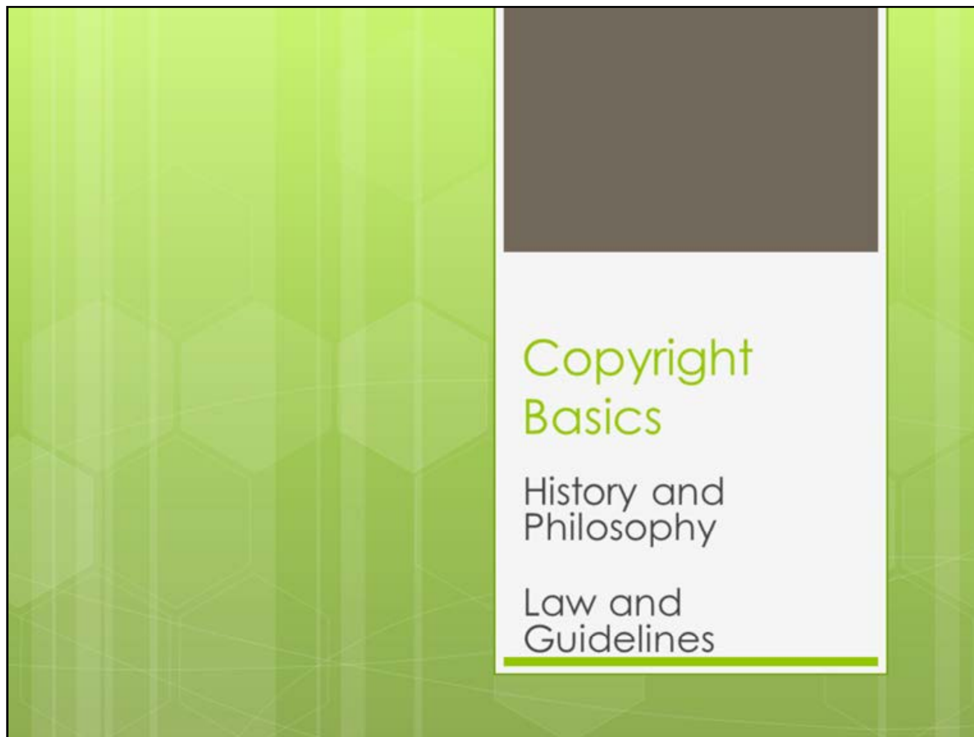
Welcome – My name is Janet Brennan Croft, and I'm the Head of Access and Delivery Services at the Rutgers University Libraries. I've been here a bit over a year, and previously held the same position at the University of Oklahoma Libraries.

- *I am not a lawyer. The information in this presentation is not intended to replace the advice of legal counsel. I strongly recommend that you consult your institution's legal office with any questions or doubts about your specific situation.*
- *What I am is a librarian, an author, a teacher, and an editor. This presentation is based on my experience in these fields.*

First, a disclaimer that I am not a lawyer. As a librarian, I've worked with ILL and reserves, two fields where we have to be very careful about fair use of materials. Because I work in these areas, I'm also familiar with issues concerning database licensing and the contract vs law debate. As an author and editor, I want to make sure I am using the works of other authors in an equitable manner and that I understand my own rights as a creator. In this area, I have experience seeking out permission to use certain kinds of materials and properly crediting these permissions.



The first part of today's presentation is going to be a review of current copyright law in general, and then we'll take a look at exemptions and exclusions for libraries and educators. We'll discuss some philosophical and ethical considerations around intellectual property and the encouragement of creativity. In the next section we'll look at interlibrary loan specifically. After that we'll talk about classrooms and media, then if there's time, close with a grab bag of current issues and some useful resources.

What is copyright?

- "Copyright" secures certain rights to someone who creates a work that is "fixed in a tangible form of expression," as described in the Copyright Act of 1976.
- Copyright exists automatically from the moment the item is created; it is not necessary to formally publish or register a work for it to be copyrighted (though in some cases it is advisable to register it).

A lot of this will be very familiar to many of you, but I think it never hurts to review and to look at the philosophy behind the rules.

These two statements are the basis of current US copyright law.

1. Basically, the government gives you a limited monopoly over your work. We'll talk more about this concept in a minute.
2. This was not the case before 1976 – you had to register before then. You CAN still register through their website. Advantage: Dates your copyright officially and protects you in case of a lawsuit where date of creation is important.

Libraries, the Public Domain, and the Philosophy of Copyright

- Creative work as "property" is a recent concept
- The original concept in the Constitution balanced encouragement of creation with the need for a public domain
- Changing balance of power as current laws (especially copyright extension and DRM) favor rights of creators over the need for a public domain

The concept of creative work as intellectual "property" has been evolving . If a creative product is property, then the conclusion is that it can and should be owned and controlled forever by its creator or his or her heirs. But creativity is an inexhaustible resource, and a creative product like a book is not used up if it is read over and over again or by many people.

The conception of copyright that the Founders worked into the Constitution – that it existed "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"-- favors a balance that encourages creation but acknowledges the claim of the public domain. Since copyright laws seem to be going through a period of favoring the creator – or actually, favoring the middleman (the publishers, producers, etc.) who may not entirely share the creator's agenda—some people are calling for a return to a version of this original balanced concept updated for the cyber age. These include respected copyright attorneys and groups like the Electronic Frontier Foundation, who are proposing viable alternate systems to established copyright law, and organizations attempting to create new models like Creative Commons licenses or Open Access for scholarly publishing. It's expected that the new Librarian of Congress, when appointed, will have a great deal of influence on the future course of this debate.

Why do we need a thriving public domain? The public domain is our common creative

and intellectual heritage – the works we all draw on when creating new things. The public domain is old myths, ancient Christmas carols, traditional quilt patterns, folk songs, Victorian novels, Shakespeare's plays, Leonardo da Vinci's art, all available for us to draw inspiration from and reuse as we like. There's a myth of the author as working totally alone and inspired by nothing by himself, but this isn't true – everyone is a product of this vast history of human creativity. To mark some of it off bounds forever is neither historically nor artistically sound.

What laws govern copyright?

- The *Copyright Act of 1976*. Sections 107 (*Fair Use*) and 108 (*Reproductions by Libraries & Archives*) are of special interest to librarians and library staff.
- *Amendments* to the Act (such as the 2002 *Technology, Education, and Copyright Harmonization* (TEACH) Act, the 1998 *Digital Millennium Copyright Act* (DMCA), and the *Term Extension Act* ("Sonny Bono Act") of 1998) cover software, audio-visual materials, length of copyright, and international copyright.
- There are also several sets of guidelines.

The resource list at the end of these slides includes a link to the US Gov Copyright site, where you can find the full texts of the act and guidelines. Amendments get worked into the law, so you won't find a separate law called the TEACH Act – it's been integrated into Section 110. The guidelines we'll discuss later are very broadly adhered to, but they are still guidelines, not actual legal requirements.

This further unpacks the phrase “fixed in a tangible medium” from the first slide in this section and tells you what media are considered tangible.

So what are patents and trademarks? How do they differ from copyright?

A trademark is something that basically advertises a business and is associated with that business in the public mind.

A patent is granted to safeguard a thing or process.

For example: Mickey Mouse films are copyrighted as artistic works. The Mickey Mouse ears are a trademark. If Disney has a special process for a certain special effect or a certain type of film or lens, that would be patented.

What can't be copyrighted?

- A work that is not "fixed" is not protected; this might include such works as improvised speeches or songs that have neither been written out in advance, nor recorded during performance. An unpublished diary or letter is "fixed" and therefore copyrighted.
- **Ideas cannot be copyrighted until fixed in a tangible form.**
- "*Works consisting entirely of information that is common property and containing no original authorship*" cannot be copyrighted—this includes items like calendars, tables of weights and measures, etc.

