ABSTRACT

The advent of electronic publishing and the widespread use by libraries of the Internet, particularly the World Wide Web, to deliver information dictates review of the concept of legal protection of the rights of authors in their works and the "fair use" doctrine in relation to electronic provision of copyrighted materials. Current and proposed laws dealing with intellectual property as well as recent case law in the area are examined in relation to the types of Web-based information delivery currently being used by libraries.

In relation to intellectual property rights, a library's service activities in distributing the knowledge contained in copyrighted works are lawful mainly due to two features of the copyright laws: the "first sale" doctrine, which allows the buyer of a copyrighted work to sell or lend it to another on the basis that, under the law, the copyright holder's claim to the physical embodiment of the work ends at the moment of its first sale; and the doctrine of "fair use," which recognizes that the inherent exclusivity of copyright is not an absolute, and limited copying for purposes of criticism, comment, news reporting, teaching, scholarship, and research should be permitted. The ease of manipulability and interactivity of digital, electronic forms of materials, allowing a document to be downloaded, changed -- material deleted, modified or added -- and then uploaded to another system with the eventual user being unable to detect that it was in any way used or changed from its original form, presents problems not contemplated by the copyright laws. Likewise, the test of a "fixed medium," such as with ephemeral e-mail and non-archived news group postings, leads to confusion as to whether they could even be covered by copyright; however, most experts posit that only "live" transmissions via the Internet would not meet the law's fixation requirement.(1) In all events, lawmakers must be well acquainted with how computers and networks operate if workable legislation for the electronic information environment is to be developed. The recent controversy, stemming from a court case originating in California(2) and discussed at the World Intellectual Property Organization meeting in Geneva last fall, of whether the "copy" of a computer program or file in a computer's random access memory constitutes a second copy of the program (the program disks themselves having been legally "first use" acquired but not the "copy"), which conclusion would, of course, effectively kill personal computing and
browsing on the Web as we know it, demonstrates, by the very fact that the discussion took place, a widespread misunderstanding of the electronic medium and a lack of clear thinking by policy makers in this area.

Resolution of these issues in the wrong way could be disastrous. As stated by Steven Miller:

The additive nature of IT [information technology] content (and the decentralized nature of personal computer technology) is the material basis behind the hope of early personal computer visionaries that the spread of information technology would lay the basis for social cooperation and shared prosperity. But these hopes are now running into the wall of intellectual property protection.(3)

Is Copyright Obsolete?

Several popular authors have opined that the near-universal availability of electronic information has rendered copyright as we now know it obsolete. Nicholas Negroponte offers the following view:

Copyright law is totally out of date. It is a Gutenberg artifact. Since it is a reactive process, it will probably have to break down completely before it is corrected.(4)

That is to say, the movement toward electronic resources is so great that it is no longer possible to protect authors’ rights adequately, so perhaps we should not even try.

Bert Boyce goes further:

Current copyright law, as it applies to learned journal literature is, on its face, in contradiction with the clearly expressed purposes of the authors of the basic law of the United States. ... A [copyright] law that meets constitutional requirements should be able to demonstrate that the granting of exclusive rights in some way benefits the authors and does not impede the progress of science. All available evidence suggests that the current law meets none of these tests.(5)

This same reasoning could be applied not only to the journal literature but to any scholarly publication not intended as a potentially remunerative endeavor. Although faculty, for financial gain, write both textbooks and popular accounts that derive from their research interests, there are certainly many of their other publications, such as technical reports and works treating subject matters anticipated to be of interest only to limited audiences, that can in no way be considered lucrative for their authors; thus the interests of scholarship might be better served by a system not based on exclusivity as are our current copyright laws.
But many say copyright is not dead, albeit a few "legislative fixes" are needed. James Billington, Librarian of Congress, asserts:

As we look ahead, there is no question that protection of intellectual property is crucial to the full use of the 'electronic superhighway.' The copyright law tries to strike a balance between the rights of the creators to control the dissemination of their works and the public interest in their widest dissemination.(6)

