

Fair Use and Digital Publishing: An Academic Librarian's Perspective

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From the Editor: These provocative "companion pieces" provide history and perspective on fair use issues. Representing different points of view, they share similar concerns and offer complementary strategies. Both papers were originally presented at the symposium "Fair Use and the Internet: Current Status and Emerging Trends," which was held by the National Federation of Abstracting and Information Services, January 25, 2001, in Washington, D.C.

"The Congress shall have the 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." Under Article 1 Section 8 of the United States Constitution, the Congress has for more than two centuries established the rights to intellectual property and its uses. I will tell you where I stand on this matter, and it seems to me to be imbedded in the order of priority in the very words used by the founding fathers—the social good was defined as the purpose, not the individual right. However, in the history of our democratic republic the intellectual property regime has drifted inexorably toward the latter. Today, we are arguing desperately to preserve basic rights to use copyrighted works, against the very federal agency that has custody over them—the Copyright Office of the Library of Congress. In the interest of full disclosure, I will admit also that I have a point of view as a scholar, as a journal editor, as a professor in the university classroom, and as the dean of a large research university library system. My views are shaped by that perspective, but are defensible as legitimate and worthy of serious consideration in a society that benefits greatly from the contributions of the academy.

As is well known, the legal basis that emerged in U.S. common law for noninfringing use of copyrighted materials was the doctrine of "fair use." The legal principle of fair use appeared before the Civil War and became so thoroughly instantiated in our common law that it was codified in the copyright law revision of 1976. In so doing, the Congress exercised its constitutional power to establish a legal right that recognized the common good—or to use the simple elegant prose of the founders "to promote the progress of

science and useful arts.” In the case of libraries, there is a special variation or embellishment of this principle known as “first sale” which, among other things, allows a library to purchase a copyrighted work and then lend it to a patron without infringing. Section 107 of the 1976 statute lists factors of fair use that courts must consider, which are neither exhaustive nor in fact clear guideposts as to what is or is not a noninfringing use:

- Purpose and character of the use
- Nature of the copyrighted work
- Amount and substantiality used in comparison to the work as a whole
- Effect on the potential market for or value of the work

Libraries and publishers struck a bargain after the 1976 revision, embodied in the so-called CONTU Guidelines, which covered practice for activities such as interlibrary lending, library reserves, classroom use, and patron photocopying. The guidelines basically outlined practices that we mutually agreed were fair use by libraries and, by extension, scholars and students. Although they do not carry the force of law, they were the “safe ground” that both parties accepted. Or to put it another way, it was the best arrangement we could reach for not suing one another.

The world of modern research, academic library practice, and publishing that we know began to emerge in the last half of the nineteenth century. The touchstones of that process were, among other things, the emergence of modern scholarly monograph publication, the development of the modern journal, classification and subject heading schemes, periodical indexing and abstracting, replacement of book catalogs by card catalogs, and the application of the typewriter. Concomitant was the emergence of librarianship as a profession. It is no happenstance that the modern research university also emerged at this time. Johns Hopkins may have modeled itself on the German higher education, but it was not long before American practice distinguished itself in new ways. It is of particular importance that the impetus for research spread from such doctoral-granting institutions to pervade all of American higher education. This milieu has proved satisfactory for over a century. Publishers found that they could make a profit as markets expanded to a national, then international scope before World War II. Higher education became both the producer and consumer of this special kind of information we call scholarly. Libraries were then, are now, and will remain a major source of those profits. I submit that this is no accident, but the result of a symbiotic relationship that is endangered as we explore changing our intellectual property regime and particularly, technologies of control.

Just how large is the library market? As an illustration, let me focus on a narrow subset of academic libraries in North America—the members of the Association of Research Libraries. There are only one hundred and twenty-two ARL institutions, but they account for a large portion of academic library resources—as we can ascertain easily from the ARL annual statistical survey. In terms of assets, budgets, and the number of users they serve, ARL institutions are an extraordinarily important market. In fiscal year 1998-99, total ARL expenditure was more than \$2.7 billion. Of that amount, a bit more than \$2 billion was spent by the one hundred and eleven university library members, and \$633 million by the eleven nonuniversity library members. The median



average materials expenditure was over \$9 million. Materials expenditures were on average 34.4 percent of budgets, and totaled nearly \$1 billion. Remember, this represents only a small fraction of all academic libraries in the country—albeit those with the largest budgets. U.S. institutions represent, in turn, only a small percent of the worldwide market of higher education. What is the point of this recitation? It is to underscore the point that the academic library is the primary economic fact in the world of scholarly publishing. In the second half of the last century hugely profitable commercial publishing enterprises were built on this fact.

