COPYRIGHT CHALLENGES IN HIGHER EDUCATION

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Innovations in technology and the pressures of globalization challenge traditional concepts of copyright law. Laws change with changing times, however, and copyright law is evolving to meet the needs of the emerging information economy. It is essential for those who use copyrighted works in academic institutions to understand not only the essentials of copyright law but also the fundamental principles upon which the copyright system is founded.

Copyright law is part of intellectual property law, which governs rights in ideas or information. The four areas of intellectual property protection are distinct but related and include patent, copyright, trademark/trade dress, and trade secret. Tangible property has long been recognized by human society as something worthy of protection. The Fifth Amendment to the United States Constitution prohibits the taking of private property without just compensation. Common law, civil law, and criminal law each protect private property from interference or taking by others. Ideas or information, on the other hand, are less tangible and protections evolved more slowly.

One economic justification for intellectual property law is to ensure that the consumer has a variety of intellectual goods to choose from at the lowest possible price. By giving individuals and businesses property rights in information, along with an opportunity to profit from this information, the law provides the needed economic incentive to produce intellectual goods. With property rights as an incentive, producers of information may realize the value of the information to the marketplace.

The Supreme Court has recognized, however, that this monetary incentive may have a detrimental effect on society. "The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff." Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd. 545 U.S. 913-928 (2005). Without a legal monopoly for information holders not enough intellectual goods will be produced; with a legal monopoly consumers will use too little of the information. Unlike real property, which is subject to overuse and depletion, information is indivisible and an unlimited number of consumers can use it without depleting it. The property rights of intellectual property conflict with the social benefits of information indivisibility. As information technologies advance and evolve to an extent no one could foresee, intellectual property law must continually question which works to protect, to what extent, and for how long.

The origins of our present copyright law can be traced back to the eighteenth century. The primary copyright law in the United States today is a federal statute codified in Title 17 of the United States Code. Congress derives its authority for enacting this law from an express grant of power in the United States Constitution:

> The Congress shall have 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.

U.S. Const. art. I, § 8, cl. 8. Patents and copyrights.

One purpose of the Copyright Act, as reflected in Article I, is to motivate the creative activity of authors and inventors with the exclusive right to their works. After this period of exclusive control has expired, the public has access to the creative genius of those who came before them, which will hopefully inspire more creative activity.

Copyright laws protect "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). The Copyright Act gives five fundamental rights to copyright owners: exclusive rights of reproduction, adaptation, publication, performance, and display. These rights are a legal monopoly and subject to only limited exceptions. The five major exceptions applicable to academia are fair use, face-to-face teaching activities, first-sale doctrine, transmitting materials in distance education, and library copying, and are discussed further below.

If no exception applies, one must obtain permission from the copyright owner to copy, adapt, publish or distribute, perform, or display the work in any forum for any purpose in order to avoid copyright infringement. For example, academic institutions often secure licenses to online works for use by faculty and students. Further information on how to obtain permission is found at the websites discussed in the annotated bibliography below. Penalties under the law for infringement may include civil statutory damages (up to $150,000 for each separate willful infringement) and criminal action. Faculty, staff, and students of academic institutions may also find themselves subject to administrative and/or disciplinary action by the institution itself.

Almost any form of captured information falls within the scope of copyright laws. This includes, but is not limited to, literary works, paintings, architectural drawings, photographs, sculpture, plays, ballets, music, sound recordings, movies, electronic media, web pages, software, and even graffiti. Note that copyright protection goes to the expression of an idea; the idea itself is free to the public except where protected by patent. Also generally not covered are facts; words and short phrases, such as slogans; plans, methods, or systems; blank forms; works containing information that is common property or in the public domain, such as height and weight charts, calendars, and works published in the United States before 1923; and works of the United States Government.

Federal copyright is automatic and attaches from the moment the work is first fixed in a tangible medium of expression. Publication of the work is not required for copyright protection. Registration with the United States Copyright Office is also not a condition of copyright protection, although there are practical and legal benefits to registration, and it is required to file a lawsuit for copyright infringement. In 1989, the Berne Convention Implementation Act eliminated the requirement for the familiar copyright notice, ©, to appear on publicly distributed copies of a work as a condition for protection, although there are practical benefits to giving notice.

Copyright protection generally lasts for the life of the author plus 70 years. Works published between 1923 and 1978 are protected for 95 years from the date of publication if all copyright requirements were followed. After the period of copyright protection expires, the work falls into the public domain and may be used by others without permission or infringement.

Fair Use Exception of 17 U.S.C. § 107. Section 107 codifies a traditional privilege of other authors to fair use of an earlier author's work. Fair use is a question of both law and fact and requires a case-by-case analysis of four factors: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107.

Face-to-Face Teaching Activities Exception of 17 U.S.C. § 110(1). This exception permits displaying or performing copyrighted works during face-to-face teaching activities without the author's permission. Section 110 also requires use of a lawfully-made copy in the case of motion pictures or other audiovisual works. The exception does not extend to other rights of copyright protection, such as copying or distributing a work.

First-Sale Doctrine of 17 U.S.C. § 109. Copyright law distinguishes between ownership of the copyright and ownership of a copy of the copyrighted work. The first-sale doctrine provides that the owner of a legally-obtained copy of a copyrighted work may dispose of that copy (give away, lend, rent, sell, or throw away) without the copyright owner's permission. The copyright owner still retains all other rights, such as copying, to the copyrighted work itself. There are limitations on first sale rights in sound recordings and computer programs. For example, many copyright owners of computer software avoid "first sale" issues by characterizing the transaction not as a sale but a license.

