

The Practical Realities of the New Copyright Laws: A Librarian's Perspective



Presented at the Modern Language Association Conference
in New York City on December 28, 2002

by Duane Webster
ARL Executive Director

The problems inherent in current copyright laws are well summarized in a piece written by Duane Webster, Executive Director of the Association of Research Libraries, and delivered at the annual meeting of the Modern Language Association. As Duane notes, recent changes in copyright law have been insufficiently careful to protect the "fair use" of copyrighted materials. The newest laws pose significant threats to the basic functions of teaching and learning on campus. Duane's piece is written for an audience that is not familiar with the intricacies of the law.

Richard Ekman, President, Council of Independent Colleges

Introduction

I am pleased to have this opportunity to engage in this dialogue concerning the changes taking place in the system of scholarly communication.

Librarians are often in the crossfire between publishers seeking more control over their digital information resources and users seeking easy, convenient, transparent access to needed information resources.

Frankly, academic research libraries are laboring to meet the challenge of moving to the new publishing models and providing robust, affordable electronic information services.

We face a bewildering array of legal changes and technological innovations. In effect, both the recipe and the ingredients in the new smorgasbord of electronic information access are changing.

This combination of changing ingredients and recipe include: extensive new copyright laws; new business models based on licenses and leasing of information rather than owning of information; and the introduction of technological controls over the use of these electronic information resources.

This combination of factors has radically changed the traditional landscape of scholarly publishing that has worked relatively well since the passage of the Copyright Act of 1976.

Let me review the legislation.

In October 1998, Congress passed the Sonny Bono Copyright Term Extension Act which extended the copyright period of protection by an additional 20 years, resulting in a significant decline in works entering the public domain and protecting the narrow financial interests of the entertainment industry.

That same month, Congress passed the Digital Millennium Copyright Act which creates rigorous compliance measures, introduces the domination of technological controls of information over the exercise of fair use, and through anti-circumvention measures generally threatens basic copyright exceptions such as first sale, fair use, and preservation.

And this year, Congress passed the Technology, Education, and Copyright Harmonization Act (TEACH) which extends important fair-use provisions into the distance learning arena but at a cost of additional complexity and compliance requirements.

These laws take copyright principles into the digital information age and establish complicated rules that most users do not yet fully appreciate and libraries are scrambling to implement.

To reflect on the practical implications of these developments, I will draw upon recent testimony provided to the Copyright Office by an alliance of the five major library associations in the U.S.¹ The full testimony is available from the ARL web-site at <<http://www.arl.org/info/frn/copy/1201comments02.pdf>>.

I want to start, however, by noting that research libraries have long been among the nation's largest volume-purchasers of copyrighted works. This last year, for example, ARL members in the aggregate spent almost one billion dollars on information resources. 16% of those expenditures went for electronic resources up from 5% just five years ago.

Libraries and their staffs are also diligent law abiders. Most of us come from the generation that tries to understand and adhere to the balance that the Constitution and copyright law have struck between the rights of copyright owners and users.

I am not so sure that the younger generation is as willing to work through this increasingly complex legal environment. We may well be heading toward a period when copyright laws are so complex that they will be overlooked or simplified by these confused users.

I also want to note for you that libraries have invested considerable time and effort in working on these legal issues with the scholarly community, including the Modern Language Association. One example of

these joint efforts is our work with the National Humanities Alliance.

The NHA Principles on Use of Electronic Information

Five years ago, the National Humanities Alliance (NHA) adopted a statement of "Basic Principles for Managing Intellectual Property in the Digital Environment."² The statement was updated and simplified this last year and is available as a handout today and on the NHA web-site: <http://www.nhalliance.org/ip/ip_principles.html>.

This statement frames many of the issues I am addressing today: assuring a balance of competing interests, ease of compliance, robust public domain, and ready access to needed information resources.