Another similar opinion is expressed by Peter Lyman:

There is no question that copyright is threatened by network technology, for computers essentially copy information, and networks distribute it. There is no question that publishing adds essential value to information -- in the form of investment, quality control, marketing, and pricing. Thus, the regulation of illegal copying and distribution of copyrighted material is a legitimate subject for government policy.(7)

The original purpose of copyright should not be forgotten. Copyright was never intended simply to enrich authors (or publishers) but to ensure that information, ideas, processes, etc. are actually disseminated to the public and not simply hidden away by their creators. That copyright and the protection of intellectual property rights remains vital in the electronic environment is a key assumption of this research paper.

Methodology

Examination of Internet based resources and their delivery to patrons via the Web, necessitated a review of the library and legal literature, case law, etc. to outline the parameters of "fair use." Then, examination of how libraries currently use the Web to deliver information to users was undertaken. Web sites identified from the journal literature, conference programs (such as those for ALA, ASIS, SLA, SELA, etc.) or from general web surfing were visited and a content analysis was performed for copyrighted (or potentially copyrightable) materials to determine the type of information being provided and the potential intellectual property exposure for the library. Interviews are being conducted where Web sites include copyright protectable information that is provided either to the general public or only to on-campus faculty, staff, or students, not including such services as OCLC's FirstSearch or CARL's UnCover where copyright issues are the concern of the service providers. (Of course, the "advantage" of the vendor service from the point of view of the library and ultimately the user is illusory. There is no way to determine how much is paid to the copyright holder for uses that are clearly "fair" and should have been available without the payment of royalties.)

Fair Use

The legal basis for fair use derives implicitly from Article I of the U.S. Constitution, specifically from Section 107 of the Copyright Law of 1976, and generally from the First Amendment, in the sense that the right to access information forms a prerequisite to freedom of inquiry. Some legal scholars have also interpreted the
Ninth Amendment to cover the right to information as an unenumerated but fundamental right reserved for the people.\(^{(8)}\)

The basic tenet of fair use is the recognition that there should be some limits (for the sake of science and progress) to the exclusive rights granted to the copyright holder. Unfortunately, Congress in the 1976 law did little to clarify or define just what is fair use. This is not surprising since fair use originated from judicial decisions, each of which was based on the particular facts of a specific case.\(^{(9)}\) The basic criteria against which fair use is tested in each case are: purpose, nature, amount, and effect. Due to concerns of educators after the introduction of the legislation that would become the 1976 Copyright Act, Classroom Guidelines (also known as the CONTU guidelines), which were much more detailed than anything Congress would likely put into the law itself, were developed by a committee representing professional organizations. On defining fair use, Kenneth Crews states:

**Educators must ... lessen their insistence on "answers" to all copyright questions. Their demand for specifics led to the meticulous and ultimately unrealistic Classroom Guidelines. Sometimes the questions are better left unanswered or perhaps the best answer might be only general principles of law and practice.\(^{(10)}\)**

The American Library Association, the Association of Research Libraries and four other library professional organizations have been active in seeking application of the fair use doctrine for electronic information, issuing a statement entitled "Fair Use in the Electronic Age: Serving the Public Interest," which declares that nonprofit libraries should have the rights:

- to use electronic technologies to preserve copyrighted materials in their collections;
- to provide copyrighted materials as part of their electronic reserve room service;
- to provide copyrighted materials as part of electronic interlibrary loan service; and
- to avoid liability, after posting appropriate copyright notices, for the unsupervised actions of their users.\(^{(11)}\)

