Copyright in Libraries: 21st Century Challenges...and Opportunities

James S. Heller
William & Mary Law School, heller@wm.edu
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James S. Heller
The College of William & Mary

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ARTICLE I, SECTION 8

Congress may "promote the progress of science and the useful arts by securing for a limited time to authors and inventors the exclusive right to their writings."
Copyrightable Works

- Articles, books, plays, music, art, film, sound recording, architectural works, software
- Original & fixed in a tangible medium of expression
- Not ideas, procedures, processes, systems ...
Foreign Authors & Foreign Works

– Author from, or a work first published, in a UCC or Berne country
– Country where published protects U.S. authors
– Works published by U.N. or the O.A.S.
Works in the Public Domain

– Never copyrighted
– Copyright expired
– Works of the U.S. government
– Facts

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<th>Economic Indicators</th>
<th>2020Q1</th>
<th>2020Q2</th>
<th>2020Q3</th>
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<td>Disposable income (in USD)</td>
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<td>11.84</td>
<td>11.62</td>
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<td>GDP per capita (in USD)</td>
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<td>Real GDP growth (%)</td>
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<td>1.13</td>
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<td>CPI inflation (%, December over December)</td>
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<td>Exchange rate (US$/USD, average)</td>
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<td>General government fiscal balance (% of GDP)</td>
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<td>19.2</td>
<td>18.3</td>
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<td>General government revenue (% of GDP)</td>
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<td>Current account balance (% of GDP)</td>
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<td>External debt outstanding (USD)</td>
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</table>

Homer
The Odyssey
Translated by Robert Fagles
Introduction and Notes by Bernard Knox
The Copyright Owner's Rights

- Copy
- Make derivative works
- Publicly perform, distribute, & display

- Works of visual art: Attribution and Integrity (Moral Rights)

SECTION 106
Term of Copyright

- Individual or Joint authors, and works created in 1978 or later: life of the author + 70 years

- Anonymous or corporate authors, or works made for hire: 95 years after publication or 120 years after creation, whichever expires first
Who Owns the Copyright?

- Default: the author
- Employer if a “work made for hire”
- Transfer of rights must be in writing
  - May transfer all or just some rights

SECTION 108(f)(i)
What remedies does a copyright owner have against an infringer and who is liable?
Damages

• Actual damages and profits, or
• Statutory damages
  • $750 to $30,000 per infringement
  • willful infringement: $150,000
  • innocent infringer: $200
• No statutory damages if --
  • Employee or agent of nonprofit educational institution, library, or archives
  • Acting with scope of employment, and
  • Reasonable belief the use was fair

SECTION 504
Institutional Liability

Vicarious Liability:
- right to supervise
- financial benefit

Contributory Infringement:
- knowledge
- induce, cause, or materially contribute
The Georgia State University Case


E-reserves for educational use
Fair Use

Favored Uses from the Preamble:

- Criticism
- Comment
- News reporting
- Teaching
  - includes multiple classroom copies
- Scholarship
- Research

SECTION 107
Four Fair Use Factors

- Purpose and character of the use
- Nature of the copyrighted work
- Amount and substantiality used
- Effect on potential market or value

(Non-publication doesn’t bar fair use)
E-Reserve Fair Use Guidelines

• Articles or book chapters OK; not entire books or journal issues
• not substitute for a coursepack – instead supplemental to overall reading
• Access for instructors and students during semester
• Include attribution & copyright notice
• Teacher or library has lawful copy of uploaded content
E-Reserve – Use Links

• If a work is available online, LINK TO IT instead of uploading the file
• Linking is not copying
• Don’t link to suspect sites
• Uploading content from subscription databases may violate license agreement
Google Books
and the
HathiTrust Digital Library
HathiTrust Litigation

• Copyright infringement suit
• 10M digital volumes and 5M titles (75% still protected by copyright
• Universities’ arrangement with Google
  – Public domain works available
  – Copyright works require owner’s permission
• Case dismissed
Copyright and Licensing
First Sale Doctrine

