

Fair Use is Not Civil Disobedience: Rethinking the Copyright Wars and the Role of the Academic Library

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The academic library community has been at the center of the copyright wars, advancing the interests of students and faculty. Digital and network technologies, the licensing of electronic content, and the globalization of copyright have combined to challenge our traditional views of intellectual property. New laws and legislation over the past decade have threatened the sustenance of fair use and key exceptions to copyright. We must re-commit to the education of our campuses, to political advocacy, and to collective risk taking.

Copyright is a MEGO topic... my eyes glaze over. Academic librarians understand the central importance of copyright to education and research on their campuses. But few make 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. Copyright has become a trite topic. 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. This paper will review several recent copyrights developments that impinge on fair use, and outline a call to action, a renewed energy and capacity across

academic libraries to assert and advance the principle and practice of fair use.

First, a micro-lesson in the basics of copyright. 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

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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.

A few trends will help to establish the context. 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 sufficient framework for under-

standing the changing academy and its increasingly schizophrenic relationship with copyright policy and practice as both creator and consumer.

The library presents a particularly challenging shift in its roles and responsibilities. The library remains focused on core services to users: on information acquisition, synthesis, navigation, dissemination, interpretation, understanding and archiving. This commitment to get, organize, find, deliver, answer, educate, and preserve are central to the library intersection with copyright. This also translates into a new responsiveness to user expectations. Users want more and better content, more and better access, they want convenience, they want new capabilities, to do new things. They want control of their content and the infrastructure that supports use. They want to manage their costs and improve individual and organizational productivity.

But as the library expands its suite of activities, the perspective grows in its complexity and ambiguity. The library is an aggressive consumer, negotiating in groups with heightened legal awareness and market power. The library is aggregator, bringing information of diverse media together from distributed sources. The library is publisher, participating in the scholarly communication process in partnership with the research and education sectors. The library is educator, not just advancing an information literacy agenda, but in the classroom and in the community as teacher and as full partner in the learning enterprise. The library is a research and development organization, creating new knowledge, serving as a laboratory for experimentation, positioning for federal, foundation and corporate investment, and building a capacity for capital development. The library is an entrepreneur, leveraging the assets of space, content, expertise, and traffic to build new customers, markets, and resource streams. And the library is policy advocate, concerned with and active on a wide range of information policy agendas ranging from privacy, to telecommunications, to intellectual freedom, to appropriations, to government information to copyright. Thus the library vision will embrace legacy, a responsibility for centuries of societal records in all formats. It will comprise infrastructure, the essential combination of space, technology, systems and expertise. It will include repository, guaranteeing the long term availability and usability of our intellectual and cultural output. It will be portal, serving as a sophisticated and intelligent gateway

to expanding multimedia and interactive content and tools. It will be enterprise, taking on a more entrepreneurial capacity for innovation and business development. And the library will be public interest, engaging the political process to advocate for the needs of the users it serves.

This shift in vision and the concomitant expansion in roles bring the library into a heightened and volatile relationship with copyright. About nine years ago, I published an article in *American Libraries*, the professional magazine that reaches about 100,000 librarians worldwide, entitled “Copyright is Dead, Long Live Copyright.” I argued that the American and global higher education and library communities are confronted by a copyright axis of evil. That gauntlet dates the paper and demonstrates the will of the editor to draw readers into the article. I cited a combination of developments that I found particularly troubling. These included the following: the rampant globalization of copyright and the efforts to harmonize laws at the risk of undermining national copyright traditions and advantages; the orgy of new legislation and laws seeking to update copyright and to advance or better protect the interests of various groups; the battery of court decisions at all levels in the judicial system defining copyright through litigation and not through public debate; new copyright imperialism through forced trade agreements imposing conservative features on national copyright law development; the hegemony of licensing, whether negotiated, shrink wrap or click through, as the means to gain access to electronic information; the pressure to embrace use guidelines to refine copyright compliance which the library and education communities have successfully resisted; new technological controls that may make it difficult and illegal to access digital information for appropriate purposes; and the continuing debates on our campuses about the ownership of faculty works and the culpability of the university for the actions of its members.

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 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 Organi-

zation (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. 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.

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 copyright in governing access to information in our nation’s libraries?

Academic libraries are focused on several key arenas of copyright, and they are summarized below:

- The need for orphan works legislation, thus providing libraries with the ability to digitize and make available works under reasonable terms when the owner cannot be identified or located.
- The urgency of digital fair use under the impact of DMCA provisions and the need for legislative solutions where Section 1201 Anti-Circumvention Rulemaking does not provide appropriate relief.