1. Something on the Internet may look like it's free to use, but unless it says otherwise, it's copyrighted – it's fixed in a tangible form of expression.

2. This can be thought of as "idea" versus "expression" – it's the expression of the idea that's copyrightable.

3. The information in a calendar that's common property – dates, moon phases – can't be copyrighted, but illustrations, additional material can be.

What rights does the copyright holder have? (Section 106)

- To *reproduce* the work
- To *prepare derivative works* based upon the work
- To *distribute* the work
- To *perform* the work publicly
- To *display* the work publicly

This PowerPoint presentation is in part a derivative work based on a book I wrote on copyright for ILL and reserves. While my publisher has the right to reproduce the original book in its entirety for sale, under the terms of my contract I retained the rights to make derivative works, create handouts incorporating parts of the work, and perform and teach from the work publicly. It also incorporates material from articles I've written, for which I've retained different sets of rights.

What can the copyright holder do with these rights?

- These rights can be signed over to other parties; for example, the author of a book may sell film rights to one company and book-on-tape rights to another.
- These rights are limited by *first sale doctrine* (§109(a)), which allows someone who buys a book or other copyrighted item to sell, give away, rent, or lend it to someone else.
- The creator's rights are also limited by *Fair Use* exceptions.

1. This is how publishing works – you sign over certain rights to a publisher under the terms of your contract, and negotiate which ones you want to retain.
2. First Sale is how libraries and used booksellers and video rental stores work. A useful thing to think of here is "container" versus "content" – the content is copyrightable, but not the container. Of course this gets into a grey area with electronic materials!
3. We'll talk more about Fair Use in a minute.

How long does copyright last?

It depends on several factors:

- When was the work first fixed in a tangible form or published?
- Is the author alive or dead?
- Is this a work for hire, a group work, or an anonymous work?

The controversy over copyright length

- Congress has 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" (Constitution Article 1 §8)

Originally, copyright was for a mere 14 years with one renewal allowed. A healthy author who started writing when young could expect to see his works go into the public domain and be reprinted without profit to him within his lifetime. (Mark Twain is a prime example of this, and he fought to get copyright extended.) Over the years, copyright time has been lengthened considerably and the renewal option has disappeared; with the Sonny Bono Act, it is now automatically the author's life plus 70 years. Sonny's work did not go out of copyright in his own lifetime, and his grandchildren will profit from his work if it continues to sell. But this causes problems:

The controversy over copyright length

- *Exclusive rights* encourage creators to produce work because they alone will profit from it for a certain amount of time, the idea being that financial rewards motivate creativity.
- The balancing *limitation on time* allows works to eventually pass into the public domain, where they can be used by anybody who wishes to publish, sell, adapt, translate, record, or perform them, or otherwise use them to create derivative works.

Basically, the government guarantees a creator a limited monopoly on his work in return for the work eventually enriching the public domain for the benefit of all. Without exclusive rights, an author couldn't expect to get rich from a best-seller because anybody could print a pirated copy or put it on the Internet for downloading, and therefore he or she might not have as much incentive to write.

But without the limitation on time, you wouldn't be able to sing old hymns in a church choir without paying a fee, or paint a parody of the Mona Lisa without expecting an angry letter from Leonardo Da Vinci's estate, or perform a Shakespeare play without sending his descendants a check. And Shakespeare wouldn't have been able to base his work on Hollinshed's histories or old myths or classical Greek comedies. This delicate balance benefits everyone.

How can you tell if a work is still under copyright?

- If the work was ***created after January 1, 1978***: copyright is for the author's life plus 70 years. For group works, copyright expires 70 years after the last surviving author's death.
- If an item is a "work for hire" (some educational or corporate works) or anonymous, copyright lasts 95 years from publication or 120 years from creation, whichever comes first.

1. For example, the entire works of John M. Ford, an author I knew who died in 2006, will not enter the public domain until 2076. Anyone who wants to reprint his memorial poem on the World Trade Center bombings in 2001 will need to get permission from his estate.

2. What is a work for hire? Something you produce as a job assignment. When I'm asked to write up instructions on how to renew a book for my library's web site, it's a work for hire copyright by the university. It gets to be a very grey area with research and materials prepared for instruction like syllabi or online lectures. Your organization may have rules about this.

How can you tell if a work is still under copyright?

- If a work was ***created before January 1, 1978 and after January 1, 1923***: Copyright lasts a maximum of 95 years from date of publication, depending on circumstances (such as whether its copyright was renewed or not). A work created in 1977 will not enter the public domain until 2072. Works created in 1923, the beginning of this category, don't enter the public domain until 2018.

Gone With the Wind, for example, was published in 1936. In the US it enters the public domain in 2031. But for a while it was already in the public domain in Australia, and you could if you lived there download a copy from Gutenberg Australia perfectly legally. However, Australia since adopted laws closer to those in the US and taken it down. There's a kind of arms race going on in international copyright law – countries are tending to adopt the most stringent rules found among their trading partners. This is partly because of the internet – there was nothing to prevent me, in the US in the late 1990s, from finding and downloading the Australian GWTW text while it was up on their site, and in fact I did. (Do I now have a legal or ethical obligation to delete it? What if I've previously purchased a paper copy as well? Discuss.)

How can you tell if a work is still under copyright?

- If a work was ***published before 1923***: It is in the public domain; that is, it is not copyrighted and may be used freely.
- *Federal government publications* are not copyrighted and may be used freely (§105).
- Orphan Works
- The U.S. Copyright Office has a guide to researching the copyright status of a work on their website, but much information on registered works is still not online.

The third category is works published before 1923…

While Fed Gov Docs are in the public domain, States differ, and all or part of their publications may NOT be in the public domain.

You may have heard of orphan works. These are works where you cannot find the copyright holder. Maybe the publisher's gone under, the author has passed away, etc. This is a side effect of the automatic copyright of all material fixed in a tangible medium without the requirement for registration. Concerns had been raised that the uncertainty surrounding ownership of such works might needlessly discourage subsequent creators and users from incorporating such works in new creative efforts, or from making such works available to the public. In 2006 an act was passed which limited damages which could be paid to a copyright holder of an "orphan work" if the user made a "reasonably diligent" search for the owner, and ceased using the items immediately if directed to do so. If the work was used for an educational or scholarly non-profit purpose, the user wouldn't even have to pay compensation for the use, so libraries are pretty safe in using orphan works. The 2015 Copyright Office Report, based on a failed 2008 bill, would require a fairly burdensome search process and a "Notice of Use." But no new laws regarding Orphan Works have been passed and the standard still remains a "diligent search" process for rightsholders which is never clearly defined. Section 77 of the Canadian Copyright Act includes a list of sources that must be checked and could serve as a model.

Resources for figuring out if a work is under copyright

- Copyright Advisory Network Digital Slider: http://www.librarycopyright.net/resources/digitalslider/
- When Works Pass Into the Public Domain (Lolly Gasaway): http://www.unc.edu/~unclng/public-d.htm
- Is it in the Public Domain? (A good source for non-print materials, from Berkeley): https://www.law.berkeley.edu/article/the-samuelson-clinic-releases-is-it-in-the-public-domain-handbook/

Here are a few good items to have in your copyright tool kit. Non-print copyright lengths are particularly complex, so the Berkeley site is especially important if you deal with media.

Break for questions before moving into Fair Use.

