COPYRIGHT ISSUES IN FOR-PROFIT SPECIAL LIBRARIES:

A HANDBOOK FOR NON-LAWYERS

By Carol Helgerson
Justice O’Connor said:

“The primary objective of copyright is not to reward the labor of authors, but to promote the Progress of Science and useful Arts. To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”

- Feist v. Rural Telephone (1994)
Introduction

- For-profit Libraries and non-profit libraries share copyright concerns. They need to respond to requests for information which often involves photocopying articles and/or printing copies from a database.
- What are some differences in for-profit libraries?
- Does “fair use” ever apply in a for-profit library?
- Does a special library have to be open to the public to qualify for the “library exemption?”
- How do DMCA, and CONTU apply?
- What are good guidelines to follow?
Can you answer these questions?

- What is Copyright?
- Who can claim Copyright?
- What works are protected?
- What cannot be copyrighted?
- Where/what is the public domain?
- What is “fair use.”
- What is the library exemption?
- What is copyright infringement?
Terminology

- United States Copyright Office
- Website [http://www.copyright.gov/](http://www.copyright.gov/)
- About Copyright
  - Copyright basics: Definitions, etc.
  - FAQ
  - Current fees
U.S. Copyright Office Webpage

- Search copyright Records
- Publications (Circulars, forms, fact sheets)
- Licensing
- How to register a work – by type
- How to record a document

- Law and policy –
  - Fed. Law
  - Current legislation
  - Fed. Register
  - Regulations
  - Info in Spanish

- Related links – patents, trademarks, other IP protection
What is Copyright?
Gives © owner “exclusive rights to:

- **reproduce** the copyrighted work in copies or phonorecords;
- **prepare** derivative works based upon the copyrighted work;
- **distribute** copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- **perform** the work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;
- **display the work publicly**, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work; and
- in the case of **sound recordings**, **to perform the work publicly** by means of a **digital audio transmission**.
What works can be copyrighted?

- Literary works (prose, poetry, drama)
- Computer programming
- Musical works, including any accompanying words
- Dramatic works, including any accompanying music
- Pantomimes and choreographic works
- Pictorial, graphic, sculptural (includes maps and architectural plans)
- Recorded music and/or song (CDs, audiotapes, 33’s, & other)
- Video footage, motion pictures, other Audio Visual work including animations
- Java applets
- A Web page Musical notation
- Photographs
What works cannot be copyrighted?

- Mere facts
- Public domain works when duplicated exactly
- Forms that collect but do not provide information
- Logos and slogans (may have other IP protection)
- Ideas
- Systems
- Titles and short phrases
- Works by Federal government employees
Copyright Act of 1976

- Basic law on copyright
- [http://www.copyright.gov/title17](http://www.copyright.gov/title17)
- Title 17 U.S. Code
  - Preface – Amendments since 1976
  - Chapters 1-8, 10-12 are Copyright Law
  - Chapters 9,13 statutory design protectors
  - Appendices I - X
Section 107: Fair Use

- Copyright protection is not limited in the following use of materials:
- “Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright.”
- 17 U.S. Code [section] 107
Librarian skills

- Recognize if item is or is not a copyrightable item
- Is item in public domain, has copyright expired, does this person have © permission from holder?
- Ask “is this ‘fair use’”?  
- Librarians must apply 4 “fair use” factors
Four “fair use” factors

1. **Purpose** and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

2. **Nature** of the copyrighted work;

3. **Amount** and substantiality of the portion used in relation to the copyrighted work as a whole;

4. **Effect** of the use upon the potential market for or value of the copyrighted work.
Georgia Harper at University of Texas Office, of General Counsel

Document: “Fair use of Copyrighted Materials”

Creates a way to balance each “fair use” factor on a continuum from “probably fair use” to “probably not fair use.”

She warns that at the end, courts seem inclined to favor the fourth Fair Use factor, when the other 3 factors lean toward a for-profit use. 

## FACTOR 1: What is the character of the use?

<table>
<thead>
<tr>
<th>Non-profit Use</th>
<th>Core uses</th>
<th>For-profit Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nonprofit</td>
<td>Criticism</td>
<td>Commercial</td>
</tr>
<tr>
<td>Educational</td>
<td>Commentary</td>
<td></td>
</tr>
<tr>
<td>Personal</td>
<td>News reporting</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Parody</td>
<td></td>
</tr>
<tr>
<td></td>
<td>“Transformative” use (other)</td>
<td></td>
</tr>
</tbody>
</table>
## Factor 2: Nature of the work to be used?

<table>
<thead>
<tr>
<th>Towards “fair use”</th>
<th>Probably “fair use”</th>
<th>Less likely “fair use”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facts</td>
<td>A mixture of fact and imagination</td>
<td>Imaginative</td>
</tr>
<tr>
<td>Published</td>
<td></td>
<td>Unpublished</td>
</tr>
</tbody>
</table>
How much of the work will you use?

<table>
<thead>
<tr>
<th>Towards “fair use”</th>
<th>Away from “fair use”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Small amount</td>
<td>More than a small amount</td>
</tr>
</tbody>
</table>
If this kind of use were widespread, how would it effect the market for the original or for permissions?