Distance Education Exception of the 2002 Technology, Education, and Copyright Harmonization Act (TEACH Act). This Act expanded a provision for distance learning found in 17 U.S.C. § 110(2) and applies to transmissions during a class session of a "nondramatic literary or musical work" and "reasonable and limited portions of any other work." 17 U.S.C. § 110(2). To fall within this exception, one must meet its requirements including those regarding the performance or display, technological restraints, and notice. The Act's protections against infringement do not extend to uploading material for use outside the class sessions, material marketed as distance education coursework, or material that was obtained illegally.

Library and archive exception of 17 U.S.C. § 108. Copyright law permits libraries and archives to make and distribute copies of copyrighted works for several purposes, subject to strict conditions.

As faculty, staff, and students learn to use new technologies such as file-sharing, digitization, and the internet, they must also consider the requirements of copyright law and the risk they put the institution and themselves if they ignore those requirements. Does one commit copyright infringement when uploading/downloading music, movies, photographs, video games,

software, even if for educational purposes? What about electronic course packs where faculty post copyrighted materials to a central website portal or academic department or library network for access by students? The five exceptions discussed above do not apply to all academic uses of copyrighted works. Where no exception applies, even those in higher education must obtain permission from the copyright owner.

Annotated Bibliography:

Bielefield, Arlene, and Lawrence Cheeseman. Technology and Copyright Law: A Guidebook for the Library, Research, and Teaching Profession. 2nd ed. New York: Neal-Schuman, 2007.

Invaluable as both a copyright primer and reference resource for libraries and those in the research and teaching professions. Focusing mainly on United States copyright law, this book traces the history of copyright from early days to present state and federal law. In-depth discussion of fair use and its application to libraries and education. Each chapter highlights the changes in the law since the first edition.

The Board of Trustees of the Leland Stanford Junior University. Stanford Copyright & Fair Use Center, *at* http://fairuse.stanford.edu/. Stanford University Libraries, 2005 (last visited Aug. 3, 2007).

This web site is comprehensive and provides internet users with links to a detailed copyright and fair use overview; primary materials; current legislation and court cases; other related web sites (e.g., government agencies, journals and collections, blogs); key copyright sites; and resources for librarians. An excellent place to start for anyone who is doing research on copyright as it pertains to academic institutions.

Bruwelheide, Janis H. The Copyright Primer for Librarians and Educators. 2nd ed. Chicago: American Library Association, 1995.

Provides readers with concise overview of current copyright law especially as it relates to librarians and educators. Question and answer format. Sections include discussion and commentary on recent developments and emerging technologies such as digitization, the internet, computer software and databases, and distance education.

Cohen, Julie E., et al. Copyright in a Global Information Economy. 2nd ed. New York: Aspen, 2006.

Textbook covers the full range of copyright law from its historical context, the subject matter of copyright law, to copyright scope and enforcement. The authors place emphasis on the evolving nature of copyright and copyright law in response to technological change and globalization.

Crews, Kenneth. Copyright Law for Librarians and Educators: Creative Strategies and Practical Solutions. 2nd ed. Chicago: American Library Association, 2005.

Book covers broad spectrum of current copyright law. Provides the reader with basic copyright concepts and principles and discusses the rights of ownership. Focus is on the four factors of fair use and how they apply to education and libraries. Special features include discussions on music

and copyright; The Digital Millennium Copyright Act; copyright, archives, and unpublished materials; and permission from copyright owners. Useful appendices contain a guide to additional resources, selected provisions of the U.S. Copyright Act, a checklist for fair use, a checklist for the TEACH Act, and a table of court cases.

Indiana University – Purdue University. Copyright Management Center, *at* http://copyright.iupui.edu/. Indianapolis: Indiana University – Purdue University, 2006 (last visited Aug 3, 2007).

Invaluable website with detailed information on basic copyright laws and principles, fair use issues including a fair use checklist, permissions information, and copyright ownership. Also includes links to other related sources such as legal resources, other university copyright web sites, distance education materials, library issues, and frequently asked questions. An excellent place to start for anyone who is doing research on copyright and fair use.

Lessig, Lawrence. Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity. New York: The Penguin Press, 2004, *available at* http://free-culture.org/freecontent/.

New technologies often lead to new laws or changes in existing laws. Professor Lessig discusses the changes brought about by the internet and its "effect upon how culture is made" (p. 7). The result is an imbalance in our culture brought about by extreme intellectual property rights, regulation of creativity, and a shrinking domain of public ideas.

Merges, Robert P., Peter S. Menell, and Mark A. Lemley. Intellectual Property in the New Technological Age. 4th ed. New York: Aspen, 2006.

Legal textbook covers both traditional protections for and new issues of intellectual property, including trade secret protection, patent law, copyright law, trademark law, state and federal law and protections, computer software, and an overview of the intersection of intellectual property and antitrust law. Integrated into the authors' discussion of each subject area are court cases to provide further illustration and explanation.

United States. United States Copyright Office Website, *at* http://www.copyright.gov/ (last visited Aug 3, 2007).

United States Government web site offers basic copyright information with links to areas on copyright, copyright records, publications, licensing, preregistration, how to register a work, how to record a document, law and policy, and related links to such subjects as patents and trademarks.

Additional Resources:

U.S. Const. art. I, § 8, cl. 8; amend. V.

The Copyright Act of 1976 as amended, Pub. L. No. 94-553 (codified as amended in scattered sections of 17 U.S.C.).

Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (Oct. 31, 1988), effective March 1, 1989.

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