Fair Use: How to use an item that is under copyright

- To determine if an intended use is fair, the user must take four factors into consideration.
- The complex interplay of these factors must be judged on a case-by-case basis; there are no hard and fast rules for the user, only guidelines. A fair use checklist is a good tool to use in decision-making.
- Technically, Fair Use is a *defense against charges of infringement*, not a right

The concept of "Fair Use" provides educators, librarians, researchers, writers, artists, and other individuals with limited ways to use copyrighted material without violating the rights of the author. Fair Use is covered under section 107 of the Copyright Law, and allows the public to "share, enjoy, criticize, parody, and build on the works of others" (Heins "Executive Summary" 2).

Is Fair Use a defense or a right? Fair Use is technically a defense against charges of infringement, although many also interpret it as a right (Gasaway, "Copyright Considerations" 132, note 17). Many who say it's a right suggest we have to "use it or lose it" – if we allow Fair Use to erode away, it can hobble all kinds of creativity, so we should push it to its limit.

Fair Use is NOT a set of rules about numbers of pages you can use and so on. Since there are no precise rules, it's hard to know if you are safe. To determine if an intended use is fair, the user must take into consideration the following **four factors**:

The Four Factors of Fair Use

1. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes.

- A non-profit institution is granted greater leeway in using copyrighted material than a for-profit company. However, just because it's educational doesn't mean it's automatically fair!
- "Transformative" use – using the original in some other work or format – is also more fair than just copying it.

Transformative example: If you just take a copyrighted picture of Marilyn Monroe and put it on a t-shirt to sell on Café Press, that's not transformative. If you're Any Warhol and use the picture as a basis for a series of prints playing with color and design, that's transformative.

What about buying a book or a greeting card so you can cut out the pictures and decoupage them to tiles you will then sell? How about if you are doing it systematically, buying hundreds of copies of the card? There were several similar cases like this and different courts decided differently. It's not a clear-cut case. (Lee v. A.R.T. Co. in 1997 decided it was not infringement; Mirage Editions Co vs Albuquerque A.R.T. Co. in 1988 deciding it was.))

This is starting to be considered the most important factor. In the case of educational and library use, when a work is used for other than its original intended purpose, that is increasingly considered transformative.

The Four Factors of Fair Use

2. *The nature of the copyrighted work.*

- Is the original work creative or factual? Using a factual work is more likely to be allowable than using a creative work. Is it a "consumable" item, like a workbook? Copying a consumable item is rarely fair use. Audio-visual works are also less likely to be considered fair game for fair use.

This is partly because facts can't be copyrighted. For example, the list of ingredients in a recipe can't be copyrighted – but the way the recipe itself is written can be considered a creative work and is protected.

The Four Factors of Fair Use

3.The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

- Using the whole work or a major portion of it is not fair use and neither is using only the "heart of the work."
- There are guidelines for classroom copying that can be helpful for educators trying to judge the safest amount of a work they can use.

This ties in closely with the last factor:

The Four Factors of Fair Use

4. The effect of the use upon the potential market for or value of the copyrighted work.

- Will it affect sales adversely?
- Some courts think this is the most important factor, but the trend is moving away from this interpretation.

This is tied closely to purpose; if you are using a work in the classroom it's expected to have little effect on sales.

Fair Use Checklists

- http://copyright.cornell.edu/policies/docs/Fair_Use_Checklist.pdf: Based on the well-known Kenneth Crews Checklist for Fair Use
- http://copyright.columbia.edu/copyright/fair-use/fair-use-checklist/: Another version of the Kenneth Crews checklist, this one is licensed under Creative Commons, making it easy to share with your colleagues
- http://librarycopyright.net/resources/fairuse/ : This Fair Use Evaluator can give you a time-stamped printout of your evaluation for your files.

Another good tool to have in your kit is a Fair Use Checklist. Here are a few; more can be located through some of the general copyright sources listed on the last slide. As we move away from guidelines and towards basing our decisions on Fair Use (as the ARL Code of Best Practices suggests), you'll find yourself relying on checklists like these to help you make decisions. We'll talk more about that in a minute. You don't need to use it for every single decision you make, but in situation where you think the copyright holder or some other party might question your use, it can be helpful to have a copy of the form on file just in case.

How libraries operate under copyright in the US

- Right of first sale allows loans of physical material (differs in other countries)
- We strive to balance creators' rights and consumer needs
- Library exceptions and exemptions for making copies
- Patron responsibility for own copying
- Law vs. contract in next part of presentation

Now we will get into aspects of the law relating specifically to libraries and education and involving making copies.

So – to the legal basis for lending. In the United States, for physical items owned by the lending library, lending is a straightforward process supported by the right of "first sale" (U.S.C. Title 17, Section 109), which allows the owner of a copy of a copyrighted item to lend, rent, resell, or dispose of that copy as desired. Once the physical item is in the hands of the borrower, it's up to him or her to comply with the Fair Use statues.

Rules for invoking the library exception:

Libraries have the right under Section 108 to make copies of a work for individual users, interlibrary loan, or preservation, if certain conditions are met:

- The library must be **open to the public or researchers** from outside the institution
- The copies must be made **without a profit** to the library
- Copies must **include a standard notice** of responsibility for copyright violations
- There can be **no "systematic" copying** of works

What is systematic copying? For example, a library cannot systematically photocopy articles from the new issue of a journal each month to send to a routing list of instructors.

And that's the end of this section reviewing the law. Questions?

Stop me anytime for questions!

The Philosophy of ILL

- Libraries: Our core mission is to provide access to information, as much as possible without direct charge, for our user groups, spreading the cost of acquiring and organizing information across our income and user base.
- Interlibrary loan: leads to seeing the universal set of all library users everywhere as our patron group, and all libraries everywhere as a shared resource pool.
- Dramatic rise in use of ILL in recent decades.

Now I've been seeing a levelling off of ILL lending and borrowing recently in the libraries and consortia where I have access to statistics. At a recent meeting of the CIC ILL directors we had a discussion trying to figure this out – reasons we proposed included more articles and books available electronically at home libraries and the increasing amount of material available free on the Internet through Institutional Repositories, Hathi Trust, Google Scholar, and so on. But use is still high after an upward trend over the past few decades.

Interlibrary Loan

- Right of First Sale easily covers lending physical items
- Library exceptions allow lending copies; compliance with copyright is responsibility of borrower, not of either library
- Ownership vs. access—conflict between law and contract—signing away rights
- Contract limitations conflict with the core principles of ILL—interlibrary cooperation and patron service

One of the big issues in ILL is whether the database contracts we sign allow ILL. Contracts trump actual law, and we can sign away our rights to use the database to serve our customers.

How Print and Electronic ILL Differ

Does technology create a difference "in kind" or a difference "in scale"?

- Location of items, access to items
- Circulation of items
- Patron familiarity with/use of service
- Copying – the big one
- Violations

Does electronic delivery of ILL constitute a difference in kind or just a difference in scale? Most of this is pretty obvious when you think about it, but it's a good foundation for understanding why publishers see e-resources (and what libraries want to do with them) as dangerously different from print. Let's start with the fact that photocopying for interlibrary loan use is implied in the copyright law in sections 108(d) and 108(e), which discuss a user requesting a copy "made from the collection of a library or archives where the user makes his or her request or from that of another library or archives." The CONTU guidelines go into far greater detail, and as they are approved as part of the copyright code and are included in Circular 21, there is far less ambiguity about what is generally accepted as permitted and forbidden for interlibrary loan than for reserves.

Sending a physical photocopy, like we used to do, is fairly straightforward, as section 108(d)(1) allows a library to supply a user with a copy of an item from his library "or another library or archives," as long as the copy becomes his property, he gives no indication that the item will be used for any other than "private study, scholarship, or research," and the copyright notice is clearly displayed at the place where his order was taken.

