staff. When the staff of Colorado State University-Pueblo began using an electronic reserve system they discovered that "the nuts and bolts of implementing the ERes system were relatively simple compared to the challenge of revising our reserves policy to accommodate electronic reserves" (Hudock & Abrahamson, 2004, p.65). Because copyright can mean something different to various people (usually compounded by their position in the university)Furello (2011, p. 112) suggests that the interests, interpretations and definitions of all stakeholders be taken into account. Educators are becoming more aware of the cost of infringement and wish to comply with the law, while still seeking to fulfill their educational objectives. Creating an information office dealing with the various issues of copyright may help them accomplish their goals without fear of breaking the law. Furello suggests that determining the purpose, scope and services offered can be challenging, and the infrastructure of the educational institution must be taken into account, as the library creates the services they will offer (Furello, 2011, p. 113).

Peters (2011, p.592) suggests that when starting a copyright office it is best to assume that the people the office will be providing services to will be unfamiliar with copyright practices. He also offers advice on focusing on the positive aspects of information sharing, consider the audience, institutionalizing the copyright office by forming a university copyright committee to help make decisions and centralize services, creating a Web site from the users point of view and get to know the university counsel (p. 593-94). The copyright office to develop standard policies can avoid both confusion

and frustration on the part of staff and faculty. Wagner (2008, p.247-254) recounts the development of the Cheng Library's policies and procedures for processing supplementary print and electronic materials for classroom use. Requirements for this area included a staff member, who in addition to being extremely detailed oriented, "must correspond with faculty and publishers, be comfortable discussing copyright law and fair use guidelines with librarians, faculty and staff and frequently searches library databases for article links for electronic reserves" (p. 248).

Copyright offices need to also be familiar with online programs developed to assist users in facilitating fair use decisions. Myers (2012, p. 5) reviews and compares three types of these online tools and their usefulness to librarians, faculty and others. The programs considered by Myers are the Fair Use Elevator, provided by the Copyright Advisory Network; the Fair Use Visualizer, operated by The Copyright Website; and Thinking Through Fair use from the University of Minnesota Library's Copyright and Information Resources Web site (p. 5). Online tools such as these can assist the busy staff of a copyright office in referring simple questions to the program. They are also useful tools for librarians who may not have a great deal of experience with copyright law.

Copyright offices may be critical in creating and updating copyright policies for their institutions. Pressman (2008) recommends six practices for creating a solid copyright policy. Her practices include: a) discussing fair use in terms of an ethical issue; b) encouraging and supporting the concepts behind fair use; c) provide heuristic tools for assessment of materials to determine fair use; d) be clear in explaining to the user that policies are not to be interpreted as copyright law but only guidelines; e) there should be a clear discussion of the good faith defense when copyright infringement becomes an issue for non-profit institutions; and f) orient the policies toward the user and the reason for use (p.103-106).

Open Access and Non-Print Resource Challenges

In 2002 the Association of Research Libraries (ARL) recommended that "open access to quality information in support of learning and scholarship"

be promoted throughout the organization. In the Budapest Open Access Initiative of 2002, open access was defined as "free availability on the public internet" where anyone could use it as they wish as long as they were not breaking the law, without cost or any other type of barrier (Blixrud, 2011, p. 550). Open Access repositories are now being formed in select fields such as the National Electronic Article Repository (NEAR), and the PubMed Central (an online archive for the National Library of Medicine) (p.551).

The ARL kept members apprised of the issues and debate on changes that might be made throughout the 104th and 105th sessions of Congress, when the Digital Millennium Copyright Act (DMCA) was passed. This act implemented the five World Intellectual Property Organization (WIPO) Internet Treaties. The Treaties "established safe harbors for online service providers; permitted temporary copies of programs during computer maintenance; made miscellaneous amendments to the Copyright Act, including amendments which facilitated Internet broadcasting; and created sui generis protection for boat hull designs" (Blixrud, 2011, p. 546).

One of the most controversial aspects of this law, is its punishment of those who used technology to hack into Web sites to circumvent technology that is put into place to prevent illegal use of works on the Internet. This law is important to those who work in the e-book industry. The Digital Rights Management (DRM) was created to prevent users from downloading e-books onto different e-reading devices, no matter if the material was music, film or e-books (Zimmerman, 2011, p.73). Unfortunately, DRM's created a chance for the entertainment industry to "avoid being accountable to the narrow amount of copyright law that reined them in" (Chang as cited in Keane, 2011, p. 37). A problem with the DRM model is the DMCA-blessed authentication process," which gave, intentionally or not, some large companies the legal right to control creative and intellectual content at the expense of the Constitution's clause promoting progress in the sciences and useful arts" (Keane, 2011, p.37) Publishers claim to have tremendous losses from e-book piracy and the technology must constantly change in order to protect the copyright of the e-

book publisher. The threat to copyright in this area comes not from organized crime but from the ordinary hacker and non-hacker working on their own computers (p. 74).