<table>
<thead>
<tr>
<th>Towards “fair use”</th>
<th>Most likely “fair use”</th>
<th>Less likely “fair use”</th>
</tr>
</thead>
<tbody>
<tr>
<td>• After evaluation of factors 1-3</td>
<td>• Original is out-of-print or unavailable</td>
<td>• Competes w/or takes away sales from orig.</td>
</tr>
<tr>
<td></td>
<td>• No ready market for permissions</td>
<td>• Avoids payment for permission in an established permissions market</td>
</tr>
<tr>
<td></td>
<td>• © owner is unidentifiable</td>
<td></td>
</tr>
</tbody>
</table>
Checklist for “fair use”

- Purdue University Copyright Management Center
- [http://www.copyright.iupui.edu/](http://www.copyright.iupui.edu/)
- Help finding permissions
- (TEACH Act explained: not applicable to for-profit subsidiaries of non-profit institutions.) Drews, Kenneth D., Prof. of Law, Indiana U. School of Law [http://www.copyright.iupui.edu](http://www.copyright.iupui.edu)
17 U.S. Code Section 108: The Library Exemption (post DMCA)

A qualified library may make a single copy if:

1. The copy is made or distributed w/out purpose of direct or indirect commercial gain.
2. The collections of library or archive are:
   a. open to the public. (includes ILL by phone, fax, email, mail) or
   b. available to researchers (from inside and outside the library or archives institution)
3. The copy includes © notice on the copy or a legend stating © protection covers the work
4. The library makes only single copies on “isolated and unrelated” occasions and may not engage in “systematic reproduction or distribution of single or multiple copies.”
For-profit Library

- Can still qualify if performs document finding services and ILL
- With remote user, copies **must be © labeled**
- Is allowed to recover copying costs, if a fair charge is assessed
- No “purpose of direct or indirect commercial advantage.”
- 5 Other limitations besides these
5 Library Limitations of Section 108

1. May only be copied or reproduced at the request of a user
2. Only one copy of an article from a periodical or part of a collected work per person
3. The copy becomes the property of the user, not part of the library’s collection
4. The library should not know of any use of the copy by the patron other than “fair use.”
5. The copy should have a notice of copyright if it is a visible work.(© or word copyright + author + yr. of publication)
Guidelines for For-profit Libraries

- Robert Goddard’s Guidelines*
- CONTU Guidelines
- Digital Millenium Copyright Act Guidelines (and non-profit libraries)
AALL Guidelines


- to satisfy a user’s request, a library may make a photocopy or other *printed copy* of a printed work such as an article, a chapter or portions of other copyrighted works. 2.1.1 AALL Guidelines

- to satisfy a user’s request a library may scan an article from a periodical issue, a chapter, or portions of other copyrighted works and provide an *electronic copy* to the user in lieu of a photocopy. The library may not retain the scanned image. A copy may be faxed or otherwise transmitted electronically to the user, but the library should destroy any temporary copy made incidental to the transmission. In other words, an incidental copy made to facilitate transmission is a fair use, as long as that copy is not retained. 2.1.2 AALL Guidelines

- unless prohibited or otherwise restricted by the terms of a valid license agreement, a library may print a copy of an article, a chapter, or portions of other copyrighted *digital works* at the request of a user. 2.1.3 AALL Guidelines

- unless prohibited or otherwise restricted by the terms of a valid license agreement, a library may download a copy of an article or portions of other copyrighted *digital works* at the request of a user and forward it electronically to the user.
The “suggestion of five” allows libraries to copy five articles from the most recent five years of a single title of a periodical or other collected work without paying a royalty.

Articles beyond five years old may be copied without paying royalty fees.

The requesting library maintains the record to keep track of how many requests are made for copies or phonorecords.

The length of time recommended shall be the end of the calendar year in which the request was made. [1]

Library situations where reproducing is allowed

The Library’s Legal Answer Book by Minow & Lipinski

- For reproduction of unpublished works for “preservation and security” for the library
- For replacement of published works (that are damaged, deteriorating, lost, stolen, or in an obsolete format) for the library
- For reproduction for a patron of a serial or less than whole part of a work
- For reproduction for a patron of an entire or substantial portion of a work
Digital Millenium Copyright Act

- October 28, 1998, parts revised 10/28/03
- Implements 2 WIPO treaties
- WIPO = World Intellectual Property Organization
- Protects online copyrighted material from international piracy
- Introduces criminal penalties for intentional copyright infringement
DMCA – Concerns in the For-profit Library

- Limits copyright infringement liability for ISPs which transmit information, when no knowledge of financial gain present –
- DMCA Revisions dealt with what class of works are exempt for Anti-circumvention Provision
- Librarian of Congress recommends further review of “fair use” of protected materials by library users in October, 2006.
  http://www.arl.cni.org.info/frn/copy/timeline.html
How do for-profit libraries get access to materials they do not own? When

- the material is commercially valuable
- the material is difficult to find
- the materials are protected by copyright laws

AND

- when the use is not “fair use”