Typically, electronic delivery from a physical original involves the lending library scanning the item and sending the scan to the borrowing library. The borrowing library then passes the item on to the patron by posting it on a secure web site for a limited

amount of time, where the patron can access it with a password, perhaps a limited number of times, or simply sending the PDF directly to the patron.

Technically the lending library makes a digital copy in the process of scanning it, and the borrowing library also makes a digital copy in the process of receiving it, and possibly another when passing it on to the patron. But the lending library's copy is only a by-product of the process and is usually discarded or deleted immediately. The borrowing library, in theory, only keeps its digital copy posted long enough to ensure that the patron has had an opportunity to view it, and then it is deleted as well. So these "extra copies," to our minds, are only a temporary and ephemeral part of the process itself – but a database provider might not see it this way when we try to do the same thing with an electronic original.

Copyright Law vs. License Agreement

- The contract terms proposed by the provider do not have to be in agreement with copyright law
- There are a wide variety of clauses with little standardization among them for the same type of library use
- Three approaches to the problem: avoidance, reactive, proactive

Because these are not outright purchases, the use of these electronic databases and journals is governed by the contracts the owner and the library sign under state law, and not by federal copyright law. As a result, the producers of these products can limit or forbid uses we consider fair or exempt use, like interlibrary loan lending. If ILL is permitted, they can mandate that the lending library, rather than the borrowing library (as is required with print ILL), meet copyright restrictions they impose. We may find ourselves signing away our expected fair use exceptions (which we often see as our patrons' rights) when we sign a contract, and the current climate favors the rights of copyright holders of the rights of users.

Users of interlibrary loan have been able to copy and mail the items they borrow to friends and colleagues as long as there have been photocopiers. But information providers are wary of one-touch dissemination to large groups of people by the recipient of an electronic interlibrary loan document. The user can print the item, save it to a disc or hard drive, and send it to a friend by email – or to ten thousand friends or the whole world by posting it on the internet. Digital copies generally don't degrade, no matter how many times they are recopied, and they cost nothing to send to either one or one million other email addresses. To the mind of the content provider, therefore, technology makes such a great difference that it becomes a difference in kind and not just in scale.

Law vs: Contract: Middlemen and Fair Use in the electronic environment

- Ownership vs. access
- Contracts trump copyright law – libraries sign away rights for their patrons
- Technology-neutral law trumped by contract clauses
- Lack of consistency between contacts with different vendors makes compliance more complicated

Now I want to talk about a few places where libraries stand at the intersection of copyright holder rights and public needs. First, let's look at electronic content that we "purchase" for our patrons and the problem of licenses vs. law. The problem is, we don't really "purchase" databases: we pay a fee for access. So without clear "first sale" ownership, copyright law doesn't truly apply – and therefore our access, and our patrons' access, is governed by the terms of our contracts with the database providers.

- Ease of compliance; efficient workflow. No extra work or expense.
- Consistency in what's permitted and how we can use material
- Understanding of library processes and goals by vendors
- Transparency for patron
- Good faith dealing; an acknowledgement that we aren't out to steal from the vendor

Part of the difficulty in dealing with this issue is that publishers don't always know what we want – they don't understand patron needs and our own workflow.

Let me quote Laura Gasaway, because I think this really sums up the dilemma of copyright not just for librarians but increasingly for private citizens as well:

Most librarians are law-abiding citizens who want to comply with the copyright law. Unrealistic restrictions [and] outright denial of use […] on the part of publishers may discourage compliance. (Gasaway 131)

What do publishers want?

- Overriding need to maximize profits
- They don't always understand what libraries are doing
- They don't always understand the extent of use of their resources
- Overprotective of copyright on behalf of copyright holders; may not understand fair use and educational exceptions
- They attempt to prevent abuse rather than punish it when it does happen

We need to understand their needs and fears as well.

It might also help publishers to know that a study presented at the ALA conference in Orlando, July 2004, by Tom Sanville of OhioLink shows that less than 0.1% of their serials database use was for filling ILL requests. It's undoubtedly increased since then, but what we are talking about here is still really a very, very minor use of the vendors' resources.

<u>Violations</u>

So this gives you some idea of why copyright owners may see electronic delivery of interlibrary loan as something so different from the older model that they feel it needs to be tightly controlled. When you look at the laws, regulations, and decisions concerning responsibility for violations of electronic copyright, there seem to be two trends pulling in opposite directions. On the one hand, as shown by the Sony Betamax decision, and by RIAA's recent tactic of going after the people who are actually downloading illegally rather than their internet service providers, there is the idea the end user is really the one responsible for any violation of the law, and the only one who should be punished. In the library world, the signs we all post by our copiers and at the point of ILL pickup state that the end user is in fact solely responsible for staying within copyright law when using his materials.

On the other hand, as shown in the Napster case and in the proposed ACTA international anti-piracy laws, there is the tendency to blame someone who can be conceived of as a middleman, someone who provides the means to violate the law, although they themselves are not actually violating any laws and their product can be and usually is in fact usually used legally. This is in part because the middleman generally has deeper pockets than the end user who actually violated the law, even when the middleman is only, for example, the parent who is paying for high-speed internet for her household.

A case could certainly be made that a library is in no way responsible for any user's violation of the law, and that our only responsibility (and it's a professional and ethical one, rather than a legal one) is to educate the user about his rights and responsibilities, but the copyright holder may look at us and see only a middleman knowingly facilitating copyright violations..

A solution probably lies somewhere between these extremes. The current balance between library and patron responsibility works well for print material, and makes a good basis for a fairly workable compromise for interlibrary loan of electronic material – at least in our own minds.

Protections for librarians

- There are two key concepts involved: **willful infringement** and **good faith**. If you willfully copy or distribute a work, knowing that what you are doing is not a fair use, you could be fined and/or imprisoned.
- However, if you work for a nonprofit education institution, library, or archives and are acting within the scope of employment the court can bring the statutory damage award down to **$0**, *even if you are found to be infringing copyright*. For this to happen, you must show that you believed and had reasonable grounds for believing that your use was Fair Use.

Here are some things to make you feel better about pushing for your patron's right to use material

This is why it may be important to document your reasoning in more ambiguous cases.

- The copy must become the property of the user
- The library must have no notice that the user plans to use it for any purpose other than private study, scholarship, or research
- The officially-worded warning about copyright compliance must be posted where orders are taken and on the order form, as well as on public-use photocopiers and scanners.

As librarians, our protection is that the owner of the copy is ultimately legally responsible for adhering to copyright law, not the supplying library. Our responsibilities include posting the appropriate copyright warning forms at the place where orders are taken, on the order form, on the document, and at our photocopiers; and refusing a loan if the patron informs us it will be used for purposes other than private study, scholarship, or research. Since the copy is owned by the patron rather than lent by the library, responsibility for copyright compliance rests with him. We may consider that we have an ethical responsibility to make our patrons aware of fair use and the rights of the copyright holder, but there is no technical way we can enforce compliance.

Interestingly, some providers of databases and purchase-on-demand services DO try to make libraries responsible for ensuring that their end uses delete or destroy items after using them. But these are totally unenforceable clauses and should send up red flags about the providers trying to use them. At Rutgers, we recently decided against one provider of reprints in part because of this clause in their contract.

CONTU Guidelines protecting the copyright holder from the library:

- Libraries cannot substitute interlibrary loan for purchasing an item (so, for example, a library is expected to limit itself to borrowing no more than five articles from the past five years of the same journal each year without permission, and cannot keep files of requested items for later re-use)
- Libraries cannot profit directly or indirectly from interlibrary loan or reserves (any fees must be for cost recovery only)
- The library must not perform any "systematic" copying (for example, routing copies of journal articles to a list of instructors.)