Since the educational community encompasses such a wide range of institutions and individuals who are creators, owners, and users of intellectual property, there is a need for the educational community to come to understand and advocate on these issues. A recent article in the *Chronicle of Higher Education* entitled: "Copyright as Cudgel" underscores the importance of faculty understanding what is at stake in the move to the electronic environment.³

Today, I will briefly examine five concerns librarians are struggling with as we move into the digital environment: 1) availability of digital works, 2) electronic interlibrary borrowing and lending, 3) meeting our preservation responsibilities, 4) assuring the privacy of our users, and 5) availability of a robust public domain.

Availability of Digital Works

At the center of our concern with the new copyright laws and business models that emphasize licenses is the impact these developments have on the ready availability of digital works.

In the past decade, electronic distribution has grown into a dominant method for publishing many kinds of copyrighted works.

The DMCA anti-circumvention and access rules encourage publishers to distribute digital works by providing greater assurance to copyright owners that those who abuse access barriers will be subject to severe penalties. This assurance comes in the form of technological measures that control access to the information.

But, these technological measures, augmented by the threat of criminal sanctions for circumventing those measures, permit publishers to control uses in new and unprecedented ways.

Routine library practices permitted under copyright law, such as interlibrary borrowing, lending for classroom or at-home use by patrons, archiving, preservation, and duplication for fair use purposes, have

all been restricted, in some cases severely restricted and in other instances barred by licensing agreements.

Digital publishers now have the ability to manage the kind of day-to-day operational decisions that were previously within the discretion of libraries.

Previously, as owner of a particular copy of a book, a library was entitled to set the terms of patron access to that copy. In the new world of libraries as licensee of a digital work subject to technological measures, the library may be denied such right.

Publishers can now block a lawful licensee's access to digital content by activating a control device embedded into the code.

These access controls combined with anti-circumvention technologies impose unprecedented limits on a library's ability to lend and make fair use of lawfully acquired digital works.

The law also established unprecedented accountability for a library or a university providing the network from which a user gains access to digital works.

Mindful of the accountability imposed by these technologies, libraries are asked to comply with licensing terms that effectively restrict the time, place, and duration of private intellectual engagement.

Moreover, one patron's misuse may be used as the pretense for foreclosing access not just to the offending individual but to all authorized users. For example, one university recently had several services turned off by the vendor because of "unusual patterns of use" such as excessive searches and downloads by one individual.

The DMCA and its legislative history indicate that the prohibitions on unauthorized access in the law were not to affect other rights, remedies, and limitations in the 1976 Copyright Act. Presumably, fair use, first sale, and library exceptions are protected.

However, any exercise of these rights is uncertain if the technological measures used to control access also prevent use of the underlying works in ways that have traditionally been permitted under the first sale, fair use and library exceptions.

In light of the accountability and criminal penalties imposed by the new laws, many individual librarians are understandably reluctant to make the fair use judgment calls that previously were standard management decisions or to expose patrons to the new sanctions.

Where uncertainty about permissible use exists, liability concerns may lead librarians to forego uses that are actually permitted under the copyright law.

Interlibrary Lending Concerns

A specific aspect of our concern with the availability of digital works is related to interlibrary borrowing and loan practices of libraries.

Because information resources are costly and library budgets are limited, few libraries can afford to acquire access to all the works that are likely to be sought by patrons. Interlibrary borrowing has traditionally enabled libraries to supplement from each other's collections on behalf of patrons seeking access to material that is unavailable in the patron's local library.

Let me emphasize, interlibrary borrowing is not a substitute for purchasing frequently needed material. It is used to obtain material infrequently requested by users.

Unlike printed books or journals, however, digital products are generally made available via license agreements and these licenses often prohibit making the information available through interlibrary loan. On many occasions print copies may substitute but often there is no print equivalent.