Answer: They **purchase** permission through a copyright clearinghouse.
Copyright Clearance Center (CCC)

- CCC was founded in 1978 at the suggestions of the U.S. Congress.
- CCC is a member of the International Federation of Reproduction Rights Organizations (IFRRO).
- CCC charges a flat processing fee of $3.00 for each successful transaction + royalty fees set by © holder.
Document Delivery Service (DDS)

- Another way to access copyrighted information
- See tips on using DDS
  http://www.docdel.net/Copyright_Sites.html
- Association of American Publishers copyright site at
  http://www.publishers.org/home/abouta/copy

- Includes company name, address, phone and Fax, fees, deposit account availability and minimum, discount, subscription fees, rush service, turnaround time, payment and delivery options, material, content, and subject coverage, types of documents, currency accepted, whether they report and pay royalties to CCC, searching capabilities, etc.
Collective Rights Organizations

- Special for-profit libraries should seek copyright permission by type of material.
- Examples: Copyright Office - searches anything for a fee.
- Music Performance - ask ASCAP, BMI, SESAC.
- Play rights - ask Samuel French, Inc.
- Liability – free movies – Movie Licensing USA.
## Other collective rights entities

<table>
<thead>
<tr>
<th>Part of book or journal article</th>
<th>CCC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Images</td>
<td>Artists Rights Foundation</td>
</tr>
<tr>
<td>Movie rights (2)</td>
<td>Swank Motion Pictures, or Motion Picture Licensing Corp.</td>
</tr>
<tr>
<td>To record/distribute music already performed</td>
<td>Harry Fox Agency, Inc.</td>
</tr>
</tbody>
</table>
WATCH

- WATCH = Writers, Artists, and their Copyright Holders
- Owner, author, publisher and © Copyright owner information on literary authors, authors in and outside the Humanities, Politicians and public figures in English - US and UK
- At Univ. of Texas, Austin, Harry Ransom Humanities Center [http://tyler.hrc.utexas.edu](http://tyler.hrc.utexas.edu)
- In conjunction with Univ. of Reading (UK)
Georgia Harper,

- attorney for U. of Texas, IP Office
- Wrote article “Getting Permission.”
- Collected excellent sources on where to seek (and pay for) copyright permission
- [http://www.utsystem.edu/ogc/intellectualproperty/permission.htm](http://www.utsystem.edu/ogc/intellectualproperty/permission.htm)
- Maintains that a thoroughly documented search for an owner would positively affect the balance of the fair use test under the fourth factor or lessen a damage award...”
Georgia Harper

- Said “courts seem increasingly willing to let the fourth factor of the fair use analysis trump all the other factors so that where there is a market for permissions, ‘fair use is negated.’”

- University of Texas, Office of General Counsel (2004)
  [http://www.utsystem.edu/ogc/intellectual property/copypol2.htm](http://www.utsystem.edu/ogc/intellectual property/copypol2.htm)
Bottom line for for-profit libraries

- For-profit libraries have fewer exemptions than school, public, and academic libraries.
- Infringement of copyright is ruled more often with deep-pocketed corporations, who could afford to buy their own subscriptions or pay copyright royalties, when profit is involved.
- Seek your institutional lawyer’s opinion, if unsure whether “fair use” applies.
- Read all database licenses to determine limitations on copyright.
- Decide when profit motive is involved, and when it is not. Be honest. Be ethical.
Ethical decisions

- More important than profit, in long run.
- Fourth factor of “fair use” is often the trump card
- Know the copyright law
- Know the case law
- Protect your company from suits
- If in doubt, “Don’t copy that floppy!”
THE END

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Bibliography

Bibliography (continued)


Backup slides for additional information

- These slides are available to jump to in response to audience questions or need for more emphasis or detail, but would not be shown in the basic presentation unless called for.
Robert Goddard’s Guidelines –
Written before DMCA

1. Don’t reproduce systematically any copyrighted item or make multiple copies for wide distribution.
2. Don’t copy commercially produced performance materials of any kind without permission.
3. Try to locate the author or distributor of a copyrighted item prior to copying it.
4. Don't copy works and publications that are intended to be consumable (workbooks, tests, etc.)
5. Don’t copy anything if it appears that this copying will reduce the market value to the author or copyright owner.
6. Don’t copy an item to avoid its purchase.
7. Make sure that all copies of a copyrighted item include notice of copyright.
8. Don’t reproduce any copyrighted item if there is a direct or indirect commercial advantage to be gained from the copies.
9. Don’t request multiple copies of published articles from your corporate library or reproduction center.
OUTLINE

- Copyright terminology
- Copyright Act of 1976
- Section 106: What is Copyright?
- Section 107: Fair Use
- Section 108: The Library Exemption
- Guidelines
Outline (cont.)

- Digital Millenium Copyright Act (DMCA)
- Copyright Clearance Center (CCC)
- Document Delivery Services (DDS)
- Getting Permission
- Collective Rights Organizations
- Conclusion
Why is “fair use” important?

- Anytime the library provides a copy of something at the request of a user, the librarian must decide if the use is “fair use.”
- This is more difficult for a for-profit or commercial library because it already has one strike against it.