As long as the document is only accessible to the person who requested it, this process should not be perceived as systematic copying and distribution of an article; libraries certainly wouldn't interpret it this way. It should also only be kept on the library's server for a limited time, or it could imply that the library has borrowed the material in lieu of purchasing it.

For example, a discussion archived on the Liblicense list at Yale revealed one actual publisher's representative who was pretty sure the sole purpose of interlibrary loan fees was to recoup the price of the subscription to the journal. Publishers might easily mistake the term Document Delivery to mean a business that sells copies of articles for a profit, while libraries know that any fee charged will cover only a fraction of the administrative expenses of delivering an article. Many libraries pass no fees on to their users at all. Some publishers include clauses prohibiting any "distribution" of documents from their product, which a library might interpret to mean interlibrary loan is prohibited, even if that isn't the vendor's intention. The clear definition of library and vendor terms would help correct these misunderstandings and ease their fears.

Libraries must be careful that interlibrary loan services should operate only on a cost-recovery basis, since a library should make neither a direct nor an indirect profit from supplying photocopies. A library which is part of a for-profit institution should check with its legal counsel, because this service may be seen as something designed to lead

users on to additional profit-making library or other institutional services. A library in this situation may need to request permission for every item it borrows, rather than just anything over the "suggestion of five."

- Secure delivery system
- Copyright notices at all required locations; see 37 CFR 201.14
- Suggestion of Five OR Fair Use evaluations for borrowing
- Confidentiality of patron records
- Fees and permissions

One useful strategy to prevent issues like these from coming up is to develop a written legal policy for interlibrary loan, both lending and borrowing, and post it publicly and adhere to it, for your own protection. When there is an available written policy with justifications linked to existing laws and regulations, it provides something a library can point to if its actions are questioned. For example, in the recent challenge to UCLA's policy of streaming videos on reserve, the university was able to refer to the TEACH Act and the concept of time-shifting, as well as to internal technical policies compliant with suggested guidelines about restricting access to students currently enrolled in each specific class.

So what should go in this policy?

Secure Delivery System

Items should be accessible only to the borrowing patron, for a limited amount of time and/or a limited number of downloads.

Copyright Notices

Notices are required at several locations:

At the place where orders are taken; wording, location, font, and paper weight are

specified in 37 CFR 201.14.

On the order form, including electronic order forms; same wording as above. 37 CFR 201.14 gives details on how it is to be printed on the order form.

On the document. At a minimum, must say "This material may be protected by copyright" (Crews 127). For further discussion, see http://www.copyright.iupui.edu/super_copying.htm.

At each public photocopier in the library (no particular wording is mandated, but many library supply catalogs carry standardized signs with wording suggested by ALA)

The Suggestion of Five

The library should consider following the "suggestion of five" from the CONTU Guidelines and request permission for usage beyond these limits (5 from past 5 yrs in one calendar year). These limits should be included or referred to in the public policy, so that patrons will be aware there may be reasons we might not be able to request an item they want or will have to pass on a fee to them. We'll talk in a minute about Fair Use as an alternate basis for limitations on borrowing.

Confidentiality of records

A record retention policy should address removing patron names as soon as a returnable item is received at its home library, or as soon as a non-returnable is picked up. Because patron records for both borrowing and lending can still be subpoenaed under the PATRIOT Act, libraries should consider developing records retention policies for interlibrary loan which retain the essential information about each transaction but eliminate the patron names.

Fees

Under section 108 (a), libraries may only charge fees for cost-recovery for a use to remain fair use. OCLC encourages its member libraries to use Interlibrary Loan Fee Management (IFM), which tracks fees libraries charge each other and manages deposit accounts and credits. Individual libraries must decide how much, if any, of these fees will be passed on to the patron.

There should also be a policy in place about the use of orphan works and any potential associated fees, in case the copyright holder cannot be located.

The Avoidance Approach

Avoid the issue by simply not considering interlibrary loan or other requests for items held only in electronic format

- Avoid listing electronic resources in places where they could be requested on ILL
- Loan only from paper where both are owned
- Philosophically goes against the grain of ILL by removing a large portion of the library's resources from reciprocal sharing

There are several ways of approaching the problem of lending from materials governed by contract, not copyright law. This one is not as common as it used to be, fortunately.

The Reactive Approach: License tracking and workflows

Reacting to the existing situation means developing tools and procedures which aid library employees in complying with licensing terms that differ from the copyright regulations under which the library normally operates

- Notations in catalog records; simple lists; internal databases; ILS components
- Many drawbacks, particularly in terms of staff time; licenses differ widely in what is permitted

Some libraries develop in-house lists or databases of licensing terms, to which the interlibrary loan department can refer whenever they receive a request which could be filled from an electronic resource. At its simplest, this might just be a list posted near the lenders' workstations saying, "Do not loan from these databases and journals." But as libraries acquire more and more electronic material or discard paper in favor or electronic, a list becomes awkward to use and too narrow in scope. It becomes a huge burden on personnel and discourages compliance. Many ILS systems now have a component that allows you to set up exclusions based on your database contracts, but then someone has to set them up and keep them current.

But whichever method a library chooses, it is still going to find its staff doing an enormous amount of work just to make sure it is in compliance with a wide and mutually incompatible array of licenses.

The Proactive Approach: License negotiation

The proactive approach is based on the fact that contracts are designed by their very nature to be negotiated.

- Use of model licenses for guidance
- Developing negotiation skills through workshops, other learning materials
- Advantages of the proactive approach include benefits for the entire library community

Considering the lack of consensus about the nuts and bolt of compliance, in many ways it makes more sense to approach the problem preemptively by negotiating licenses before signing to ensure they allow interlibrary loan by some method. Many libraries and consortia have had great success with this route. One librarian's advice is "[d]o not apologize for negotiating or splitting hairs. If the publisher did not want to negotiate, they should not have had a license" (Nasea).

But is it realistic to plan to refuse to sign a contract that prohibits using the product to fill ILL requests? Georgia Harper reassures and encourages us: "These licenses are fully negotiable! Do not hesitate to ask for what you want. Vendors are willing to work with libraries to tailor their contracts to your needs. In fact, the really good news is that as more libraries ask for better terms, contracts are improving for everyone. This is the function of standard-setting." (Harper, Just Sign It)

Renegotiations are obviously widespread and even expected by the publishers, but many providers try to include clauses saying that all negotiations must be kept confidential. By keeping this information secret, publishers try to prevent libraries from comparing notes about their contracts. This appears to be in the best financial interest of the publishers, because theoretically, the more restrictive the license, the more libraries will have to subscribe in order to have access to their publications. But in reality, libraries often reject licenses that are too restrictive, and the publisher can get a bad reputation in

the library community. Having library-friendly licenses and being known for flexibility and adaptability to library needs might be a better profit-making strategy for the long run.

At the University of Oklahoma, where I previously worked, our negotiation team insisted on certain terms being included in all licenses we signed, including: the ability to deliver ILL requests electronically (at a minimum by Ariel delivery, and preferably by direct electronic delivery as well); access to permanent archives of the licensed material; access by all OU campuses; access through IP address range; and Oklahoma jurisdiction (or no jurisdiction stated) for legal remedies. The state consortium used similar standards, which included permission to use state-licensed databases for interlibrary loan. We did turn down deals from time to time when providers were unwilling to meet our needs!

