Introduction to Copyright & Copyright Legislation

Background Information for “Copyright Conundrums,” Librarian to Librarian Networking Summit, February 3, 2007, Joyner Library, East Carolina University

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Copyright: Definition & Foundation

- “A property right in an original work of authorship…” – Blacks Law Dictionary, 7th ed.

- 1790 US Constitution, Article I, Section 8:
  - “The Congress shall have power … To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”
Copyright: US Legislative History

- 1790 – First US Copyright Act
  - Covered ONLY books, maps and charts
  - 14-year term of protection, renewable once if the author were alive
  - Copyright had to be registered, document deposited, and notices listed
- 1909 – Notice requirements, lengthened duration, expanded works
- 1976 – Codified judicial rules, federal supremacy, expanded works
- 1980 – Computer software added
- 1982 – Criminalized high volume copying of records and movies
- 1990 – Visual Artists Rights Act – additional protections for sculptors, etc.
- 1992 – Criminalized copying willfully for commercial or private gain
- 1998 – Sonny Bono Copyright Term Extension Act “Mickey Mouse Act”
- 1998 – Digital Millennium Copyright Act (DMCA) – Anti-piracy
- 2002 – TEACH Act – Classroom and Distance Education Fair Use
- 2002 – Digital Media Consumers’ Rights Act (DMCRA)

Copyright is governed by Title 17, United States Code
Copyright: Requirements

- Work Must Be
  - An original expression
  - Independently created
  - Modicum of creativity
  - Fixed in a tangible medium of expression

- Protects
  - Creative expression
  - Selection of creative material
  - Arrangement of creative material
Copyrightable Material (§102)

- Literary works (includes website & software code)
- Musical works (including any accompanying words)
- Dramatic works (including any accompanying music)
- Pantomimes and choreographic works
- Pictorial, graphic, and sculptural works
- Motion pictures and audiovisual works
- Architectural works
- Sound recordings
Non-Copyrightable Material

- Prohibited by Statute
  - Ideas, Principles, Concepts (§102)
  - Processes, Procedures, Systems, Methods (§102)
  - Most US Gov Docs (§105)

- Excluded by Court Cases
  - Names, Titles, Short Phrases
  - Facts and Theories
  - Recipes
Copyright: Rights & Authors

- Rights (§106)
  - Reproduce
  - Derivative works
    - Movies, plays, etc.
  - Distribute
  - Perform publicly
  - Display publicly
  - Transmit digitally

- Authors (§201)
  - Creator
  - Joint-Authors
  - Employer
    - Work for Hire
Copyright: Limits on Exclusive Rights

- §107 Fair Use
- §108 Libraries and Archives
- §109 First Sale Doctrine
- §110(1) Face to Face Teaching (media)
- §110(2) Distance Education Teaching (still media)
- §113 Pictorial, Graphical, Sculptural
- §117 Computer Programs
- §120 Architectural Works
- §121 Reproductions for disabled persons
- §111, §112, §118, §119, §122 Secondary Transmissions
  - broadcast, cable and satellite TV; radio; digital
- §114, §115, §116 Non-Dramatic Sound Recordings
Copyright: Libraries and Archives

- Limitations on Exclusive Rights: Reproductions by Libraries and Archives (§ 108)
- Allowed to make three copies:
  - Unpublished: solely for preservation and security, if owned
  - Published: solely for replacement of an owned item if cannot obtain an unused copy at a “fair price” and if obsolete reader equipment is no longer “reasonably available”
  - All: Any digital copy cannot leave the library building
- Does not preclude fair use or license restrictions
- Within last 20 years of a copyright, can reproduce a work only if no longer still profitable for owner and if unavailable for purchase at a “reasonable price.”
- Applies only to books and journals in facilities that are open to the public, provide notices of copyright on request forms, copies, and copiers/scanners, and which can reasonably claim no direct / indirect commercial advantage.
Copyright: Registration & Notice

- **Formal Registration**
  - No longer required – immediately fixed upon completion
  - Required prior to enforcement suits
    - proof of ownership, enhanced damages, attorney fees
  - Requirements
    - Deposit of first and last 25 pages of code
    - Trade secrets can be redacted
    - Source code or object code can be registered

- **Notice**
  - No longer required, but suggested
  - Notice may be placed on work
  - ex: © Owner’s Name, year
Copyright: Duration (§300)

- **Personal Authors & Joint-Authors**
  - life of author(s) + 70 years

- **Corporate Authors**
  - 95 years after publication -- OR (the lesser of) --
  - 120 years after creation
Copyright: Enforcement

