Top 5 Trends in Copyright

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Military Libraries Workshop
December 10, 2013

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• Why do we have copyright?
• What is copyright?
• Top 5 Trends
• Q&A
Why do we have copyright law?

What is the purpose, or goal, of copyright law?
U. S. Constitution Article I, Section 8, Clause 8

To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries
What is copyright?

- 17 USC § 101 et seq.
- “Bundle” of exclusive rights
  - Granted to “authors”
  - Of protectable “works”
- Minus exceptions and limitations
Owner’s exclusive rights

Exceptions

FAIR USE
Exclusive rights

- Reproduce
- Create derivatives
- Distribute to the public
- Publicly perform or display
  - “a place open to the public or where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered”
What is a “public” place?

- Definition: “a place open to the public or where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered”

- or “to transmit or otherwise communicate a performance or display of the work” to such a place, whether or not the recipients are in the same place or receive at the same time
Protectable works

- Original authorship
- Modicum of creativity
- Fixed in tangible medium of expression
How can you tell if something is protected by copyright?

• Does not have to be “published”
• Does not have to include copyright notice
• Must assume copyright if not otherwise indicated unless you know that the work is in the “public domain”
• *Public domain* – Not subject to copyright protection
Statutory Exceptions for/about libraries

- First sale doctrine
- Photocopying by libraries (Section 108)
Fair Use

- **Spirit vs. letter of the law**
- Case-by-case basis
- Would allowing the use further the purpose of copyright law more than would disallowing the use?
Fair Use Factors

- Purpose & character of use
- Nature of work used
- Amount and substantiality of portion used
- Potential effect on marketplace

- Anything else court deems relevant
- Remember ultimate question
TOP TRENDS IN COPYRIGHT
All Defined by Evolving Technology

Ease of mass infringement → Corporate owners scared

*It is not the strongest of the species that survives, nor the most intelligent that survives.*

*It is the one that is the most adaptable to change.*
1. Corporate copyright owners attack fair use

- The Authors Guild sues HathiTrust and Google over Google Books project
- 3 university presses sue Georgia State University over e-reserves system
- GSU case financed by Copyright Clearance Center and Association of American Publishers
Google Books Project

- Google partnered with major research libraries
- Scanned entire collections
- Searchable; result displays highly limited
- Full text available only to impaired users
- Libraries kept one digital copy of books from their own collections
HathiTrust

- Consortium of 5 GB libraries
- Holds GB-produced digital copies
- Copyright owner known:
  - Full-text searching; results show only page and occurrence number
  - Preservation
  - Full access for print-impaired
- Orphan works project on hold
Cambridge University Press v. Georgia State University

- Plaintiffs: Cambridge Univ. Press, Oxford Univ. Press, Sage Publishing
- Claimed infringement by including excerpts in e-reserve system
- Some available through CCC
The Big Issues

- All defendants believed uses were fair
- And made efforts to ensure fair use

- Authors Guild suing over non-replacement uses
- GSU plaintiffs suing own customers and providers
2. Fair use rights confirmed... 
...for now

- Google Books cases:
  - All uses fair
- GSU:
  - 75/79 uses fair
- All on appeal
• Uses are highly transformative
  – Purpose is searching, not accessing documents
  – Allows scholars to identify relevant works more efficiently
  – Helps Defendants preserve collections
  – Provides print-disabled individuals with access “to the wealth of information within library collections”

• No existing marketplace for those uses
Georgia State Takeaway

• Court set hard line *minimum* for third factor
  – In books of 10 chapters or less, use 10% or less
  – In books of >10 chapters, use no more than 1 chapter
  – Portion used is not “heart of the work”

• Harm to marketplace depends on specific market
  – Strongly favors pub’r if reasonably priced, readily available *license for digital excerpts*
  – Otherwise favors library unless “so great as to harm *market for entire book*”
3. Mass Digitization Projects (individual institutions)

- Works often include combination of:
  - Protected + owner obvious
  - Public domain
  - Orphan works
  - Unknown status
The Law

- **Section 108**
  - Up to 3 copies for preservation purposes
  - Digitizations not accessible outside library premises

- **Fair use?**
The Big Issues

- Typical library/museum use not highly transformative
- BUT: Tremendous benefit of digitizing orphans
- BUT: No clear law
- New body of guidelines
  - Association of Research Libraries
  - Society of American Archivists
• Conflict between goal of copyright and uncertainty
• Lack of certainty discourages many
• Which contravenes goal of copyright
3. Move from ownership to licensing

- What is “licensing”?
- How contracts work:
  - Law gives Suzy Owner rights to control
  - and John User rights to use
  - Suzy & John enter agreement to each give the other something they want beyond what law grants
  - Law becomes default where contract does not apply
The Big Deal

- Copyright statute based on ownership of item
- When user owns work, no license – law defines user & owner rights
- Electronic works ➔ license
- License defines user & owner rights
The Big Issues

- Loss of First Sale Doctrine rights
- May give up other rights (e.g., fair use, Section 108) under license terms
- Ability to physically control use of work
- Archival issues
The Bottom Line

- Users lose guarantees of rights under law
- Equivalent to each interaction making own law
- Inequity
- Uncertainty

BUT...
Growing “author licensing movement”

- Creative Commons
- Open Access
4. Open Access

- Response to rising journal costs, licensing issues
Variety of Models

- Who pays
- Who hosts/publishes
- What is deposited
Law/Regulatory Role

• Federal Research Public Access Act and Fair Access to Science & Technology Research Act
  – Agencies with research $100M+
  – Free & open online repositories all research (delay)
  – Support: bi-partisan Congressional; education community
  – Opposition: AAP

• NIH Public Access Policy
  – Research funded by NIH
  – PubMed Central
Bottom line

- Not public domain
- But author, rather than publisher, retains copyright
- Neither author nor user dependent on publishers’ decisions
- Easy inclusion in mass indexing like Google Books
- But only successful because authors not reliant on sales of works (not model for everything)
5. Congressional Moves on Copyright Reform

- Judiciary Committee hearing testimony from range of interested parties
- Ties with copyright owner industry
- Indications concerns focus on ensuring protection in digital age, not balance
- But this is just the beginning
WHERE ARE WE NOW?
Copyright owner industry
• Confused & afraid
• Attacking fair use
• Fighting for licensing

Information users
• Productive new applications of tech
• Courts upholding fair use so far
• Alternative movements

Sides of the Scale

REACTIVE

PROACTIVE
Where are we going?

- Navigator: Congress
- Map-makers: Advocates

owner advocates

user advocates