

The Copyright Axis of Evil: The Academic Library Must Confront Threats to User Rights

James G. Neal

This paper will define the key copyright developments that will challenge academic libraries over the next two years (2013-15) as they seek to support teaching, learning and research at their institutions. American libraries have benefited in significant ways from the availability of fair use (section 107) and various exceptions (section 108) in the US copyright law. But a new library treaty in development at the World Intellectual Property Organization highlights the expanding influence of global copyright developments on national policies. With a new Register of Copyright at the Library of Congress and the issuing of her legislative priorities for the new Congress, we can expect major new and refreshed initiatives around exceptions for libraries, orphan works, antipiracy, among other proposed laws that will require careful consideration and political action by the academic library community. A rapidly expanding percentage of the resources being provided to users by libraries are governed by contract, thus setting copyright aside as the governing legal framework. Licensing presents tough legal, economic, and social concerns. There are many important cases advancing through the U.S. courts on such important topics as first sale, mass digitization, electronic reserves, and piracy, and these legal decisions are increasingly redefining the copyright context for the work of libraries. The Digital Millennium Copyright Act introduced the hegemony of digital rights management over fair use, and allowed anticircumvention measures to generally undermine basic copyright limitations. And there is now a revitalized

call for community embraced standards in the form of use guidelines and best practices that can undermine freedom of institutional risk assessment and contextual action. Clearly, digital and network and mobile technologies, the expanding expectations of library users, threats to traditional content business models, the integration of digital media and applications, the push to information openness, among many trends, have challenged traditional views and applications of copyright in the academy. But as the national and international legal and legislative context is reframed, the academic library must commit to a robust educational, advocacy and leadership role on campus and across higher education.

This author, writing in a December 2002 *American Libraries* article (vol. 33, pp. 48-51), asserted the following: The American library community is confronted by a copyright axis of evil. The combination of globalization, extensive new laws and legislation, rampant licensing of information and new technological controls is making it increasingly difficult for libraries to serve their users. Librarians must be at the frontlines of the intellectual property wars. The opposition, the content owners, are well-financed and well-organized. Under the guise of protecting copyrighted works from the ravages of network piracy and digital abuse, some are committed to undermining the copyright system that has developed over two centuries.

It is essential that academic librarians understand the central importance of copyright to education and research on their campuses. But few make

James G. Neal is Vice President for Information Services and University Librarian at Columbia University , e-mail: jneal@columbia.edu

the commitment to understand the complexities of the law and the implications for library collections and services, leaving advocacy and action to a few knowledgeable experts. It is frequently talked about but rarely presented in the context of academic library relevance and success. Fair use and other exceptions in U.S. copyright law represent hard-won victories for the academic library community, but even these limited advantages are at risk. Libraries advance and assert the public interest, but the ability to use content for learning and scholarship is increasingly constrained.

Copyright in the U.S. has its roots in the Constitution, and is based on a fundamental balancing of the interests of copyright owners and users. Copyright assigns to the owner of a work control or exclusive rights to prohibit others from using that work in specific ways without permission, and to profit from the sale or sharing of that work for a fixed period of time. These exclusive rights constitute a monopoly over reproduction, distribution, adaptation, public performance, and public display. However, these rights are restricted to allow limited uses of the copyrighted work, particularly if the uses offer societal benefits.

Works may be copyrighted when they are fixed in a tangible medium of expression. An important test of copyright protection is the requirement that the work demonstrate a level of originality, something more than a “merely trivial variation” and more than the product of “sweat of brow.” There is a public domain where works are not protected by copyright, and this includes materials that have reached the term limit of copyright protection and publications issued by the federal government, for example.

U.S. copyright law also reflects a series of specific and general exceptions and limitations to copyright. Specific exceptions, like interlibrary loan, preservation and copies for users are captured in Section 108 of the law. Fair use is a more general and ambiguous exception included in the law as a defense against claims of inappropriate uses of a work. In determining whether an action meets the test of fair use, the courts have traditionally applied four measures: purpose or character of use, nature of the work, the amount of the material that is used, and the impact on the market.

