

A (Very Short) Overview of Copyright

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Copyright Law

The term copyright refers to the sum of its parts: who has the right to copy a work. The United States Code does not define “work” but this term means the “intellectual creation of an author” where “author” is broadly defined as the originator of the creation (Svenonius, 2000, p. 9).

Copyright law is primarily concerned with “fixed” works. Works are “ ‘fixed’ in a tangible medium of expression when [their] embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” (U.S.C 17, §101). Certain things, including ideas and concepts, cannot be copyrighted. Works do not have to be registered with the U.S. Copyright Office (www.copyright.gov) to be protected by copyright law. Works that are fixed but not covered by copyright law are in the public domain and may be copied freely.

Copyright generally belongs to either the creator of a work or its publisher. It exists for two reasons that can sometimes come into conflict: for the benefit of society and for the protection of creators. Copyright law is based on the idea that society gains when creators can profit from their work. It is similar to rights attached to property but not as easy to grasp since the works are not always as tangible as real property. By discouraging people from exploiting works, copyright encourages creators write, compose, sculpt, paint, etc. In the library setting, for example, patrons often request articles for scholarly research or educational purposes and these might be considered to be motivations that work for the benefit of society.

History of Copyright

Copyright law originates in Renaissance Italy where printers held the right to copy works. With the development of the printing press, copyright law spread across Europe eventually reaching England. The Licensing Act of 1662 gave printers in the kingdom monopoly over publishing. The act lapsed in 1665, but in 1710 Parliament passed the Statute of Queen Anne. This statute, which is the basis of modern copyright, transferred copyright ownership from printers to authors and established a fixed term for copyright protection (Gilmer, 1994).

The English colonies in North America followed the Statute of Anne until the Revolution. Article I, Section 8 of the U.S. Constitution provides for copyright protection: “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.” However, from the end of the war until 1790, each state passed its own laws which were often difficult to enforce. In that year, the First Congress passed the Copyright Act based on the Statute of Anne. This law has been revised four times in 1831, 1870, 1909, and 1976.

The copyright law of the United States is Title 17 of the United States Code. The various amendments to the law change the actual words of Title 17. Another area of United States law is the Code of Federal Regulations (CFR). These are administrative laws that describe how the various agencies of the executive branch will enforce the United States Code. The Copyright Code is found in Title 37 of the Code of Federal Regulations. Both statutory and administrative laws are legally binding. When a lawsuit is brought before the courts, it is judged on the basis of both types of law.

A different type of copyright law, emphasizing the rights of the author, developed in continental Europe. The Berne Convention of 1886 “established mutually satisfactory uniform

copyright law to replace the need for spate registration in every country” (American Research Libraries Timeline, 2007). The United States did not sign the treaty until 1988. In 1893, two small bureaus, one of which grew out of the Paris Convention to Protect Industrial Property and the other out of the aforementioned Berne Convention, combined to form the United International Bureaux for the Protection of Intellectual Property (BIPRI). In 1967, BIPRI became the World Intellectual Property Organization (WIPO) and was absorbed by the United Nations in 1974. WIPO administers 24 treaties, one of which, the WIPO Copyright Treaty was signed by the United States as the Digital Millennium Copyright Act (DMCA) of 1998.

As mentioned above, both the DMCA and the Sonny Bono Act have been instrumental in bringing copyright law to the forefront of information ethics research. Under the 1976 law, copyright was held by a creator for a term of life plus 50 years. The 1998 Copyright Term Extension Act, also known as the Sonny Bono Act, extended copyright to life plus 70 years. The Act also extended copyright for works published before January 1, 1978 by 20 years for a total of 95 years (U.S.C 17, §302-304). This standard determines the timeline for when works move into the public domain.

The 1976 Copyright Act

The copyright code of the United States is contained in the Title 17 of the U.S. Code and its most recent revision is the 1976 Copyright Act. The revision, which was under consideration for over 20 years, was the direct result of advancements in photocopying technology. Sections 101-108 of the Code are the most pertinent for libraries. The Code has been amended, but not revised, several times since 1976 by the passage of laws such as the Digital Millennium Copyright Act and the Berne Convention Implementation Act of 1988. It is difficult to revise the entire code since copyright issues involve so many stakeholders with competing interests.