- Owner’s must police own copyright
  - C&D orders, lawsuits, & notifying police, FBI, etc.
- Many private agencies/associations
  - International Federation of Reproduction Rights Organisations
    - Links to 109 international IP rights management organizations
  - Am. Soc. of Composers, Authors, and Publishers (ASCAP)
  - Software & Information Industry Association & Motion Picture Assoc. of Am.
  - Copyright Clearance Center, Assoc. of Am. Publishers, National Writers Union
  - Recording Industry Assoc. of Am., Broadcast Music, Inc., Harry Fox Agency, SESAC
- The National Intellectual Property Law Enforcement Coordination Council
  - U.S. Patent and Trademark Office & U.S. Copyright Office
  - U.S. Dept. of Justice (Criminal Div) & U.S. Dept. of State (Bureau of Econ/Bus/Ag)
  - Office of the U.S. Trade Representative
  - U.S. Customs Service & U.S. Dept. of Commerce (Intl. Trade Admin)
Copyright: Complexities

- Typical modern music CD
  - Musical Score
  - Lyrics
  - Sound Recording
  - Cover & Booklet Art
  - Booklet Text
  - Enhanced CD software
- Joint-Authorship Book
- Work-for-hire
- Software: EULAs, DRM, etc.
Copyright Infringement: Defenses

- Independent Creation
- Fair use
- Not Substantially Similar
- Material was licensed
- Copyright misuse
- Copyright is invalid
  - Not fixed in medium
  - Not original
- In Public Domain
  - Non-copyrighted materials
  - Ancient works
  - Expired copyrighted works
  - Abandoned works
  - Federal Government publications
Copyright Infringement: Remedies (§500)

- Injunction: a court order to cease infringement
- Seizure and Destruction of infringing works
- Damages
  - Infringer’s Profits – AND/OR –
  - Actual monetary damages – OR –
  - Fixed statutory damages
    - Only for registered items
    - $500-$20,000 unintentional; $20,000-$250,000 intentional
- Educational non-profits usually fall under “good faith” caps on damages
Copyright: Fair Use
Fair Use: Creation of Doctrine

- 1841: Folsom v. Marsh – Supreme Court
  - Four prong test
- Each case decided on its own facts
  - Many cases have solid arguments on both sides
- Balance of two desirable characteristics
  - Financial incentives to produce content
  - Desirable uses of existing information
- Developed in an era of physical documents
  - Perfect copies/instant delivery alter the balance
Fair Use: Definition (§107)

- Fair Use is an exception, not a defense to copyright
  - Copyright owners & users often differ on “fair use”
- No clear definition of Fair Use, only guidance
  - Blacks Law Dictionary, 7th ed.: “A reasonable and limited use of a copyrighted work without the [rights owner]’s permission” – original had ‘author’ which could be misleading
- Statute states: “For purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research…”
Fair Use: Four Factor Test

- The purpose and character of the use
  - This focuses on the transformative nature of the work: whether the work adds something new
  - The commercial nature is not determinative of whether a use is fair or not
- The nature of the copyrighted work
  - Factor focuses on the plaintiff
  - Fictional works are usually more protected than non-fictional
- The amount and substantiality taken
  - Some circuits were using the “conjure up” test – you could use just enough so that the public knows what you are taking without taking too much
  - Some courts said that if you took the heart of the work it was infringing
  - Taking a lot is not presumptively unfair either
- The effect on potential market for or value of the copyrighted work
  - This is the most important element
Fair Use: Tips

- Education/nonprofit does NOT create automatic fair use
- Commercial use usually requires permission
- Imaginative works are more likely to require permission
- Use only “on occasion”
- Excerpt small quantities
- Always credit sources
- Limits on Fair Use
  - preempted by digital rights management
  - surrendered by restrictive contracts and licenses
  - copyright holders can exercise arbitrary power
Guidelines

CONTU

CONFU

- US © Office: Classroom Guidelines
  - Intended to be a minimum to ensure safety from infringement
  - More limited than statute because was a compromise
  - Not law, but legal history and in cases; has become forceful

- One per student IF made by or for instructor
  - Brevity test:
    - Complete article of less than 2,500 words
    - An excerpt under 1,000 words or 10% (the lesser)
  - Spontaneity test
    - If planned in advance, should get © permission
  - Cumulative effect test
    - “shall not be more than nine instances…for one course”
  - Must include notice of copyright and citation
CONFU: Conference on Fair Use