Owner may sell or otherwise dispose of a lawful copy

BUT . . . Licensed Digital Content

SECTION 109
19th and 20th Century Legal Publishers

1837 - Little Brown
1842 - Baker, Voorhies (absorbed by Lawyers’ Coop. in 1940)
1857 - Bancroft Whitney
1863 - Callaghan and Company
1868 - Martindale-Hubbell
1873 - Shepard’s Company
1876 - West Publishing
1882 - Lawyers’ Cooperative
1887 - Edward Thompson Company (acquired by West in 1960’s)
1887 - Matthew Bender and Company
1887 - Anderson Publishing Company
1897 - Michie Company
1900 - American Law Book Company (absorbed by West in 1960’s)
1913 - Commerce Clearing House
1916 - Clark Boardman
1932 - Banks-Baldwin (began as Gould & Banks in 1804)
1933 - Bureau of National Affairs
1933 - Practising Law Institute
1935 - Research Institute of America
1961 - Warren, Gorham & Lamont
1973 - Prentice Hall Law & Business
ThomsonReuters in 2013

• Callaghan & Company
• Clark Boardman
• Warren, Gorham & Lamont
• Lawyers Cooperative
• Research Institute of America
• Maxwell Macmillan
• Shepard's (treatises only)
• West Publishing Company
• Banks-Baldwin
• Barclays
• Glasser Legal Works
• Foundation Press
• Federal Publications
• FindLaw
• Harrison Company
• Andrews Publications
Reed Elsevier in 2013

- Congressional Information Service
- R. R. Bowker
- University Publications of America
- Martindale Hubbell
- Butterworths
- Michie
- Martindale-Hubbell
- Shepard's
- Matthew Bender
- LexisNexis
- Mealey's Publications
- Courtlink
- Anderson Publishing
- Gould Publications
Wolters Kluwer in 2013

- Aspen Law & Business
- Commerce Clearing House
- Little, Brown
- Prentice Hall Law & Business
- Wiley Law Publications
- Panel Publishers
- Loislaw.com
- Bowne Publishing
- Casenotes Publishing Company
Legal Publishing in 2013

1837 - Little Brown > Wolters Kluwer
1842 - Baker, Voorhies > Lawyers Cooperative > Thomson Reuters
1857 - Bancroft Whitney > Thomson Reuters
1863 - Callaghan and Company > Thomson Reuters
1868 - Martindale-Hubbell > Reed Elsevier
1873 - Shepard's Company > Thomson Reuters (books) & Reed Elsevier (citator)
1876 - West Publishing > Thomson Reuters
1882 - Lawyers’ Cooperative > Thomson Reuters
1887 - Edward Thompson Company > West > Thomson Reuters
1887 - Matthew Bender and Company > Reed Elsevier
1887 - Anderson Publishing Company > Reed Elsevier
1897 - Michie Company > Reed Elsevier
1900 - American Law Book Company > West > Thomson Reuters
1913 - Commerce Clearing House > Wolters Kluwer
1916 - Clark Boardman > Thomson Reuters
1932 - Banks-Baldwin > Thomson Reuters
1933 - Bureau of National Affairs > Bloomberg
1933 - Practising Law Institute (Regents of the State of New York)
1935 - Research Institute of America > Thomson Reuters
1961 - Warren, Gorham & Lamont > Thomson Reuters
Online Legal Publishers

- **1973** - Lexis (began as Mead Data Central’s OBAR in 1971)
- **1975** - Westlaw
- **1985** - VersusLaw
- **1987** - Loislaw
- **1996** - Findlaw
- **1999** - Casemaker
- **1999** - Fastcase
- **2009** - BloombergLaw

- **1992** - SSRN (began as FEN – Financial Economics Network)
- **1999** - bepress
- **2000** - HeinOnline (Wm. S. Hein & Co. began 1961)
Problem License *(Contract)* Clauses

- Automatic renewal
- Indemnification
- Liquidated damages
- Unilateral modification by vendor
- Binding arbitration
- Licensee pays attorney's fees
- Confidentiality (non-disclosure) clauses
The Good License

- Read the contract
- Permanent or temporary access
- No barriers to authorized users
- Preserve Copyright Act rights
- Respect user’s privacy and confidentiality
- Hold-harmless clause
- Read the contract again
The Library Exemption

A library or employee acting within the scope of employment:

• one copy
• no direct or indirect commercial advantage
• open collection (interlibrary loan OK)
• copyright notice
  • from the copy reproduced, or
• legend

SECTION 108(a)
Copyright in the For-Profit Workplace
Articles, Excerpts & Books

• Single copy
• Becomes user’s property
• No notice of impermissible purpose
• Display copyright warning
  • Where orders are accepted & on order form

• Entire Book or Journal issue: if cannot get a new or used copy at a reasonable price