Copyright has developed in an international context since the late 19th century. The World Intellectual Property Organization (WIPO) is playing an increasingly influential role in the formulation of national policies. The treaties adopted at WIPO in late 1996,

which spawned the Digital Millennium Copyright Act in the U.S., stimulated broad efforts to update national copyright laws to reflect the expanding importance of digital communication. Global economics is encouraging countries to work through the World Trade Organization (WTO) to establish new rules covering international trade, including intellectual property. The General Agreement on Trade and Tariffs (GATT) and the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), for example, authorize countries to file complaints for noncompliance and allow the use of trade sanctions or fines as retaliation. Market competition is driving nations to adopt copyright-harmonization strategies. Bi-lateral and multilateral trade agreements, which might sometimes be referred to as “copyright imperialism,” are imposing very conservative practices in countries which seek access to U.S. markets. International copyright agreements are not always in compliance with and supportive of American copyright traditions and practices, and not always in the interest of libraries. The “Draft Law on Copyright,” issued by the international organization Electronic Information for Libraries is a useful model for a comprehensive global reform and renewal of copyright laws that would advance the interests of libraries and their users. New WIPO treaties focused on copyright exceptions for the visually handicapped/print-disabled, and on general exceptions and limitations for libraries, are capturing wide attention.

Another important theme is the expanding role of licensing as the means for libraries to provide access to information for their users. At its core, licensing is a legal matter, defining through contract the terms of use and the costs of access. But licensing is also an economic issue—not only the price paid, but also the costs of negotiating, managing, and supporting the license. It is a political issue, driven by the legal and legislative changes that threaten to undermine the application of copyright and fair use to electronic information. It is a psychological issue, dependent on personal and organizational strength, commitment, durability, and tolerance to achieve favorable contract terms. It is a social issue because the cost and quality of access and use is too often determined by the ability to pay and skills of negotiation. We face an information divide heaped on top of a digital divide, and the creation of classes of users driven by licensing terms. Will licensing and contract supplant the role of copy-

right in governing access to information in our nation's libraries?

In October 2011, the U.S. Copyright Office issued *Priorities and Special Projects* for the two-year period through October 2013. This report outlined seventeen priorities and ten special projects, an ambitious agenda "to address current complexities in the copyright system and to prepare for future challenges."

Among the policy priorities and legislative work advanced are the following:

- Small claims solutions for copyright owners as a counter to the cost of federal litigation. Will this lead to a significant expansion in lawsuits and further chill the use of exceptions and limitations in the law and the application of fair use?
- Mass book digitization, including issues of orphan works and section 108 library and archive exceptions raised by the Google Book Search litigation. Will Google, the participating libraries, the publishers, and authors achieve a viable agreement?
- Rogue websites and the need for legal tools to address online infringement of U.S. works, particularly from overseas. And illegal streaming as a serious threat to copyright owners and U.S. businesses. Will there be continuing efforts to introduce comprehensive intellectual property enforcement legislation to counter piracy?
- Orphan works, when authors cannot be identified and located by users of a copyrighted work. Why can't fair use work?
- Copyright exceptions for libraries, in particular the need to update section 108 to meet the needs of libraries, archives and museums in dealing with born-digital works, digital preservation, and digital conversion.

These ideas were advanced further by Maria Palante, the Register of Copyrights, in the Manges Lecture delivered at Columbia University on March 4, 2013. In her talk entitled "The Next Great Copyright Act," the Register calls for a "comprehensive review and revision of U.S. copyright law." She observes that in recent years, Congress has made only "minor adjustments or technical corrections," and enacted legislation to address the "problem of piracy in the digital environment" through enhanced civil remedies, criminal sanctions, and federal enforcement.

The Register proceeds to discuss the "major issues" to be addressed in a "forward thinking but flexible" revision: exclusive rights, in particular reproduction, distribution and public performance on the Internet; incidental copies; new enforcement strategies, in particular for illegal streaming; a review of the Digital Millennium Copyright Act, the "best model of future-leaning legislation," including the rulemaking which permits circumvention in cases of non-infringing activity; digital first sale, the ability to transfer copies of creative works without consent of the copyright owner; and exceptions and limitations for libraries and archives, for print-disabled, for on-line education, and for personal uses.