There are seven sections of the 1976 copyright law that pertain to libraries--four directly and three more indirectly: Section 106 states that the owner of the copyright has the exclusive right to reproduce his or her work. Section 107 describes the fair use doctrine. Reproduction by libraries and archives are described in section 108. Section 109(a) contains the right of first-sale without which libraries would not be able to exist. Section 109(c), 110(1), and 110(2) describe the public display, face-to-face teaching, and distance learning exceptions. This paper will focus on the fair use and library reproduction exceptions. According to Gilmer, the laws pertaining to photocopying for interlibrary loan were the most controversial part of this section since some publishers worried that photocopying would lead to a reduction in sales. This was one of the motivations for Congress to convene the National Commission on New Technological Uses of Copyright Works (Gilmer, 1996).

National Commission on New Technological Uses of Copyright Works (CONTU)

Sometimes when Congress develops new laws or amendments, the committee responsible for the law will organize a group of advisers, often called commissions, to discuss the provisions of the new bill. In 1976, during the development of the new Copyright Act, Congress assembled the National Commission on New Technological Uses of Copyright Works (CONTU) to formulate guidelines for the new law. Unlike statutory and administrative laws, these guidelines are not legally binding.

The CONTU Guidelines work according to a general rule of thumb known as the “Rule of Five” Guideline:

- 1- One calendar year
- 1- One periodical title
- 5- Five articles

- 5- Five Years

During one calendar year, a library may request and receive five articles from one periodical title published within the last five years. There are several major limitations to the guidelines but two deserve special mention. First the Rule of Five does not cover periodicals older than five years. Second, the guidelines only address articles in periodicals not chapters in books or other materials.

The commission's final report consisted of several recommendations for changing the sections of the U.S. Code that related to libraries and archives. It also developed specific guidelines for interlibrary loan related photocopying. Even though the CONTU Guidelines do not have the force of law, following the recommendations helps librarians remain within the boundaries of fair use when requesting photocopies. This report might also be considered to be ethical guidelines; however, as will be noted below, they are very limited in scope.

The various sections of Title 17 that pertain to libraries are explained in depth below. The descriptions show how nebulous copyright law can be when trying to apply it to real life situations that might arise in the library.

Section 106: What Does Owning Copyright Mean?

Section 106 of the Code describes what the copyright owner can do with a copyrighted work. He or she can reproduce it, make derivative works, and perform or display the work publically. The provisions described in the sections 107 and 108 are exceptions to the rights outlined in Section 106. Even though it is not mentioned in the code, authors of journal articles usually transfer all rights of ownership to the publisher. This transfer of copyright raises ethical dilemmas for many librarians since royalty fees paid to the publisher are not passed on to the creator of the work.

The following sections of the copyright code provide for limitations to the exclusive rights of copyright owners. Section 109 describes the right of first-sale without which libraries could not exist: “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord” (U.S.C 17, §109). This allows libraries to lend materials to patrons. Section 107 describes one of the limitations to exclusive rights that is available to all individuals and institutions know as the doctrine of fair use. Section 108 contains an exclusion that is only available to libraries and archives.

Section 107: Fair Use

Fair use is one of the most difficult areas of copyright law to understand. It is almost impossible to work in a library setting and not hear the term used from time to time. Fair use refers to a very specific provision of the copyright law which states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copy-righted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copy-righted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors (U.S.C 17, §107).

The doctrine of fair use is guided by the four factors enumerated in Section 107: purpose, nature, amount, and effect. The code attempts to clarify the limitations on the exclusive ownership rights of a copyright holder and determines when it is permissible for an institution to reproduce

a copyrighted work. As noted above, the CONTU Guidelines were developed to help libraries remain within the boundaries of the law, however, many requests fall outside of the Guidelines.

The doctrine is not always easy to understand and its application is often cause for controversy. The explosion of new formats in the past 30 years has made the CONTU Guidelines somewhat obsolete. In 1997, the Conference on Fair Use (CONFU) failed to reach a consensus on fair use and electronic documents. Convened by the Clinton Administration's National Information Infrastructure initiative in 1995, CONFU consisted of talks involving varied copyright stakeholders including librarians, teachers, publishers, and creators who divided into five subgroups. The failure of the conference CONFU means that there continues to be no agreed definition of fair use. In the most general terms, “users thought the Guidelines were overrestrictive and copyright owners thought they were giving away too much” (Harper, CONFU Background, 1997).

There are other guidelines for various situations that librarians may use including the Fair Use Guidelines for Electronic Reserve Systems and the Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use. In his book on copyright, *Copyright Law for Librarians and Educators*, Kenneth Crews notes that these guidelines often have many problems including a tendency to both narrowly construe the law and to create rigidity in its application. This comes out of a need for the guidelines to be acceptable to many diverse groups with competing interests.