In recent years, libraries seem to be doing more and more negotiating, if the number of books, articles, websites, and workshops now available is any indication. But the next big trend takes us in another direction entirely:

Basing a philosophy of ILL on Fair Use

- Conceptual framework: all ILL is fair, OR patron is ultimately responsible for fair use of requested item
- Library as middle-man only with no responsibility for patron's use of item
- Concept of all libraries as one; all requests as one pool of requests

Can a library base its interlibrary loan policies on the concept of Fair Use rather than on guidelines like CONTU and the library exceptions in the copyright code? It's an interesting idea. Conceptually, it can mean one of two things: either that we see every potential interlibrary loan request as a fair use by our library, which could possibly leave us vulnerable to charges of violation, OR that we see the burden of judging fair use as resting solely with the patron, with the library merely acting as the middleman. This is actually how we already handle copyright compliance for all the physical items we own; we merely provide access to the item by purchasing, cataloging, shelving, and circulating it, and the responsibility for using the item fairly and legally lies solely with the borrower. And this is how online purchases of e-books, MP3s, and so on works as well; it's not Amazon that is responsible for what the purchaser does with the material, after all.

Brice Austin, a member of the GWLA (Greater Western Library Association) resource sharing group recently proposed a bit of a thought experiment, and I'd like to toss it out here. This was in response to some worries that local electronic document delivery requests were taking second place to the need to meet challenging turnaround fulfillment requirements for ILL within the consortium. Here's what he said:

What if all of GWLA agreed to simply let local doc[ument] del[ivery] requests flow into the general pool of requests so that no distinction was made between locally owned

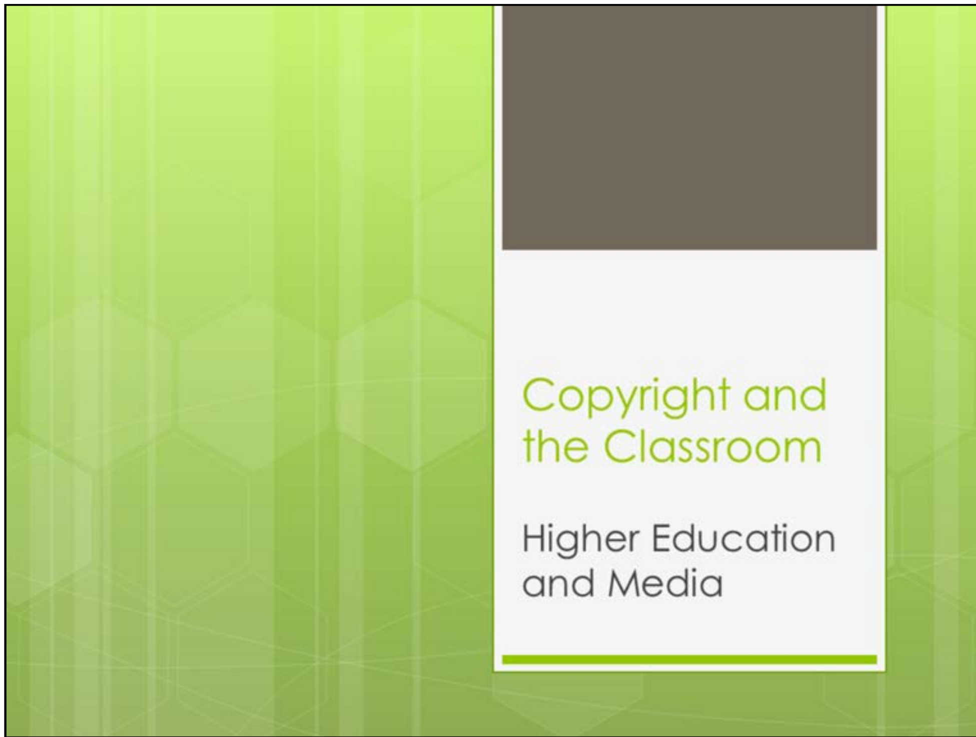
materials and ILL? So we might be filling a request from one of our patrons or one of yours—we might not even know and it wouldn't matter. Certainly the patrons don't know the difference. (Austin, email to BTPILL-L, 5 March 2010)

What if we all considered our individual libraries as part of one great consolidated collection, merely housed in different places, and each of us considered all of our patron requests for ILLs, document delivery, storage retrieval, and so on as just requests in a general pool, which we would each fill in the most expeditious way, without the patron even having to think about what they were requesting, which form to use, or knowing where it comes from?

If carried through to its logical end, this would indeed make us all middlemen, and erase the legal differences between loans of one's own material and borrowing from another library. But can these legal differences actually be erased? What about the question of ultimate ownership of the original and what that might imply? At Rutgers, we're having to deal with the fact that merging additional campuses and their libraries under our central umbrella means that we are now running into the CONTU guidelines for many titles far sooner than we used to as individual universities and colleges – could something like this be avoided if we went to a fair-use based universal pool of libraries? What do you think?

I think we are heading this way, judging by trends like Purchase on Demand and Discovery systems that search beyond the walls of the single library.

(Pause for discussion)


Copyright and the Classroom
Higher Education and Media

Using copyrighted material in the classroom

- How can you be sure you are giving the best advice to your teachers and administrators about using copyrighted materials in the classroom and in the library?
- Legal exemptions and the concept of "Fair Use" provide educators, librarians, researchers, writers, and other individuals with limited ways to use copyrighted material without violating the rights of the author.

We'll look at codes of best practices that have applicability to university and college libraries; some of my favorite web resources for determining Fair Use; and Carrie Russell's recent book on copyright for K-12 librarians and educators – which does have applicability for higher ed as well.

I want to quote a paragraph here from the VRT Code of Best Practices: "The entire structure of academia is shifting in ways that are profoundly challenging our assumptions about the kind of education students should receive and how they should receive it. The days of the single teacher lecturing to a group of students in a solitary classroom are numbered. This outmoded paradigm is unfortunately reflected in copyright law, which is based on the assumption that "real" teaching is narrowly defined as a face-to-face educational experience."

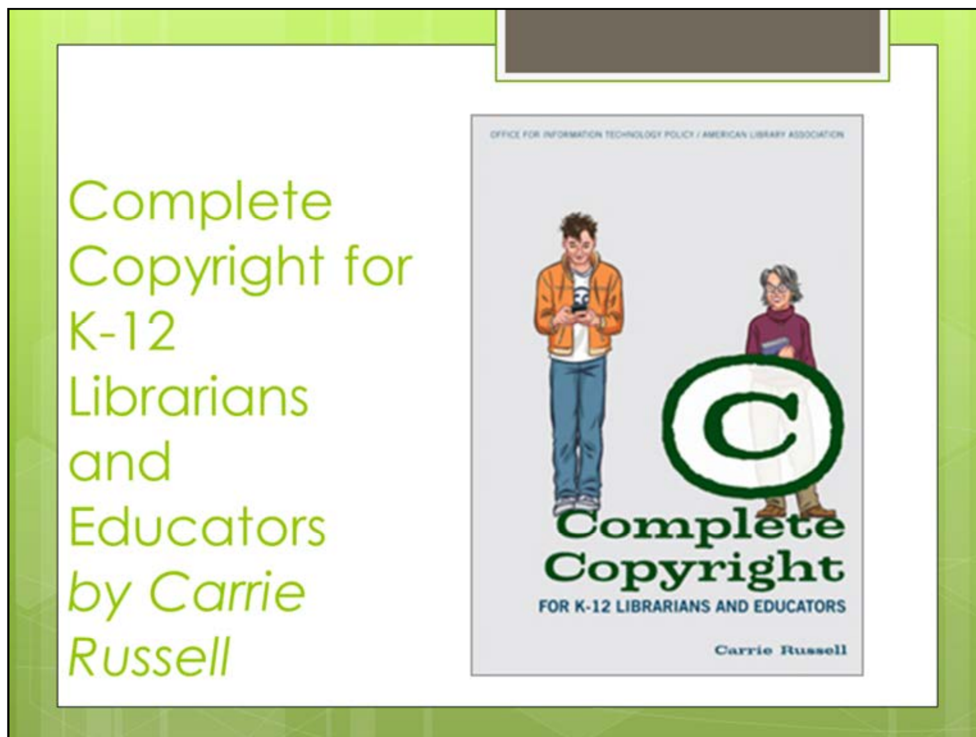
But there has been some good news recently in copyright and licensing. Educational use is increasingly seen as transformational. Tendency to use 4 factors analysis in preference to guidelines, and give more weight to 1st factor (purpose of use) than 4th (impact on market). This is a good thing, even though doing a four factors analysis is more work and more risk than simply referring to a list of guidelines or buying a blanket license.