One theme that weaves through all of these legislative initiatives is the expanding ability of content providers and copyright owners to implement technological controls to manage access to digital works. These technologies have advanced from passive password or IP domain models to more active encryption, invasive self-help, and digital rights management (DRM) systems. The purpose of DRM technology is to control access, and to track and limit use of digital works. By embedding controls in the products, providers can prevent use that is non-infringing under copyright law as well as enforce restrictions that reach far beyond the rights covered in the copyright law. The library community faces the loss of the first sale doctrine which allows for the secondary transfer of works to others, the advancement of pay-per-use models of information dissemination, the creation of limitations that prevent preservation and archiving of works, and the general erosion of fair use. American librarians must be concerned about these technology-based hazards.

Swirling around this legislative agenda has been a series of critically important court cases:

Golan et al. v. Holder: Early in 2012, the Supreme Court held that Section 514 of the Uruguay Round Agreements Act does not exceed Congress's authority under the Copyright Clause, and thus that copyright restoration to foreign works in the U.S. under the Uruguay Rounds Agreement Act (URAA) is not a violation of the First Amendment. The case challenged the constitutionality of copyright restoration in foreign works that were previously in the public domain in the U.S. Plaintiffs argued that the URAA violates the First Amendment insofar as it interferes with the right to keep using works that were exploited

when they were in the public domain. The case raised interesting questions pitting U.S. obligations under the Berne Convention against U.S. constitutional law.

Kirtsaeng v. John Wiley & Sons: The U.S. Supreme Court considered whether the first sale doctrine applies only to copies manufactured in the United States. On August 15, 2011 the U.S. Circuit Court of Appeals for the Second Circuit affirmed a lower court ruling that held the first sale doctrine (Section 109 of the U.S. Copyright Act) does not apply to copies manufactured outside of the United States. The appeals court ruled that Kirtsaeng had infringed copyrights by reselling in the U.S. cheaper foreign editions of Wiley textbooks, printed by Wiley Asia, that his family had lawfully purchased in Asia. On March 19, the Court ruled that the first sale doctrine applies to copies of a copyrighted work lawfully made abroad.

Cambridge University Press et al. v. Georgia State University: In May 2012, the judge in the case ruled that there were five infringements of copyright out of 74 claims made by the publishers, involving the use of book chapters for course readings provided to students through e-reserves. The decision clearly favored the University, but it does not provide the hoped-for clarity on the application of fair use to course material in the academic environment.

AIME v. UCLA: The case initially was filed on December 7, 2010 by the Association for Information and Media Equipment (AIME), an educational trade group of video publishers, and one of its members, Ambrose Video Publishing (AVP), against the Regents of the University of California and the Chancellor of UCLA. The plaintiffs alleged that UCLA's practice of streaming digitized video through its course management system constituted copyright infringement. The case is fundamentally about interpretation of contractual terms with respect to streaming as a public performance, but is relevant to the interpretation of fair use and of exclusive rights as they are implicated in streaming. On October 3, 2011 the *AIME v. UCLA* case was dismissed. However, the court allowed the plaintiffs to file an amended complaint on October 24, 2011. UCLA filed another motion to dismiss, which is now pending before the court.

Authors Guild v. HathiTrust: On September 12, 2011, the Authors Guild, joined by two other authors societies and eight individual authors, filed suit against the HathiTrust and five universities. This is a case about the digitization of copyrighted works

that stems from the original Google Print Library Project that commenced in 2004 (which is the subject of a separate lawsuit). The case also concerns the HathiTrust Orphan Works Project. They ask not for monetary damages but for injunctive relief, requesting that the copying, distribution and display of copies cease; that defendants cease to supply Google with copyrighted works to digitize; and that the alleged unauthorized digital copies held by HathiTrust and the five universities be impounded. Attention shifted shortly after the lawsuit was filed to claims of weakness in due diligence procedures in the HathiTrust Orphan Works Project.