- The importance of providing course reading materials electronically as part of course management systems under fair use and perhaps with an expanded understanding of best practices.
- The value of peer-to-peer file sharing and social networking technologies to academic work, and the need to avoid onerous federal legislation and unnecessary campus blocking and disciplinary strategies.
- The movement to expand open access to government-funded research, both the research papers and the research data, and to resist content industry arguments that laws violate copyrights.
- The government efforts to expand investigative powers and increase damage awards for copyright violation through the so-called Pro-IP enforcement legislation.
- The need to expand and update the exceptions in Section 108 of the copyright law to reflect digital technologies and networked access to information, particularly in areas of preservation of born-digital content.
- The proposed Google agreement and the creation of a new shared resource for searching and access to digitized works from library collections, but with challenges in the areas of fair use, orphan works, and user privacy.
- The *Omega vs. Costco Wholesale* court case which affirms that the first sale doctrine (Section 109) applies to copyrighted works manufactured and first distributed outside the U.S., a crucial exception to the distribution right that allows libraries to function at the basic level, and which is perhaps argued as fair use.

The library community brings to these developments a set of principles hammered out over the past decade. They have served as the intellectual base and the action agenda on copyright. They include the following:

- copyright law should include provisions for digital works that maintain a balance among the interests of creators, copyright owners and users that is equivalent to that embodied in the current statutes for analog works
- copyright law should foster the maintenance of a viable economic framework of relations between owners and users of copyright
- copyright law should encourage enhanced ease of compliance rather than increasingly punitive enforcement measures
- copyright law should promote the maintenance of a robust public domain as a necessary condition for maintaining the intellectual and cultural heritage
- facts should be treated as belonging to the public domain as under current law
- copyright law should uphold the principle that liability for infringing activity rests with the infringing party rather than with a third party
- educational institutions should foster a climate of respect for intellectual property rights by providing appropriate information and incentives to the members of the community
- new rights and protections should be created cautiously and only so far as experience proves necessary to meet the constitutional provision for a limited monopoly
- copyright law should assure that respect for personal privacy is incorporated into access and rights management systems.

It is these basic principles that have enabled the library community to respond to the complex issues that have been raised about the adaptation of copyright to an information access and services condition dominated by digital and networked technologies. Among the pressing questions raised in the library community are the following:

- can digital and network based distribution and copying be advanced in a balanced way?
- can international copyright agreements be developed that do not undermine national legal traditions and values?
- can fair use and access prohibitions be sustained compatibly?
- can libraries remain free of liability as internet service providers?
- will copyright management systems and anti-circumvention technologies be flexible enough to enable non-infringing uses?
- can terms of copyright protection be structured so as to maximize commercial exploitation but also allow access to works that no longer have market value?
- will copyright laws support the advancement of learning on the internet?

- will the public domain be sustained or further eroded?
- will a new protective regime for facts be created?
- will the private law of contract effectively supplant copyright as the tool for defining public access to information?

In the context of these principles and these questions, the overarching goals of the library community have been severalfold: to develop policies for copyright management which enable broad and easy distribution of and reuse of materials by students and scholars; second, to foster a competitive and supportive market for scholarly communication and creative work; third, to enable innovative and transformative uses of technology without undermining balance in copyright relationships; and fourth, to support the routine capture, curation and permanent archiving of information regardless of media. And in the context of these goals, the library community has developed a priority tactical plan, our troop surge if you will, and it includes the following elements: monitoring the impact of the anti-circumvention provisions of the Digital Millennium Copyright Act on the work of libraries and influencing subsequent rulemaking, protecting if not promoting the doctrine of fair use in the digital environment, advancing open access to federally funded research and supporting researcher compliance with the new NIH policy, helping authors to protect their rights by educating them on the various agreement options and supporting deposit of works in disciplinary, institutional and personal repositories, expediting university and scholarly society policies to support open access, providing a mechanism to allow abandoned copyrighted works to pass into the public domain and enabling new orphan works legislation to provide limited uses, exploiting court decisions and corporate negotiations around the mass digitization and searchability of in copyright works, blocking any efforts to revitalize inappropriate database legislation, researching and educating on the advantages and disadvantages of blanket licenses in support of education and research, and advancing key legislative elements coming out of the report of the 108 study group.

There is nothing more basic to our ability to serve our users, our students and faculty, and the larger scholarly and learning communities than our success in preserving and extending fair use, in refreshing the exceptions and limitations for libraries and archives,

and retaining effective control of the content created in our communities for appropriate use and distribution across our communities.

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”. Those who oppose exceptions and question the viability of fair use are well financed and well organized and politically connected. Under the guise of protecting copyrighted works from the ravages of network piracy and the digital abuse, some are committed to undermining the copyright system that has developed over two centuries. 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.

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

I cite a very important paper recently published by Kevin Smith in the January 2010 issue of *portal* on “Copyright Renewal for Libraries: Seven Steps Toward a User-Friendly Law.” He argues that “Fair use needs vigorous exercise on the part of the creative and educational communities, and it requires well-reasoned application from the bench, but the law itself is not in need of reform.” Another important study is ARL’s 2010 report on “Fair Use Challenges in Academic and Research Libraries.” Based on extensive interviews, it documented “various levels of certainty about how to interpret and apply fair use,” the frequent retreat to familiar quantitative “guidelines” and specific exceptions rather than taking advantage of the flexibility of the fair use doctrine, and the need for better guidance and more active and collective risk-taking in exercising fair use.