Special Allowances for Teaching

The laws and guidelines specifically related to teaching are:

- Copyright Act of 1976, Section 110
- Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions With Respect to Books and Periodicals
- American Library Association Model Policy Concerning College and University Photocopying for Classroom, Research, and Library Reserve Use

Because we buy books and other materials instructors may plan to use in the classroom it's useful to know about this. Basically you can read or show anything in the classroom. But there are guidelines about how much, how many copies, and spontaneity of use. TEACH Act allows simultaneous broadcast to distance ed sites under certain circumstances.



Here are some tools that will be useful to YOU.

This is a recent book from Carrie Russell at ALA's Office for Information Technology Policy.

This belongs on the office shelf of every K-12 librarian and administrator, and also many higher ed librarians as well, as we deal with more and more media-related questions. It is clear, reassuring, and, most importantly, up to date on the recent shift we're seeing away from guidelines and in favor of transformational use. Russell uses a mix of factual review of copyright code, summary of current thinking and case law, and examples of situations likely to be encountered in today's K-12 schools and libraries. Copyright is a confusing and sometimes scary topic, and there are misconceptions on all sides; Russell has an encouraging way of clearing up the misinformation and helping you make good decisions. As she points out, "Copyright never catches up to technology. Consistency can be found only in our dedication to professional values" (vii).

As I said, Carrie places great emphasis on the desirability of doing a four-factors analysis on the material you want to use rather than relying on guidelines – which are, as they say in Pirates of the Caribbean, just guidelines, anyway. The guidelines we have long been trained to use are outdated, haven't kept up with technology, don't have the force of law, and don't reflect the current legal climate. While doing a four factors analysis for everything you want to use is more of a challenge, it is far more technology-neutral and, in current interpretation, more supportive of the aims and needs of education. Carrie is also very reassuring on the topic of litigation and potential damages.

The book includes good examples of actual concerns of educators. Goes well beyond simple questions like classroom copying, reserves, and ILL and concentrates on new media, services to print-disabled, extracurricular activities like performances and clubs – all as important in higher ed as in K-12. Includes texts of relevant laws and guidelines. I can't recommend it highly enough – it will be an excellent resource for any school librarian or media specialist.

Codes of Best Practices

- Code of Best Practices for Academic and Research Libraries: http://www.arl.org/pp/ppcopyright/codefairuse/index.shtml
- Video Round Table Best Practices for Fair Use and Video https://pages.shanti.virginia.edu/Fair_Use_and_Video/2011/07/13/fairusevideo/
- Code of Best Practices in Fair Use in Media Literacy Education http://centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-media-literacy-education
- Code of Best Practices in Fair Use for OpenCourseWare http://centerforsocialmedia.org/ocw
- Statement of Best Practices in Fair Use of Orphan Works for Libraries & Archives http://www.cmsimpact.org/fair-use/best-practices/statement-best-practices-fair-use-orphan-works-libraries-archives

Another good thing to have in your toolkit is a familiarity with some Codes of Best Practices. Why? For one thing, courts are starting to take codes of best practices into account – if your use follows accepted practice in your community, you are on safer ground if you are challenged. A code can help you broaden your horizons and look at further possibilities – being too risk-averse due to a lack of understanding of the law can also mean you avoid the good things that might happen if you take risks.

The most important Code of Best Practices for higher ed, to my mind, would be the ARL code. This is a long-awaited statement on what the Association of Research Libraries considers standard best practices in accessing, storing, exhibiting, and providing access to copyrighted materials. It's not just for academic libraries; any librarian may find this useful, especially anyone who deals with educators or the library's educational mission. The code identifies eight groups of common library functions and states how fair use can support the use of copyrighted materials to fulfill these functions. They are: supporting teaching and learning with access to library materials via digital technologies (like courseware and reserves): using selections from collection materials to publicize a library's activities or to create physical and virtual exhibitions; digitizing to preserve at-risk items; creating digital collections of archival and special collections materials; reproducing material for use by disabled patrons; maintaining the integrity of works deposited in institutional repositories; creating databases to facilitate non-consumptive research uses; and collecting material posted on

the internet and making it available. This is an admirably clear and easy to understand document, providing a good grounding in what fair use is and how it works before delving into its specific interaction with library functions.

I’ve included a couple of others that are also worth a look if you deal with media or courseware or orphan works.

This is a graphic designed to go along with the ARL Code of Best Practices in Fair Use. Note: Old guidelines have failed, best practices rule. If you want to take your organization in a "best practices" direction, this is a good summary of the issues and justifications to support your argument.

Copyright Law, Section 110: TEACH Act revisions

If this class is being broadcast to students in other locations:

- It must be viewable only by those students
- The performance or display must be made by, directed by, or supervised by the instructor, and the class must be part of the instructional activities of a government body or a non-profit educational institution
- And your institution must have a copyright policy in place

- Good resources for the TEACH Act
  - http://www.ala.org/advocacy/copyright/teachact/faq
  - http://www.copyright.com/Services/copyrightoncampus/basics/teach.html

So on to some specific topics in higher ed libraries and copyright. If you are involved in distance education, the TEACH Act affects you and what materials you supply to instructors. (This for example would prohibit a student in the class showing a popular film for entertainment on a day the instructor is not present.)

Seeking Permissions

- Copyright Clearance Center, Music Publisher's Association, etc. are **commercial** entities that deal with many publishers; they are out to make a profit.
- Orphan works are still a risk, but the recent Orphan Works Act gives you protection if you make a good faith effort to find the copyright holder.
- Getting verbal permission from the author, if you happen to have access, is not really good enough. He may not be the rights holder! Start with the publisher.

Seeking permission to use a resource is something you may need to do for ILL, reserves, or general classroom use.

Seeking Permissions

The best practice is to contact the rights holder directly, or publisher if you don't know if the author holds the rights. Your cover letter should clearly state:

- Exactly what portion of the work you want to use (number of pages, picture on a certain page, how many seconds of a song, etc.)
- What you want to use it for (quote in a book, recurring class in a non-profit institution, radio ad to air so many times, etc.)
- For how long you need this permission (one semester, three weeks, as long as the book is in print, etc.) and how soon

The University of Oklahoma Press permission form http://www.oupress.com/ContactUs/RightsPermissions.aspx is a good model, or visit the CCC or MPA sites.

If you want to avoid a commercial middleman…

Many publishers have similar forms on their sites.

Questions?

If we have time, I have a few other things to bring up

What Researchers Need to Know

- Give credit where credit is due (avoid PLAGIARISM and INFRINGEMENT)
- Keep records of where you got your material, just in case
- Save expense and prevent risk: use copyright-free or Creative Commons licensed material wherever possible, and limit quotes from each individual source
- Talk with your publisher about whether they will need you to get permissions for quoted material
- Check your publication agreement for SPARC Addendum compliance

Librarians in academia are increasingly called upon to educate researchers, faculty and student, about rights and risks.