It is important to understand the key contextual trends which illustrate the expanding relevance of copyright to the success of academic libraries. Universities and libraries are increasingly focused on customization, the ability to respond to individual needs and preferences, to personalize the educational and information service experiences. Universities and libraries are committed to openness, general and barrier free access to information framed by the rhetoric of open source, open standards, open archives, open knowledge, and open access. Universities and libraries seek a more self service capability, to replicate the ATM capabilities that eliminate the limitations of time, geography and reliance on expert intervention. Universities and libraries are experiencing a state of mutability, a condition of constant change, of hybrid structures and approaches, where consistency and continuity are incessantly challenged. Universities and libraries are focused on productivity, the efficiency of individual and organizational performance. Similarly, they are increasingly concerned about usability, more iterative and more user driven processes of design and development.

Universities and libraries are confronted by heightened levels of assessment, new accountabilities of user satisfaction, success, cost effectiveness, and impact. They are obsessed with issues of the market, the depth and breadth of penetration, diversification and globalization. There is a new philosophy of less strategic planning and more strategic thinking and strategic action, more agility to respond to opportunities quickly, more alignment of resources with priorities. This means a heightened capacity for business planning, for translating vision to action, for moving from concept to product, for thinking about risk capital and sustainability. This means more focus on

competition for people, for resources, for political attention, for rankings, and for visibility. And finally, universities and libraries are obsessed with resource development, with fundraising and grants, and with tapping new internal and external capacities for funds that leverage assets, and rewarding entrepreneurial and technology and intellectual property transfer capabilities. These ten key trends set a framework for understanding the changing academy and its increasingly schizophrenic relationship with copyright policy and practice as both creator and consumer.

Academic research libraries are focused on serving their users, their students, faculty and researchers, through collections of quality and relevance, responsive and effective services, and innovative applications of technology. Academic libraries sustain a core set of responsibilities: information selection (choosing), information acquisition (getting), information synthesis (organizing), information navigation (discovering), information dissemination (delivering), information interpretation (assisting), information understanding (educating), information use (applying), and information archiving (preserving). Academic libraries are also assuming new roles as traditional boundaries shift. Libraries are learning how to be better consumers, often negotiating and licensing content and software collectively. Libraries are aggressive intermediaries and aggregators of information, and, as publishers, are creating new innovative modes of scholarly communication. Libraries are partnering with faculty to expand their educational involvement beyond traditional bibliographic instruction, and to advance operational investigations as research-and-development organizations. Libraries are also increasingly successful information policy advocates seeking through political relationships to influence national and global laws and legislation and to advance the public and scholarly interest.

These expectations point increasingly to a library that is free of time and space, defined by a combination of local resources and external connections, by the ability to put users in touch with the information and tools that they need when and where they need it. But this virtuality demands the virtuoso library, with the essential subject, language, technology, and professional expertise to serve teaching, learning, and research. It also requires the virtuous library, with the means and commitment to share resources and capabilities, and to collaborate widely. Cooperation

is part of the professional DNA of research libraries, a constant for service, success, and survival. But the larger view of the research library as an independent and self-sustaining organization, sharing on the margins, must be set aside. The tradition of cooperation must be replaced by a new spirit and reality of radical collaboration, new and energetic relationships and combinations among libraries and with the private sector. And copyright often is a barrier to advancing this vision.

Emerson once said “sometimes a scream is better than a thesis”. The library community faces the desperate need to shed its political virginity and get to the front lines of the conflict which lies ahead. It will be “hard ball.” The hallmark of the system is balance, its culture is trust, its target is the public interest that copyright owners and libraries both serve. Fair use is not civil disobedience. Perhaps as the Committee for Economic Development noted in its 2004 publication “Promoting Innovation and Economic Growth: The Special Problem of Digital Intellectual Property,” we have reached the limit of legislative and regulatory action in the new environment, and we are undermining rather than promoting innovation. Perhaps we need new business models to exploit digital distribution and new economic tools to promote the public domain. Perhaps as the Computer and Communications Industry Association reported in its 2007 report “Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use,” copyright exceptions fuel economic growth and are integral to education and research.

Important and sometimes surprising thinking and action on copyright-related arenas cut across the political spectrum. On February 22, 2013, the White House released a memorandum on “Increasing Access to the Results of Federally Funded Scientific Research.” It raised challenging issues in the higher education community on the peer-reviewed journal literature, on digital research data, and on public access to copyrighted works. The key points:

- Federal agencies with annual research and development budgets of \$100 million or more are to provide the public with free and unlimited online access to the results of federally funded research—including both unclassified articles and digital data. Note that some agencies that do not meet this threshold have contacted the White House about implement-

ing such plans, so the number of agencies is growing.