Librarians around the country have provided detailed commentary on the loss of this lending right:

- "Most licenses do not cover inter-library loan privileges, and must be negotiated. While we are able to ILL anything from our print collection, publishers are reluctant to extend that provision to electronic material."
- "The mish-mash of licensing terms has simply made inter-library loan of digital materials impractical for us to provide to the detriment of users around the globe with whom we otherwise share scholarly material."⁴

Interlibrary lending is a vital aspect of our educational system. Acquired digital works should have the same status as their print and analog companions when it comes to interlibrary loans.

Preservation Concerns

I will now turn to our concerns with preservation of digital works. The DMCA provides the most significant updating of library and archival preservation rules since procedures to cope with photocopy machines were established in 1976. The changes permit preservation and storage of a copyrighted work in a digitized format.

There are important questions over whether the anti-circumvention provisions of the DMCA may prevent libraries from working with specific resources such as early PC software.

Much of this software is about to decay and it is not clear we are allowed to circumvent technical protection measures to save it. The DMCA may prevent libraries from saving some of the most creative

works of the 20th century from being lost.

In addition, as libraries obtain more electronic products under license rather than purchase, they are losing control over archiving and preservation. This is because many licenses prohibit copying digital works for archival or any other purpose, and because the prohibitions on copying are enforced by technological measures.

From the Libraries' perspective, works that exist only on content providers' servers may be subject to corruption, sabotage, subsequent alteration and selective preservation. There are no firm statistics on losses because the transition to digital publishing is still in the relatively early stages. Furthermore, it is entirely likely that publishers will be reluctant to invest in archiving older works that are no longer marketable on a large commercial scale.

Libraries have also expressed concern that they will lose access to digital works in the event that publishers merge, cease operations, or decide not to convert existing works into new formats as technology evolves.

Libraries have been the persistent guardians of America's and much of the world's literary heritage, but in the electronic environment they are finding themselves increasingly at the mercy of publishers' willingness to allow archiving and preservation.

Privacy Concerns

Librarians also have significant concerns about the potential loss of privacy that often accompanies use of digital resources. This is a critical issue since digital resources are often delivered over the net from the publisher's server.

Despite Congressional efforts to protect privacy in the DMCA, Digital Rights Management Systems ("DRM") technologies such as "digital watermarks," "digital signatures," and "digital object identifiers" give content owners an unprecedented ability to track ongoing use of digital works.

These technologies allow publishers to monitor who is looking at a work and exactly what the users are doing with it.

While the exact nature and extent of the detrimental effects remain unclear at this time, there is a need for a full understanding of the interaction between DRM and patron privacy.

The way these technologies are implemented may discourage use of a library's digital resources for research in areas where anonymous inquiry and the absence of a digital trail are critical. Of course, this chill can affect not only scholarly researchers, but more broadly faculty, students and the general public.

I should also mention another related piece of legislation, the USA Patriot Act. Like the copyright laws it is an extensive and complex piece of legislation. Three specific areas that librarians are concerned about are: 1) the expanded circumstances under which surveillance and physical searches can be conducted, 2) the more liberal definition of which records can be obtained from libraries, and 3) the use of roving wiretaps and e-mail tracing.

America's libraries have always protected the right of patrons to enter the library's facilities, access works lawfully owned by the library, and use those works, often anonymously, as allowed by copyright laws. Any potential threat to this right will be vigorously resisted.

The Threat to the Public Domain

Let me now turn to another concern - the threat of new laws to limiting the growth and utility of the public domain.

Moving in tandem to the DMCA legislation was another copyright reform bill-term extension. The nation's first copyright law, passed in 1790, gave creators copyright protection for a term of 14 years with the possibility of a 14-year renewal. Congress has extended the term of copyright protection 11 times over the last 40 years. These repeated extensions create, in practice, an unlimited term of copyright protection.

The most recent copyright term law passed in October 1998, retrospectively extends copyright protection of existing works by 20 years. The copyright term is now the author's life plus 70 years.

The library community argues that the overwhelming majority of copyrighted works are neither commercially exploited nor readily accessible in the marketplace after several decades, much less 70 years after an author's death.

Yet, for researchers and scholars, access to such works from the library's collection are important and no limitation should be made on such noncommercial uses.