- Clinton Admin. initiative with interested parties
  - Informal, non-legislative, non-binding working groups
  - Model copyright compliance guidelines
  - Never formally adopted, but useful as a reference

- Electronic Reserves
  - Limited Accessibility
    - Documents listed only by faculty name and course
    - Currently enrolled students and faculty only
  - Faculty/Course Websites
    - May only LINK to electronic library reserves

- Bibliographic Citation
  - Reading first page must have a full citation
  - Not just © stamp (under DMCA)
Recent Legislation

Digital Millennium Copyright Act of 1998
Digital Media Consumers’ Rights Act of 2002
Teach Act of 2002
Digital Millennium Copyright Act (1998)

- Relevant Provisions
  - Prohibited circumventing anti-piracy methods
    - Exceptions: government, testing, limited research/personal
  - Prohibited circumventing for copying AND access
  - Prohibited manufacturing of devices/software used for piracy
  - Limited library digital preservation & medium-transfer
  - Limited liability for ISPs & OSPs (Online Service Providers)

- Results
  - Fair Use not adequately updated
  - First Sale doctrine undermined
  - Research & Advancement chilled
Digital Media Consumers’ Rights Act

- DMCRA (2002)
  - Revised DMCA (1998)
- Required product labeling for DRM measures
- Expanded DRM circumvention allowances
  - private users for personal use
  - scientists for research
- Restored market/consumer rights
  - To make, market, sell, buy, & use equipment that could be used to violate copyright, but has other uses, as well
TEACH Act

- Technology Education and Copyright Harmonization
- Expands approved works
  - Display/performance of most types of works
  - Permissions/royalties usually not required
- Expands receiving locations
  - classroom, closed-circuit T.V., & Internet
- Allows limited copies to be retained and reused
- Allows analog materials to be digitized
  - Must already not be available in digital form
TEACH Act: Digitalization/Broadcast

- **Allowed**
  - Non-dramatic literary and musical works in entirety
  - Any other work in “reasonable and limited portions”
  - Display “an amount [similar to] a live classroom session”

- **Prohibited**
  - Dramatic stage plays in their entirety
  - Optional readings, unless integral to the class
  - Anything “not lawfully made and acquired”
  - Anything readably available commercially
  - Works sold as primarily as distance education courses
TEACH Act: Duties

- Institutional Policymakers
  - Education & Government
  - Copyright policies
  - Notice to students

- Instructors
  - Allowed under the law
  - Made by or for instructor
  - “An integral part of a class” & "directly related”

- Info Tech Officials
  - Enrolled students only
  - Control storage and dissemination
  - Limited copy retention

- Librarians
  - No role under TEACH
  - Library services used though
TEACH Act: Alternatives

- If unable/unwilling to comply with TEACH:
  - Secure permission from copyright holders
  - Rely upon traditional “Fair Use” exemption
  - Use alternative delivery methods
  - Exclude copyrighted material from lessons
Upcoming Legislation
Orphaned Works Act
Section 108 Study Group recommendations
Orphaned Works Act

- Orphaned works are copyrighted materials with no rights owner able to be found.
- Orphan Works Act of 2006 (HR 5439) was introduced in House on May 22, 2006.
  - Forwarded to committee – no action since May, 2006.
§108 Study Group Recommendations

- Ongoing study by the Library of Congress to review copyright law for the digital age
- Intends to propose changes to Congress
- Group members include media industry representatives, librarians, and others
  - Public comment is welcomed, too
- Site: http://www.loc.gov/section108/
Interpretation & Jurisdiction
Interpretation & Jurisdiction

- State contract law trumps federal copyright
- US Federal District Courts vary in interpretations
  - Nashville, NY, and S. Calif. especially are pro-IP owner
- International Treaties alter US © law
  - Universal Copyright Convention
  - Geneva Phonograms Convention
  - Berne Convention
  - WTO Agreement: World Trade Organization
    - TRIPS: Trade-Related aspects of Intellectual Property rights
  - WIPO treaties: World Intellectual Property Organization
Copyright Misconceptions
Copyright: Common Misconceptions

- All educational uses are fair use.
- Copyright & Fair Use trump licenses.
- Following copyright guidelines absolve infringement.
- Giving authors credit absolves infringement.
- If an author dies, his/her work moves into public domain.
- Works that do not have a copyright notice are in the public domain.
- Material on the Internet is in the public domain.
- Adding something to the copyrighted work creates a new work to which you own the copyright.
- Maps are facts and therefore public domain.
Thank You / Questions

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