Into the Congressional inspecificity void come the courts. In a recent case before the U.S. Court of Appeals for the Sixth Circuit involving copyright and fair use,\(^{(12)}\) a three judge appeals court panel initially ruled that creation of coursepacks for university courses by a copyshop, Michigan Document Services, without obtaining copyright permission or paying permission fees, was fair use of the copyrighted works for which no such fees need be paid, overturning a district court decision to the contrary. The basis of the three-judge court's decision was that the coursepacks were sold only to students for use in a particular course, not to the general public, and that the students could, under fair use, have gone to the library and themselves individually copied the same material without liability; thus the copyshop was to be allowed to place itself in the shoes of its customers, and those student's use of the work for classroom purposes, and not the use of the work by the copyshop, was to be considered for its fairness. After this opinion was issued a majority of the judges of the Sixth Circuit voted to rehear the case *en banc*, and in November 1996, an opinion was issued reversing the three-judge court's finding that the copyshop's use, i.e., its making of copies of the works in question, was not fair use. This opinion turned primarily on the fact that Michigan Document Services, as a commercial copyshop, should have sought copyright permissions and paid royalties to the copyright holders. Essentially, the court was saying, if money was to be made, the creator of the product had a right to some of it. The ultimate result of this case should be seen as relatively
good news for libraries that wish or need to provide excerpts of copyrighted materials for class use, including distance education, because of the opinion's negative implication, i.e., that a non-profit enterprise enjoys a much wider scope of fair use than does a commercial one. Also, while finding against the commercial copyshop, the court did not find the use of these materials by students to be anything but fair use. The distinction drawn—that the copyshop was in the business of making copies for profit and therefore should be held to a stricter standard—may not necessarily be economically sound or literally supported by the language of Section 107, which does not make the non-commercial nature of copying per se "fair" or even the most important factors used in determining whether a use is "fair," but following the reasoning of the court, libraries of nonprofit institutions making similar types of copies, i.e., multiple copies for classroom use for teaching purposes, would seem to be relatively clear of many copyright infringement actions.(13)

But beware, fair use remains an unsettled, fluid and changing area of the law, described by one court in 1968, a somewhat simpler time in respect of copyright matters, as a concept "so flexible as virtually to defy definition."(14)

Content Analysis of the Provision of Internet Based Resources

For purposes of the content analysis, the library Web sites are classified into 5 categories:

- little or no Web presence;
- selective links on library's homepage to external information resources;
- integration of Internet resources into library's OPAC;
- provision of course-related information;
- and library as Web publisher of subject area information.

Little or No Web Presence

This category was used to designate libraries with no Web presence or only internal information, such as hours, policies, program announcements, friends information, etc. On the basis of a 1996 ALA/ACRL survey sent to a sample of 1,132 academic libraries, Mary Jo Lynch reports that the libraries of 87%, 52%, 51%, and 26% of doctoral, master's, baccalaureate, and associate of arts granting institutions respectively have a Web homepage.(15) Discussions with librarians held at various library conferences during the last eight months confirm that sizable numbers of academic libraries, especially small ones, still do not have a Web presence for their library. Most libraries encountered to date that have a homepage cannot resist linking to at least few sites, so the vast majority of libraries in this category are without a Web presence entirely. It would appear that at the present time at least half of the academic libraries do not have any type of Web presence. These libraries obviously do not have the degree of electronic copyright infringement exposure that it is the focus of this project.

Selective Links on Library's Homepage to External Information Resources

In addition to local, in-house type of information, many libraries provide outward links to other free, publicly available Internet or Web-based information. The sites in this category vary greatly with some providing thoughtful indexing and organization(16) and some being little more than simply lists of resources. Some of these lists of links amount to a particular librarian's or group of librarians' picks and lack much underlying rationality. It appears that they were identified through general surfing as looking useful; possibly sites are added as they are used in the reference process, but they usually lack the structure on the homepage that would lend an air of rationality to their selection. Some of the libraries in this category also appear to offer at least limited reference service via the Web, typically offering to answer reference questions for local users...
within 48 to 72 hours. Unless this reference service involves scanning and sending full-text responses, these libraries do not presently have an electronic copyright or intellectual property rights problem (always assuming that there is no future legislation or court decision to the contrary) in respect of what they themselves may have done, at least until some copyright infringement occurs in connection with the use made by library patrons of the information downloaded from the sites. This use would be analogous to the use of articles photocopied from journals, and the usual fair use tests could be applied to this category of use. The question is raised as to when the library might be deemed to have aided and abetted a copyright law violation through pointing its patrons to sites containing copyrighted material, especially to sites where prior permission was not obtained for the reproduction of these materials on the Web. The library as part of a larger organization might be a "better" target for a law suit concerning copyright infringement than the person who actually created the site; prudence dictates that care be taken in suggesting hypertext links to copyrighted materials whose provenance is unknown to the library.