The new term extension law delays by decades the entry of substantial numbers of works into the public domain.

This diminishment of the public domain has a profound and negative effect on librarians and other scholars by prohibiting the republication and dissemination of older works that have no commercial value, yet are of strong interest to the scholarly community.

On October 9th, four years after Congress passed the Term Extension Act, the U.S. Supreme Court agreed to hear arguments in a challenge to the Act's constitutionality. The U.S. Supreme Court is expected to issue its decision some time during the spring of 2003.

While the debate accompanying the Supreme Court's consideration of this Act is encouraging, the library community is not optimistic about the outcome of this process. Ultimately, we believe, scholars will need to find ways to build a "creative commons" that assures the ready availability of their work to the educational and research community.

Closure

We are in the midst of a time where there is an accelerating availability of digital formats. Public policy has focused on encouraging commercial interests to move to this electronic environment.

The practical realities of the new copyright laws and their impact on the traditional practices of fair use, first sale, personal use of one's own materials, and preservation/access of electronic resources is of great concern.

Librarians, faculty, and students are finding it difficult to understand and implement the recent array of copyright laws with the potential of widespread confusion and inconsistent application. Under these new laws, usage for instructional resources that have traditionally been readily available to teachers and students is more restricted. Furthermore, the systems for compliance with these laws are cumbersome, expensive, and slow.

The public domain, a rich resource for digital material in course delivery, is severely reduced and is threatened with further restrictions. Contractual licenses are supplanting copyright laws with content owners mandating more restrictions on who uses resources and how these resources may be used.

The end result of all of these changes is a more complicated and restricted environment for the teacher, the student, and the librarian.

There is, however, opportunity for change and improvement. The Copyright Office must by law review every three years the impact of 1201 (the anti circumvention provision) is having and the ability of the public to make fair use of works protected by technological measures.

The recently enacted TEACH act holds promise for addressing some of the difficulties caused by the DMCA in the distance education arena.

Congressman Rick Boucher, a Virginia Democrat, has introduced legislation that would temper the more draconian aspects of the DMCA. The Digital Media Consumers' Rights Act (H.R. 5544) would amend Section 1201 of the DMCA to prohibit the circumvention of a technological protection measure only when the purpose is to infringe on the copyright of the work. An act of circumvention for fair use purposes would be lawful.

Most importantly, many in the faculty are becoming aware of the increased restrictions and complexity these new copyright laws and publisher's business models mandate.

Faculty advocacy on these issues could lead to improvements in legislation, pressure publishers to modify their business practices, and encourage authors to negotiate with publishers to retain some control of their intellectual resources.

We hope the scholarly community finds ways to positively influence the movement to digital publishing so that educational uses are recognized as legitimate and beneficial for society.

Notes:

¹ Comments of the Library Associations to the U.S. Copyright Office in the Matter of Rulemaking: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Washington, D.C.: AALL, ALA, ARL, MLA, SLA, December 18, 2002).

² National Humanities Alliance, *Basic Principles for Managing Intellectual Property in the Digital Environment* (Washington, D.C.: NHA, 2002).

³ Siva Vaidhyathan, "Copyright as Cudgel," *Chronicle of Higher Education* (Aug. 2, 2002): B2.

⁴ Comments of the Library Associations to the U.S. Copyright Office Regarding Sections 109 and 117 of the Digital Millennium Copyright Act (Washington, D.C.: AALL, ALA, ARL, MLA,SLA, August 4, 2000).

12/27/02

dew

[Federal Relations & Information Policy Home](#) | [Federal Relations E-News](#) | [Copyright & Intellectual Property](#) | [Government Information](#) | [Telecommunications](#) | [Appropriations and Reauthorizations](#) | [ARL GIS Literacy Project](#) | [Letters, Testimony & Statements](#)



© Association of Research Libraries, Washington, DC

Maintained by [ARL Web Administrator](#)

Last modified: January 21, 2003