- Each agency is required to develop a plan and submit the draft plan to OSTP, in coordination with OMB, within 6 months of publication of this White House memorandum.
- Research manuscripts arising from publicly funded research are to be made available using 12 months as a guide after publication in a peer-reviewed scholarly journal.
- Each agency plan will include a number of elements, such as:
 - how best to leverage existing archives where appropriate;
 - how to optimize search, archival, and dissemination features that promote accessibility;
 - how to enhance and ensure interoperability and long-term stewardship of the results of federally funded research;
 - issue guidance notifying grantees of new requirements and more.
- Agency plans should be developed in consultation with stakeholders.
- Federally funded research results can be maintained in repositories managed by a federal agency, library, publisher, or other party.
- Federal grantees and contractors shall include data management plans in their grants as appropriate. These plans should include the costs of data management and encourage the deposit of data in publicly accessible databases where appropriate.

On November 16, 2012, the Republican Study Committee released a policy brief entitled “Three Myths about Copyright Law and Where to Start to Fix It.” It argues: “Today’s legal regime of copyright law is seen by many as a form of corporate welfare that hurts innovation and hurts the consumer. It is a system that picks winners and losers, and the losers are new industries that could generate new wealth and added value. We frankly may have no idea how it actually hurts innovation, *because we don’t know what isn’t able to be produced as a result of our current system* (emphasis in original).” What are the three myths?: The purpose of copyright is to compensate the creator of the content. Copyright is free market capitalism at work. The current copyright legal regime leads to the greatest innovation and productivity.

The Republican study proceeds to identify areas where the U.S. copyright law has created harmful effects: slowing the creation of an innovative remix industry, hampering scientific inquiry, stifling the creation of a digital public library, discouraging added-value industries, and penalizing legitimate journalism and oversight. The brief concludes four recommendations: reform of statutory damages, expansion of fair use, punishing of false copyright claims, and heavily limiting the terms for copyright.

A recent book, *Copyright Unbalanced: From Incentive to Excess* (George Mason University, Mercatus Center, 2012), raises the question: Why Should Conservatives and Libertarians Be Skeptical of Congress’s Copyright Regime? The answers: Congressional inability to develop rational policy, the questionable economic benefits produced by stronger copyright protection, the clear negative impact on innovation, and the unwarranted criminal prosecution of even minor infringements. The editor, Jerry Brito, argues that in the case of copyright, Congress has abdicated its responsibility to represent the public interest, but has turned over the responsibility of crafting copyright law to the representatives of copyright-affected industries and has allowed lobbyists to write the copyright laws. Thus copyright is a dysfunctional and out-of-control government program, granting subsidies and privileges to special interests.

What is the library action agenda on copyright? I would suggest the following priorities for arming this community:

- be knowledgeable resources for their communities, sources of accurate and current information about copyright
- aggressively advocate through political action for the public interest
- educate their users to respect copyright and to practice responsible use of copyrighted works
- exploit fair use and exceptions to copyright to the extent possible by taking responsible risks
- document the impact of changes in copyright laws on their ability to serve users
- effectively negotiate licenses to achieve terms that advance and not erode fair use and exceptions
- use their economic clout to influence the information marketplace
- use their community clout to influence the

legislative and political process

- actively promote open models of information access and the creation of a commons for scholarly, educational and creative works
- forge powerful and creative partnerships to advance the political agenda

One of the most important partnerships has been the Library Copyright Alliance, bringing together the forces of the American Library Association, the Association of Research Libraries, and the Association of College and Research Libraries to advance the interests of libraries and their users in legislative and legal developments on copyright. At the core of this advocacy have been several core principles:

- A robust and growing public domain provides new opportunities for creativity, research and scholarship.
- Effective library programs and services are a means of advancing knowledge.
- High levels of creativity and technological progress result from individual research and study.

Copyright and fair use will survive and thrive only if the needs and rights of our library publics are successfully represented in the courts, in the legislative forums, and in the marketplace. To ensure this, librarians must apply their political and educational talents on the local, state, national and international levels to turn their concern into effective action.