Integration of Internet Resources into Library's OPAC

In this category, libraries are providing "hotlinked" bibliographic records (containing URLs) for Internet based resources which allow the patron to access Internet resources directly from the library's catalog. One substantial site using this model is INFOMINE at the University of California, Riverside, where Internet based information provided through a Web interface from their catalog includes around 5,000 indexed and annotated records with links available to information in most major academic disciplines. Judging from electronic discussions on INTERCAT (a listserv discussion group devoted to cataloging of Internet resources), electronic visiting of sites, personal interviews, and presentations at various library conferences, large-to-medium sized academic libraries in particular are doing a lot of ground-breaking work using this model of information retrieval, which usually also includes some form of information delivery as well. As far as patron ease of use goes, as well as generally following a collection development procedure for selection of sites, this model is a great technological advancement over the selective link model, but in regard to copyright and intellectual property issues, the two should be seen as roughly equivalent.

Library as Web Provider of Course-Related Information

Being for the most part a distance visitor to library homepages, this category of information provision was usually impossible for me to actually explore. Materials such as reserves would be indicated as a link on the homepage, but typically would require some kind of authentication of the user as a member of the university community before viewing of the actual materials was permitted. Even under the commercial-nature standard of Michigan Document Services as it might apply regarding fair use by non-profit enterprises, these libraries may have a potential copyright exposure because of the typical use and conversion of the format of the entirety of the materials from print to electronic form. Discussions at the Conference on Fair Use (CONFU) indicated a position by publishers that scanning is equivalent to "publishing" and thus a violation of copyright. As these discussions ended without reaching any agreements that could be put into guidelines, this is an area where libraries should seek legal advice on their campuses as to interpretation of the copyright laws concerning scanning and fair use. One area of contention at the CONFU meetings is the fact that libraries offering electronic reserves often cannot authenticate that the user is a student in the particular class for which the materials are intended. (However, the same can also be said of photocopies of print materials.) On the other hand, if libraries do not assert their fair use rights in regard to electronic reserves, they are likely to lose them. Revision to the copyright laws is likely to be re-introduced in the next session of Congress, and libraries involved in this type of service must monitor closely what is going on in Washington and be prepared to lobby to retain at least the same fair use rights in the electronic environment that they clearly have in their print-based collections. Advocates for blanket copyright immunity for education-related
uses conducted by non-commercial entities doubtless overstate their case, as well as the current state of
the law, but should keep in mind that the perfect world need not be the enemy of ones better than the
present.

Library as Web Publisher of Subject Area Information

Academic libraries engaged in publication of information on the Web are small in number and usually
engaged in collaborative projects with other libraries or with other departments in their university. In these
instances, librarians along with other academic partners are involved in selecting materials to be made
available, scanning the materials, and cleaning up the text, often with provision of graphical and other
multimedia materials which may not have been attractive to a traditional publisher. There are two basic
approaches contained in this category: electronic publication of archival materials; and electronic publication
of new, never before published items. Libraries engaging in electronic publication of materials find
themselves at the heart of the electronic copyright and intellectual property concerns.