Why are colleges and universities willing to spend significant sums to purchase books, journals, electronic access to databases, machine readable data files, reference works, video and audio-media, and so much else? The answer is deceptively simple. Modern higher education is an information-driven enterprise—no longer dependent on an unchanging canon as it was in 1850, but rather a voracious consumer of information of all kinds. This enterprise consumes new information at a rapid rate, for specific and well-understood reasons that are tied to its historic purposes—teaching, research, and service. Moreover, it is an engine for innovation and the creation of new knowledge, invention, and creative scholarship—an engine that is perhaps the necessary condition for the modern “information economy.” At the beginning of the twentieth century it was usual for inventive genius to arise independently—Edison and Ford. It was as likely that pure scientific genius would be found outside universities as in them—Einstein. At the end

of the twentieth century it is hard to imagine either. Universities are the source for a large proportion of scientific breakthroughs—and, when they are not, it is scientists they have trained, working in the commercial sector, who are. In the U.S., government at all levels turns to higher education to help solve a myriad of social, economic, and technical problems. It is equally striking that what might be called the “research impulse” is no longer the sole province of faculty with a few graduate students. Today we find insistence that undergraduates, too, must have this experience—as early and frequently as possible, as part of the classroom learning experience—if they are to be prepared to meet the challenges they will face on graduation.

I will confess that this is all rather well understood in the academy. What I fear is not understood is that this system is truly imperiled, and the danger lies in the delicate chain of activities that support our research enterprise. In the world of print, we have established a balance that has “promote[d] 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.” More accurately, it has secured this exclusive right to copyright and patent holders, who are frequently not the authors or inventors at all, but rather commercial or scholarly publishing enterprises that have been assigned those rights by their creators, as part of the bargain for distributing them. I want to emphasize that

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these “secondary” owners of intellectual property create nothing. They serve a social good and add value to intellectual property, but they play no role in the creation of knowledge that cannot be replaced by another system of distribution. Thus their interests should never be paramount.

Libraries in higher education have developed the mechanisms through which access to this world of scholarly information is fairly seamless, so that faculty and students may pursue research without being encumbered. We purchase information for direct lending. We count the number of times that we copy articles from individual journal titles for interlibrary loan, and pay for excess access through organizations like the Copyright Clearance Center. If we borrow a book enough times, we buy it. We authenticate off-campus use of licensed databases. We fight hard for our materials budgets, and have usually sacrificed other parts of our budgets to them. Our college and university administrations support us fiscally, and they make a significant effort to regulate the classroom use of intellectual property to assure that it is fair use. Research and teaching proceed regularly in this environment, with past knowledge serving as the foundation for current learning, innovation, and the creation of new knowledge. The world of scholarly publishing is intimately bound to this research process. The vetting, the citation, the debate that underpins it—all are founded on the right of fair use.

The legislature and the courts historically have interpreted fair use. Thus far, this has served our nation fairly well. It most definitely has not harmed the progress of knowledge, or the securing of profits to support publication. A proof of this is in the expanding market for information products of all kinds—not just print. Although some publishers have made large arguments about their peril in the digital marketplace, I await the news that one has gone out of business because of educational fair use. Yet today we face an onslaught of efforts to move the control of intellectual property out of the courts and legislatures, and to manage it with technology. This is reflected internationally at the negotiations of the World Intellectual Property Organization. Domestically we find the same impulse in the Digital Millennium Copyright Act and Uniform Computer Information Transactions Act.