SECTION 108
The Library Exemption

Not --

- related or concerted copying
  • multiple copies
  • same material
- systematic copying
  • single or multiple copies
  • same or different material

SECTION 108(g)
Creating a custom database of articles and other items from a licensed database for use on the library’s intranet
Content on the World Wide Web
Taking photos of artwork you own and posting on the institution’s webpage
The Performance and Display Teaching Exemption: §110(1)

- Lawfully made copyrighted works for instruction
- Non-profit educational institution
- Face-to-face teaching:
  - in a classroom or similar place devoted to instruction
  - in the course of “teaching activities”
  - by students or instructors
The TEACH Act: §110(2)

Perform, Display, or Transmit copyright works for distance education:

- Under instructor’s direction or supervision
- “Systematic mediated instructional activities”
- “Directly related and of material assistance to the teaching”
- Enrolled students
- Nondramatic literary or musical works and “limited portions” of other works (e.g., films)
- Not distance education digital works
- What teacher would show in a face-to-face classroom
- Students may only view -- not download
Entire performances of nondramatic literary and musical works (music, news, concerts, poem recitations, speeches)

Reasonable and limited parts of a dramatic literary (plays, opera), musical (musicals), or audiovisual works (films)

Displays of other works, such as images, in amounts similar to typical displays in face-to-face teaching

"...the fair use doctrine is technologically neutral and applies to activities in the digital environment; and the lack of established guidelines for any particular use does not mean that fair use is inapplicable." (Copyright Office report, 1999). Meaning: the TEACH Act does not trump “fair use”.

“What constitutes a ‘reasonable and limited’ portion should take into account both the nature of the market for that type of work and the pedagogical purposes of the performance.” (Senate report, 2001)

“Fair use is a critical part of the distance education landscape. Not only instructional performances and displays, but also other educational uses of works, such as the provision of supplementary materials or student downloading of course materials, will continue to be subject to the fair use doctrine. Fair Use could apply as well to instructional transmissions not covered by . . . 110(2) Thus, for example, the performance of more than a limited portion of a dramatic work in a distance education program might qualify as fair use in appropriate circumstances.” (Senate report, 2001)

In addition, the Congressional Research Service in a 2006 report of the TEACH Act states that “Although what constitutes a reasonable and limited portion of a work is not defined in the statute, the legislative history . . . suggests that determining what amount is permissible should take into account the nature of the market for that type of work and the instructional purposes of the performance. For example: [showing] . . . an entire film may . . . constitute a reasonable and limited demonstration if the film’s entire viewing is exceedingly relevant toward achieving an educational goal; however, the likelihood of an entire film portrayal being reasonable and limited may be rare.” (CRS study 2006)

NOTE: Fair Use may authorize the digital copying of materials in some situations where the TEACH Act does not.
Guidance from Publishers

- Happy to give you advice
- Beware of bias favoring copyright owners, including statements at odds with agreed-upon guidelines or the law
ARL Code of Best Practices

CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES

JANUARY 2012
title: 高校与研究型图书馆关于合理使用的最佳实践规范

author: 研究图书馆协会；美利坚大学传媒学院社会媒体中心；美利坚大学华盛顿法学院信息公正与知识产权项目

date.issued: 2012-1

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- **The freedom to study the work and apply the information**: The licensee must be allowed to examine the work and to use the knowledge gained from the work in any way. The license may not, for example, restrict "reverse engineering".

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- **The freedom to distribute derivative works**: In order to give everyone the ability to improve upon a work, the license must not limit the freedom to distribute a modified version (or, for physical works, a work somehow derived from the original), regardless of the intent and purpose of such modifications. However, some restrictions may be applied to protect these essential freedoms or the attribution of authors.

The license places two key restrictions on those freedoms:

- **No DRM or TPM**: You must not restrict access to the work using technical measures, or otherwise attempt to impose limitations on the freedoms above.

- **Attribution**: You must give proper attribution to the author and retain the license notice.

## Versions of the license

- 3.0
- 2.6
Some Useful Websites

American Library Association: http://www.ala.org
Association of Research Libraries: http://www.arl.org
Copyright Clearance Center: http://www.copyright.com
Creative Commons: http://creativecommons.org/
Columbia Copyright Advisory Office: http://copyright.columbia.edu
Stanford Copyright & Fair Use: http://fairuse.stanford.edu
Copyright Office Circulars: http://www.copyright.gov/circs/
University of Texas - Copyright and the University Community: http://www.utsystem.edu/ogc

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