Plagiarism is an ethical violation, not a crime, but good practices in avoiding plagiarism are part of avoiding copyright infringement. If you quote something, give the source.

There are lots of sources for public domain texts, sound and music clips, and clip art. You'll save a lot of worry if you use these sources as much as possible in place of sources that might require permission. Google image search not has a button that lets you select rights-free images. With the new Creative Commons licenses, there is now a wide array of contemporary permission-free material in addition to pre-1923 material. In fact, a friend and I published an index to the journal I edit, and our abstracts and subject headings, which are the copyrightable (non-fact) component of the index, are freely available under a Creative Commons license.

Publishers vary about how much risk they will assume.

Describe SPARC Addendum and keeping your copyright

New trends that may affect libraries

- Google Books, Hathi Trust, DPLA, and so on making the public domain more widely available
- Open Access, Institutional and self-archiving, contract review and SPARC Addendum – our role in improving faculty awareness of "owning" their own research and being more involved in local dissemination
- E-book readers heighten awareness of DRM issues and the desirability of a robust public domain; also issues of how libraries can "lend" e-items.
- New trends in e-publishing like simultaneous free online release of print books

Open Access and Institutional Archiving are areas where we have great opportunities to teach faculty about copyright, authors' rights, and fair use issues.

Open access journals, designed to make scholarly research available directly to the user at no cost, are likely to continue to grow, and their representation in library catalogs will make them more directly accessible to users. At the moment they are concentrated primarily in scientific and medical fields.

In the world of popular publishing, prominent writers like Cory Doctorow and publishers like Baen Books are pushing new models where increasing amounts of content are available online free to users, and finding, counter-intuitively, that this free content boosts sales of simultaneously released hard copies dramatically while improving their reputation among readers

ARL website has a useful roundup of links to articles on trends and issues in new publishing models in their section on Reshaping Scholarly Communication

Cambridge U. Press v. Becker (The "Georgia State" case)

- Three academic press publishers (backed by full funding from the Copyright Clearance Center and the Association of American Publishers) sued Georgia State Universities, alleging that their online reserve readings exceeded fair use.
- The judge came down strongly on the side of electronic reserves being an inherently fair use under the first factor, purpose of use.

Now we'll talk about a few copyright cases in the news recently.

The decision is mostly very good news for libraries. The judge rejected 95% of the infringement complaints offered by the plaintiffs for various reasons—including the copyright not actually being held by the publisher in question! In a number of other cases, she rejected their claims because no students actually READ the material.

However, she did not consider electronic reserves a transformative use (which the ARL Best Practices I mentioned earlier does). Second, she set the level for the third factor (amount used) at 10% – anything under 10% of an item, she considers fair use. However, many libraries use 20% as their threshold. This part of the decision takes us back to guidelines rather than a four factors analysis, which is unfortunate.

Authors Guild v. HathiTrust
Authors Guild vs. Google

HathiTrust is a consortium of libraries and research institutions with a project to scan and digitize works in their collections. What the HathiTrust is doing is legal for three main reasons:

- Scanning books in order to create a giant index of them, without providing actual access to the works, is transformative.
- Copying for the purposes of preservation may not be transformative, but may well be a fair use.
- Making works available to the visually impaired is a fair use and one the judge finds particularly unarguable.

Similarly, the case against Google's Book Search was dismissed on appeal when the Second Circuit ""rejected infringement claims from the Authors Guild and several individual writers, and found that the project provides a public service without violating intellectual property law."

The judge's opinion is that libraries can avail themselves of fair use beyond the special provisions of section 108. It's also clear from the decision that the mere possibility that copyright holders might someday create a profitable product doesn't trump a present-day non-profit transformative use.

One interesting aspect here is that HathiTrust, as a non-profit consortium of libraries, found more favor for this project than Google working alone—even though Google works with them. Allowing a project of this scope to be handled entirely by a profit-making entity goes against the grain of the first factor, which favors not-for-profit uses. But Google Book Search was also found to be a transformative use in the end.

Klinger v. Conan Doyle Estate, Ltd.

- Most of the Sherlock Holmes stories were published before 1923, but a handful were published after and are still under copyright.
- Klinger wanted to use the characters without a license. The Estate claimed that since the characters continued to develop after 1923, this would be infringement.
- Courts have ruled that creators may use the characters, but no specific story elements that appeared in the post-1923 stories.

This will certainly be one to watch for its use in other cases of authors whose works span the 1923 copyright/public domain divide, as well as

for its implications for derivative works like pastiche, satire, and fan fiction. The Supreme Court refused to hear an appeal by the Estate in November 2014.

Broader public trends that may affect libraries

- RIAA and the bad will their lawsuits generate against business-as-usual in the music industry
- ACTA (Anti-Counterfeiting Trade Agreement)
- Amazon-Macmillan flap over e-book pricing
- Ownership of blog posts, Facebook photos, etc.
- Fee-based access to online newspapers
- General growing public awareness of how copyright affects everyone's daily life

There is a growing a public interest in and awareness of copyright issues as more people become aware of digital rights management, content creator concerns, piracy, and so on and how it all affects them personally. Individuals are even waking up to concerns about the ownership of their own material on Facebook, LiveJournal and other blogs and social media sites.

The backlash of the consumer against the middleman can be seen in the very public debate on the Amazon-Macmillan kerfuffle in 2012, where Amazon pulled all of Macmillan's print material from its site in an effort to force it to agree to Amazon's terms on e-book pricing. The ill will generated drove many Macmillan customers and loyal followers of Macmillan author blogs to take their business elsewhere. The Internet in this case was the 400-pound gorilla that Amazon ignored at its peril – fans of Macmillan imprints and authors and followers of their blogs found out what was going on and the news spread like wildfire. But they tried to do the same thing again with Hachette imprints last year.

Google's another part of this new interest in copyright issues – from Google Books to Google-mapping, the company's actions impinge on public copyright and privacy concerns in a wide range of ways. Siva Vaidyanathan is one of the more vocal critics of Google's increasing global reach, and his book *The Googleization of Everything* is worth a read.

Everywhere there is a growing awareness of how copyright impinges on everyday life. Librarians should make sure their voices are heard as parties with a long history of balancing creator and commons rights and advocates for the wide-reaching benefits of fair use. It's an exciting time to be involved with copyright.

Review

- Copyright Act of 1976, Sections 107 & 110.
- Anything fixed in a tangible form may be copyrighted.
- Rights of the copyright holder.
- Works before 1923 are in the public domain.
- Four factors of Fair Use.
- Special allowances for teaching, libraries, and other non-profit display and performance.

To review, here are the things you really need to know about the general topic of copyright

General Copyright Resources

General resources

- Columbia's Copyright Advisory Office: http://copyright.columbia.edu/copyright/copyright-in-general/
- Georgia Harper's Copyright Crash Course: http://copyright.lib.utexas.edu/index.html
- ALA's Office for Information Technology Policy, Copyright Advisory Network: http://www.librarycopyright.net/
- US Copyright Office: http://copyright.gov

ALA CAN not active right now as a place to ask questions but still has a wiki and list of resources, and the old forum posts are frequently still valid

General Copyright Resources

Blogs to follow:

- Molly Kleinman: http://mollykleinman.com/
- Kevin Smith: http://blogs.library.duke.edu/scholcomm/
- William Patry: http://williampatry.blogspot.com/
- Copyright Matters: Digitization and Public Access: http://blogs.loc.gov/copyrightdigitization/

Contact Information

- Janet Brennan Croft
- janet.b.croft@rutgers.edu
- https://rutgers.academia.edu/JanetCroft