Why should this concern us? Is it not just a way to insure appropriate use automatically? No, it is much more than that. Above all, it turns the enforcement of a legal right over to one of the interested parties—as I have argued, the party least involved in either the creation or use of the knowledge. This is a drastic departure from our historic practice of managing such disputes, a right enshrined in the U.S. Constitution with the simple phrase “the Congress shall have the power to.” In this historic regime, the interpretation of misuse proceeded in the courts where balance between the interests could be achieved. In the new regime, technical measures will be used to protect access and to control what is considered to be fair use. All this will be decided by the “middle man.”

Equally chilling is the reliance on emerging technology to manage intellectual property. It will not matter a bit that there is a right of fair use and educational use if technology can be used to block the exercise of the right before the fact. We have plenty of evidence to support the belief that this will be a problem. In my thirty years’ experience, it has not been at all unusual for libraries to be asked by vendors to sign licensing



agreement terms that surrender educational fair use rights. If we are judicious, we strike the offending clauses. Protection technologies will render this meaningless. More worrisome, in my view, is the principle of unintended consequences. If we have learned anything about technology, it is that we can foresee some, but not all, of its effects. Moreover, libraries will be unable to exercise their central role in the academic enterprise—organizing knowledge and access, and archiving knowledge. Why? We are prevented from copying, reformatting, and transmitting information. Moreover, today these activities are conducted increasingly through cooperative arrangements—library consortia—because the “paradigm shift” to electronic representation of scholarly knowledge creates economies of scale *only* through shared effort. One example: it makes no sense for every research library to individually manage a database of electronic journals. To do so would be more expensive than to continue building library facilities to house them in print. However, the “one off” view of licensing electronic information, held by many vendors, makes it exceedingly difficult to share this important work within consortia.

I believe the danger is that the “delicate chain of activities” (as I have called research) will be broken as scholarly publishing moves to a predominantly digital and networked environment. Why should we expect an effective system to continue to function with so fundamental a change? We emphatically should not—nor should any parties to this bargain. If the commercial concerns get their way and technology replaces the “rule of law,” then they, too, should expect change. I would offer two possibilities. One would be the general degradation in the quality and quantity of research productivity for higher education. Another would be the rapid emergence of alternative means of distributing the intellectual property that we create. I hope that the latter is a more likely outcome, because the lifeblood of the academy today is the constant growth of knowledge and creativity. We should not be expected to sit by and watch this worthy enterprise become crippled. It will come as no surprise that I believe the recent ruling of the Copyright Office (that there is no need for change in the DMCA to include a strong protection of “fair use”) is at best misguided and one-sided. It is a bitter irony that the Librarian of Congress, even in supporting this point of view, has noted that “potential damage to scholarship may well ensue in the course of a three-year period” and has asked that the time frame be shortened. Such a ruling combined with such a warning is implicitly self-contradictory.

In February 2001, a two-day conference entitled “Digital Rights Management and Digital Distribution for STM Publishing” was held in New York. Whatever the good intentions for holding this event, I am troubled by what were described in the program announcement as “key benefits of attending this conference.” These included tracking the use of copyrighted materials; controlling the distribution of content and maintaining content accountability; managing digital rights with many authors; and managing costs, rights, and marketing of digital works. I looked in vain for some sign that the organizers recognized the legitimate and primary goals stated in our Constitution of advancing “science and the useful arts” and found none. In my life as a librarian, I have often

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thought of one particular Aesop fable that I read as a child. I was again reminded of it by this conference agenda—and I offer the story, in conclusion, as an admonishment to the adversaries of fair use:

One day a countryman going to the nest of his Goose found there an egg all yellow and glittering. When he took it up it was as heavy as lead, and he was going to throw it away because he thought a trick had been played upon him. But he took it home on second thought, and soon found to his delight that it was an egg of pure gold. Every morning the same thing occurred, and he soon became rich by selling his eggs. As he grew rich he grew greedy and, thinking to get at once all the gold the Goose could give, he killed it and opened it—only to find nothing.¹

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Notes

1. "The Goose with the Golden Eggs" in Aesop's Fables, Traditional and Modern Versions of Aesop's Fables, Illustrated and Retold by Art Students at the University of Massachusetts, Professor Copper Gilroth, Art 271 at <<http://www.umass.edu/aesop/goose/index.html>> [Jan. 15, 2001].