

Top 5 Trends in Copyright



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Agenda

- 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?




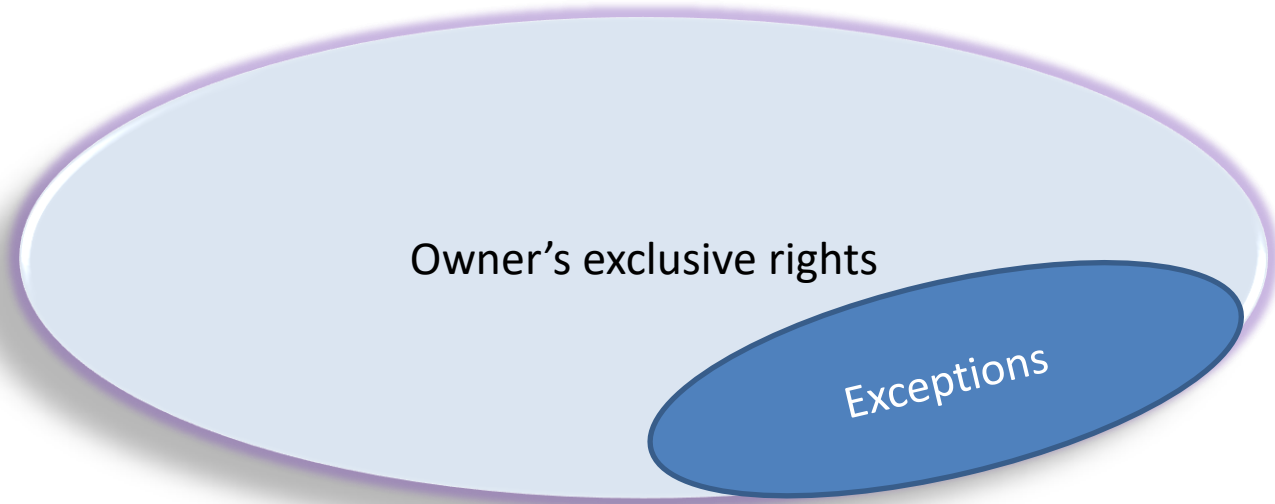
U. S. Constitution Article I, Section 8, Clause 8

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



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)

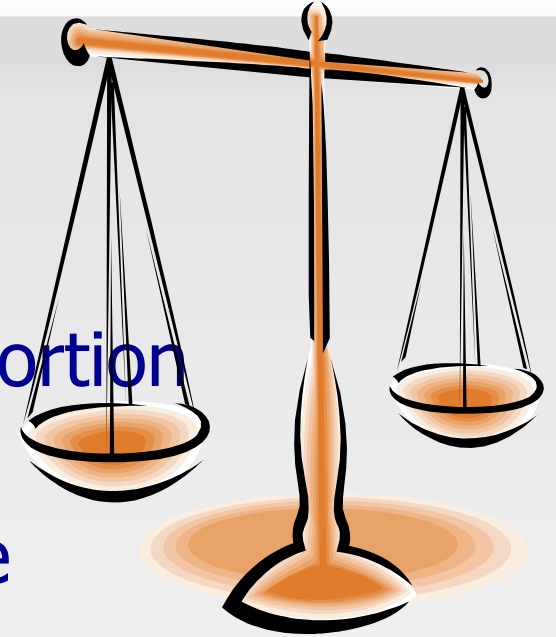
Fair Use

- ***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

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- Google Books cases:
 - All uses fair
 - GSU:
 - 75/79 uses fair
 - All on appeal



Google Books Cases Takeaway

- 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

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

The Big Issues


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- 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




The Bottom Line (orphans)

- Conflict between goal of copyright and uncertainty
- Lack of certainty discourages many
- Which contravenes goal of copyright


3. Move from ownership to licensing

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- 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

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- 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

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- 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

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- 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?

Sides of the Scale



Copyright owner industry

- Confused & afraid
- Attacking fair use
- Fighting for licensing

REACTIVE

Information users

- Productive new applications of tech
- Courts upholding fair use *so far*
- Alternative movements

PROACTIVE



Where are we going?

- Navigator: Congress
- Map-makers: Advocates

owner advocates



user advocates





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