Other developments in the battle for open access, include the signing of the America COMPETES Reauthorization Act on January 4, 2011. This law “would establish a working group under the National Science and Technology Council with the responsibility to coordinate Federal science agency research and policies related to the dissemination and long-term stewardship of the results of unclassified research, including digital data and peer-reviewed scholarly publications, supported wholly, or in part, by funding from the Federal science agencies” (Blixrud, 2011, p. 552). This law compliments the Consolidated Appropriations Act of 2007 which demanded that NIH-funded researchers to make their work available to the public no later than 12 months after publication in a peer-reviewed journal through PubMed Central (p. 551).

One of largest legal cases concerning open access, copyright law, and electronic resources is the Google Books lawsuit. In 2004, Google began the Google Print Library Project, in which they began scanning books from several of the country’s largest academic library systems in tangent with several public libraries without copyright permission from the authors. The Author’s Guild, the Association of American Publishers and others sued Google for copyright infringement. Pike (2012) states that the case became complicated due to the definition of “legal or beneficial owner” of the copyright. The law states that only those owners could sue for breach of copyright and organizations could not sue for them (p. 33). Three factors would have to be met if the organizations were going to be able to bring litigation against Google on behalf of the authors. First, there had to be proof that there was enough evidence for the authors to be able to sue in their own right. Second, the subject matter had to be relevant to the purpose of the association (for example the Author’s Guild could not bring suit for a painter). Thirdly, the claim would not require individuals of the organization to participate in the actual lawsuit. (p. 33). Google’s defense is that every case is unique and needed to be settled on an individual basis so

associations could not participate but each individual seeking damages must participate. This type of expensive and time consuming litigation is one of the reasons copyright law becomes so complicated. The damage potential in this case could run into millions of dollars, and has already become international in nature when the French courts ordered Google to stop its digitalization of copyrighted French works (Pike, 2012, p.34).

Even laws that do not seem to affect copyright can have long reaching affects. In the case of *Costco v. Omega*, the first sale doctrine is being challenged under the meaning of “lawfully made under this title” (Chamberlain, 2011, p.292). This lawsuit between a box company and a watch maker may have ramifications “on the library’s ability to lend the lawfully-acquired, foreign-manufactured materials in their collections” (p.292) Because importing copies of materials that were first made and sold abroad are under attack as “first sale” items, libraries could also be affected and stopped from being able to lend out books published overseas (p.292) as many of the books and other items in American libraries were published abroad (p.293).

Conclusion

It is obvious from the literature review, that the issue of copyright covers many areas of expertise and legal decisions, which seem to change every day. For the academic librarian who is understaffed, underfunded and undereducated on copyright law, the task of keeping up can seem overwhelming. Even with such aides as Dodge and Sams (2011) article *Innovative Copyright: Unique Resources for Copyright Education*; an annotated bibliography of excellent Web sites that deal with copyright education, librarians still often feel inadequate to the task. Many universities have opened copyright offices, and are taking the time and expense of educating their librarians in copyright issues. The investment will be worth the cost as infringement penalties become harsher and more expensive with each passing year.

The issues created by new technologies and electronic resources will continue to stretch the academic librarian, as faculty increasingly teach classes for distance learners. Electronic reserves, faculty publishing, student use of audio clips, and more will become daily challenges which must be

solved. The dilemma for librarians will become even more pronounced as they try and walk the fine line between assisting their users in information usage and protecting the rights of those who created that information.

Understanding such basic concepts as fair use, open access, public domain and copyright will assist the librarians in helping users see that there is nothing to fear in using the works of others to create new and original works. With the lawsuits, threats, and warnings on almost everything; users are becoming increasingly reluctant to add the richness of ideas from others to their presentations, research papers, and audio creations for fear of infringement penalties and imprisonment. In the sciences especially, efforts are being made to open up information to fellow scientists in a timely fashion, and create repositories of research findings to all who would seek it.

Copyright was never intended to stifle the flow of ideas and information from one person to another, only to protect the form in which it was created; so that those who worked so hard for its fruition could make a living from their work. If the rights of the creators are not protected, they will be unable to keep researching, creating, composing and writing things that inspire the rest of us. Where would the world be without music, poetry, art, medical discoveries and space flight? A world without Maria Callas or Renee Fleming would be a grayer place indeed, especially if they could not devote their lives to music because they were unable to make a living. Copyright works two ways; to protect the creators and allow others to benefit from their works.

Fear should never be a factor in the exchange of ideas. In the video *A Fair(y) Use Tale*, Eric Faden of Bucknell University (<http://cyberlaw.stanford.edu/documentary-film-program/film/a-fair-y-use-tale/>), creates a mashup of Disney video clips that taunts the corporate giant with its use of copyrighted characters from their studio. The intimidating warnings on each of their products are familiar to almost every parent of small children in the country. Librarians can ease the fear of copyright infringement if they educate themselves in the basics, and seek advice in situations that require a professional copyright specialist.

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