There are several steps involved in determining fair use that individuals and librarians must follow in order to remain within the boundaries of the law. It should be noted that the following discussion refers to reproduction of copyrighted work. As mentioned above, other uses that pertain to libraries are covered in other sections of the code. As with everything else

regarding intellectual freedom and copyright, the steps for determining what libraries may copy are imprecise and not particularly helpful.

Determining Copyright

Determining copyright should be straightforward, but often it is not. As mentioned above, the Sonny Bono Act (also known as the 1998 Copyright Term Extension Act) radically changed the timeline for moving works into the public domain. Most libraries use the ninety-five year rule: “if an item was first published more than ninety-five years ago, it is fairly safe to assume it is in the public domain” (Hilyer, 2006:43). Once an item is determined to be covered by the copyright law, librarians must then decide if it can be copied under the doctrine of fair use or under Section 108 of the law which is described below.

Fair Use Factors

Fair use is determined by the four factors described in section 107 of the copyright code: purpose, nature, amount, and effect. Purpose simply means “What will the patron do with the copied item?” Will it be used for a commercially or in a non-profit setting for education or research? According to Kenneth Crews in *Copyright Law for the American Educator and Librarians*, the law clearly favors nonprofit, educational use. However, the nature of the institution (i.e., whether or not the institution is nonprofit public or academic library) does not mean that the item can be requested under fair use law even if the “purpose” factor is fulfilled. All four factors must be weighed together.

The second factor, the nature of the work, refers to the “characteristics and qualities” of the work (Crews, 2005: 46). Interestingly, Crews notes that courts tend to be more lenient with works of non-fiction rather than fiction. This is due to the belief that non-fiction works are

“exactly the types of works for which fair use can have the most meaning” (Crews, 2005, p. 46). Inhibiting their wider dissemination would impede research and creativity.

The third factor discusses how much of a work can be copied. There are certain occasions when an entire work can be copied but they usually relate to the availability of a copy of the work and other extenuating circumstances. The discussion of Section 108 of the copyright code below mentions two circumstances where this might be permissible including copying entire works for preservation and copying entire works for private study.

The fourth factor, effect, refers to whether or not the library should simply buy the item rather than requesting it through interlibrary loan. This factor does not take willingness or ability to pay into account. By “effect” the law means the effect on the market and, by extension, on the creator of the work. Crews notes that “effect” is closely linked to “purpose” but the rules are less clear in the area of education. “The hard reality is that even some educational uses have direct and adverse market consequences” (Crews, 2005, p. 50). This is particularly true when copying chapters in a book.

Section 108: Reproduction for Libraries and Archives

Section 108 describes the situations in which a library may copy a copyrighted work. Gilmer notes that Sections 107 and 108 are related but not identical. Section 107 pertains to everyone while section 108 is only for libraries and archives (Gilmer, 1996). In order to be protected under this provision, libraries and archives must be open to the public and available to researchers (private libraries and constituent-only libraries are not covered) (U.S.C. 17, §108(a)(2)). The employees of these public institutions are also specifically protected under Section 108.

Crews divides the provisions for photocopying delineated in section 108 into three different types of copies a library may make: copies for preservation, copies for private study, and copies for interlibrary loan (Crews 2005). Section 108 also states that libraries may not participate in interlibrary loan as a substitute for purchasing a subscription to a journal or ordering a copy of a book (U.S.C. 17, §108(g)(2)).

Several of the administrative laws in the Code for Federal Regulations clarify the statutory laws listed in Section 108 of the Copyright Law. Libraries may not copy musical works (interpreted as a musical compositions), materials generally considered to be fine art such as pictures or sculptures, or motion pictures and audiovisual works. Libraries may copy items that are not specifically prohibited including “audiovisual new programs” (U.S.C., §108(f)(3)).

Copyright, Ethics & Librarianship

Copyright law and fair use seem to provide more questions than answers for information ethics. Issues regarding the meaning of intellectual property, moral rights, and the application of ethics to copyright law are discussed throughout library and information science literature. This section explores recent scholarship that specifically focuses on copyright, ethics, and librarianship. The first two articles explore terms that are important to this area.