In a recent article in American Libraries, Terry Webb asks: "Why are libraries always trying to access
something? Why do we only connect to already published sources? Why don't we create?"(19) His and
other libraries are helping to create and publish materials on the Web. But as another librarian involved in
such a project has discovered, not all librarians agree that this is a proper role for the library; to quote a
scathing letter from a colleague at another institution "Libraries should not do more than is already expected
of them."(20) Nonetheless, libraries are becoming part of the creation process, and as the trend toward
digitalization of information continues will likely find this route a valuable one for maintaining an important
position in the business of the university.

One approach is the electronic publication of archival materials that are no longer covered by copyright
protection or for which the library has secured copyright when the particular materials were acquired, best
exemplified in the Library of Congress National Digital Library project, the goal of which is to make 5 million
American history items available electronically by the year 2000. Billington notes that "we are confining
ourselves to materials that are in the public domain or for which we have permission to convert into digital
form."(21) Another project in a similar vein is the Electronic Archive of Early American Fiction at the
University of Virginia, intended to digitize and make available on the Web first editions of important novels
and short stories, including both classics and more obscure, less generally available works. Plans include
providing some of the works freely on the Web, with libraries able to purchase the entire collection on CD-
ROM or access it through the Internet for a fee.(22) These are but two projects out of several that could be
mentioned,(23) but they are good examples of an approach to library publication of electronic texts that, by
definition, avoids the copyright problems through staying in the public domain.

A second approach is the electronic publication of new materials by the library. These are materials that
may have not been attractive to the traditional publisher because of limited potential readership, extensive
data sets, extensive graphics, etc. Also as a Web publication site grows in number of materials and in use
by its targeted audience, authors may wish to have their publications available where others of the same
nature are located to facilitate dissemination of their works. Since authors of academic articles are rarely
compensated and sometimes even have to pay, especially in the sciences, page charges to get their works
published, dissemination of their works is often the major consideration. As tenure and promotion policies of
colleges and universities find their way into the electronic age, dissemination is likely to be the only major
consideration for an academic author. Copyright questions are again avoided more or less definitionally,
since the authors in such situations either forego any claim to copyright in exchange for dissemination or the
authors retain copyright of the materials but give the site permission to publish them.
An example of a venture with the library as a partner in the publication of new information is demonstrated by the announcement of a collaborative effort between the Stanford University Press and the Stanford University Libraries to publish scholarly works concerning Latin America on the Internet. This effort is building upon the Libraries' current involvement with the production of a full-text Web version of a science periodical.(24)

Another example involves the Center for Electronic Text at the University of Cincinnati Law School, a department in that school's Law Library, which has produced two databases for the Web, one in the area of corporate law and the other in human rights. Yale University is also a partner in the creation of DIANA, the database of human rights literature.(25) To date, they have worked primarily with public domain materials but also have found many authors willing to allow them to put their works online. Taylor Fitchett, Director of the University of Cincinnati Law Library, indicated on the subject of copyright that:

I do not see it as an obstacle unless librarians use it as an excuse not to move forward. There is an opportunity for librarians to help create this revolution in scholarly communication that we all hear about. If the revolution is only the same old publishers putting e-journals online, what kind of revolution is that? We need to be dealing directly with authors, showing them how we can add value to their publications, whether by markup, adding bibliographic metadata, etc.(26)

Fair use is a critically important concern for the academic librarian. While the compensation of authorship ensures continued originality and invention, as well as more brilliant scholarship, and is therefore not to be given up lightly, a new but fair, logical, and technologically feasible approach to the protection of authors' rights must be developed in the emerging electronic environment. Although current law protection may not be fully adequate for authors, and some of the technological "fixes" that have heretofore been proposed exude an unpalatable air more associated with totalitarian regimes than with a democracy, librarians must continue to fight for the same rights of fair use for their users in an electronic information world as they have enjoyed with print-based collections.

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NOTES


10. Ibid., p. 134.
http://arl.cni.org/scomm/copyright/uses.html
13. For more information about fair use, consult the web site at: http://fairuse.stanford.edu
(http://fairuse.stanford.edu/).