In a 2005 article, Roel provides a brief introduction to the idiosyncrasy of the term “intellectual property.” She notes that “intellectual activity and its ‘products’ cannot directly translate into capital in the less complex ways physical material objects produced from physical labor can” (Roel, 2005, p. 61). It is difficult to give value to intellectual property. Do you account for the amount of time it takes to think of an idea? The pleasure a piece of artwork gives to people in a museum? Roel writes that the current system used to value intellectual property places too much weight on individual accomplishments and does not take the societal structures

that surround the creator into account (Roel, 2005). It is easier for our capitalist system to view intellectual property as private property and “not credit the giants on whose shoulders the thinkers producing ‘new thought’ may stand” (Roel, 2005, p. 62). This is an issue for which librarians must account when paying royalty fees. Does it make sense to pay for private information whose findings were funded by public monies?

Another term that appears often in discussions of intellectual property is moral rights. This comes from the French term *droit moral* and provides the basis for copyright. It gives creators the power to control their work (Rosenblatt, 1998). In his article on copyright and the internet, Seadle provides two case studies regarding attribution (who created the work) and integrity (the work is what the author intended). These are considered to be “rights of personality.” “Some part of the creator’s personality has gone into each original work, and that...element of personality cannot be sold or transferred any more than a human being can be today” (Seadle, 2002, p. 124). Even though laws regarding moral rights are weak in the United States, the concept still raises ethical issues for librarians and should be considered when balancing the rights of creators against the rights of users.

Many articles on copyright and ethics in the library give advice on what professionals should do when faced with dilemmas or to protect themselves from copyright infringement claims. In an article for professional database searchers, an anonymous author writes about ethical quandaries that many document delivery services encounter: “who on the chain is responsible for payment to the [Copyright Clearance Center]? What procedure should we follow when a journal is not covered by the CCC?...And what do you do when you know full well that if you don’t deliver the protected document, someone else will?” (Anonymous, 1996). The author

recommends that the searcher err on the side of caution by doing everything in his or her power to deliver the copyright fee to the copyright holder.

Good copyright policy is one of the easiest ways for libraries to protect themselves from copyright infringement lawsuits. Amen, Garrison, and Keogh's article on developing policy notes that many institutions of higher education do not have campus-wide copyright policies. This is an area where librarians can provide leadership on their campuses and help bring all concerned parties together to create such a policy. Amen et al. found the process of developing a copyright policy for their university difficult and offer recommendations and resources in their article (Amen, Garrison & Keogh, 2001). In particular they note that institutions must maintain constant vigilance regarding copyright law. The importance of publically available copyright policies and current awareness is also mentioned by Schneider in another article on copyright and ethics in academia (Schneider, 2001).

In a 2003 article on copyright law and interlibrary loan, Nixon discusses a little known law that might have grave consequences on current library practice. The Uniform Computer Information Transactions Act (UCITA) is a model state law that enforces the shrink-wrap and click-wrap licensing agreements that are often found on computer software. The UCITA "validates the egregious license agreement terms...and allows license terms to override copyright fair use, library exemptions and other Copyright Act provisions" (Nixon, 2003, p. 76). This increases the threat of lawsuits against libraries. Clearly licensing issues are yet another area of ethical concern for librarians.

One of the most comprehensive articles on fair use and copyright notes that librarians are ethically obligated to comply with fair use, however, in a similar stance to Hauptman, the author writes that sometimes librarians should follow professional rather than legal standards.

Pressman lists three areas in which librarians should not follow legal obligations. First, when institutions use sovereign immunity defense in cases of copyright infringement, librarians should not accept this unfair legal defense strategy. Second, librarians should always model fair use for their patrons. Finally, librarians should always be aware that technology is often far ahead of the law and should always argue in favor of fair use for their users (Pressman, 2008).

Further Research

Ethics and copyright in the library setting is an area of intense interest for scholars. Issues regarding intellectual property and copyright are constant fixtures in the day-to-day work of most information settings. Librarians and other information professionals are sensitive to the fact that while technology changes rapidly, the law does not. When the law does change, as in the case of the Sonny Bono Act and the DMCA, it is often reactionary. Further research is needed on how librarians anticipate these changes. What do they do when current law or policy does not cover a given situation? How do librarians maintain awareness of current law? Librarians do have a Code of Ethics to follow but, as Pressman writes it “does not explain how an LIS professional should interpret a provision in day-to-day practice” (Pressman, 2008, p. 100) and does not help in the cases of conflicting values.

“Balance is key, and it is always the fundamental consideration in copyright” (McCord Hoffman, 2004, p. 113). Understanding how to maintain balance between the needs of the user and the rights of copyright owners is often difficult but it is essential to the work of an LIS professional today.

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