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The copyright self-help movement

Initiatives in the library community

Copyright uncertainty is a fact of life on most American campuses today. Emerging information technologies offer users new ways to make use of and share copyrighted content while spurring questions about the legality of these new uses. Powerful content providers seed fear of infringement suits, prompting users to seek, and often pay for, permissions whether necessary or not. Users with knowledge of copyright exceptions may lack confidence in their judgment, hesitating to exercise their legitimate rights under the law. Even those ready to apply Fair Use in their daily practices may prefer adherence to arbitrary but familiar numerical "guidelines" rather than puzzle through a four factors analysis.

As leading providers of campus copyright support, librarians understand the costs that copyright uncertainty can impose on their communities. Disregard for copyright may put the institution at risk of costly and embarrassing legal action. Conversely, cautious risk management approaches aimed at avoiding litigation may add administrative expenses to the institution in the form of unnecessary licensing fees and time-consuming permissions seeking. Of equal concern are the costs to scholarship and teaching that "hyper compliance" introduces. Unwarranted constraints on the use of copyrighted materials may compromise the quality of teaching or research, curtail library services and cultural programming, and thwart innovation by scholars and students. A climate of copyright uncertainty undermines an essential part of the campus mission: the production, dissemination, management, and preservation of knowledge and culture.

Librarians also recognize that copyright education is not enough, on its own, to remove all of the ambiguities intrinsic in the law. Enhancing constituents' understanding of copyright does not necessarily lead them to exercise their options with clarity and wisdom. What is needed in addition is a mechanism to raise their comfort-level and confidence, empowering them to assert their rights under the law. It is for this purpose that the self-help movement has emerged as an important element of campus copyright support.

The term *copyright self-help* refers to deliberate actions by either copyright owners or users to assert their rights under the existing copyright system. Self-help works outside the legislative and judicial process, yet remains compliant with the law. Law professor Ben Depoorter, writing in *Technology and Uncertainty: The Shaping Effect on Copyright Law,* explains that copyright uncertainty can "lead to a greater reliance on self-help efforts by content providers and users" who, in pursuit of their objec-

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tives, can not wait for "judicially or legislatively established certainty."[1]

In the library context, the *self-help* concept refers to collective actions by practitioners to maximize the balancing features in American copyright law. These features include the various limitations to owner's rights and the provision for a public domain. Copyright self-help complements scholarly communication initiatives that help campus authors retain the rights to reuse and share their own publications. In combination, both types of collective community action serve to maximize allowable uses of copyrighted materials (or identify public domain materials) in order to fuel scholarship, innovation, education, and culture. However, scholarly communication approaches generally work on the "supply side" of the copyrighted corpus to open up content available for scholarship and education, as exemplified by SPARC's "Author Rights" campaign and ARL's "Author Rights in Content Licenses Working Group."[2] By contrast, copyright-self help works on the "demand side," helping communities of practice collectively exercise their rights to leverage the corpus in ways deemed reasonable by their own members.

Currently, there are three established activities within the library community that can be characterized as self-help initiatives. The purpose, history, status, and future prospects of each initiative are reviewed below.

Code of best practices in fair use

The "Best Practices in Fair Use" initiative helps practitioners expand their Fair Use rights to use copyrighted content without permission or payment. It is particularly geared for communities with an educational, cultural, or scholarly mission where the first factor—purpose and character of the use —weighs heavily in favor of fair use. Two keystone principles of the "Best Practices in Fair Use" approach are:[3]

1. That courts have tended to defer to community standards of reasonable practice when they are clear and well documented

2. That recent court cases have signaled a more expansive view of Fair Use through the concept of "transformativeness" when copyrighted content is reused, remixed, or recontextualized in ways not intended by the original creator

At the heart of the "Best Practices in Fair Use" initiative are the codes themselves: "consensus statements of what kinds of unlicensed use of copyrighted materials are necessary and reasonable" for the work of a particular community of practice.[4] To date, nine codes have been developed in disciplines from media studies publishing to dance. This work has progressed under the guidance of two scholars from American University: law professor Peter Jaszi, director of the Program on Information Justice and Intellectual Property, and communications professor Patricia Aufderheide, director of the Center for Social Media.

Development of each code starts with research into community practices and concludes with drafting a document that is ultimately endorsed by the community. Within the library community two codes are now under development. In Fall 2007, the ALA Video Roundtable established the Best Practices for Fair Use and Video Working Group to discuss and devise "a statement by and for librarians reaffirming the application of the fair use doctrine to the educational use of video collections." Progress of this group continues during and between ALA conferences.[5] More recently, the Association of Research Libraries (ARL) began to develop a *Code of Best Practices in Fair Use for Academic and Research Libraries,* thanks to funding from the Andrew W. Mellon Foundation. Project leaders from ARL and American University are working with librarians across the United States to identify areas of consensus within several key areas of library practice: support for teaching and learning; support for scholarship; preservation; exhibition and public outreach; and serving disabled communi-

ties. Phase One of the project, involving interviews with practicing librarians, culminated in publication of the report *Fair Use Challenges in Academic and Research Libraries*.[6]

Phase Two, involving confidential discussions with librarians from a variety of institutions and functional areas, continues until September 2011. As a participant in one focus group, I observed that areas of consensus did emerge through the at-times heated discussion of scenarios and what-if's. Project leaders did not seek to resolve the points of divergence among the dozen librarians in our session. Rather, they focused on practices which all participants agreed were clear-cut examples of fair use in the library context.

The Code of Best Practices in Fair Use for Academic and Research Libraries will be released in early 2012, followed by an implementation and outreach phase. According to ARL, "the project team is confident that a code of best practices that describes key concepts and values derived from the law and actual librarian practice will better serve research and academic librarians, and will in turn benefit the patrons and the educational institutions they serve."[7]

Well-Intentioned Practice for Putting Digitized Collections of Unpublished Materials Online

The *Well-Intentioned Practice* initiative offers library and archives professionals a "practical approach to identifying and resolving rights issues that is in line with professional and ethical standards."[8] Its ultimate aim is to significantly increase online access to unpublished materials—the raw materials of scholarship—by taking some reasonable risks on behalf of learning and research.[9]

Led by OCLC Research staff in collaboration with members of the RLG Partnership, this initiative launched with the 2010 invitational workshop "Undue Diligence: Seeking Low-risk Strategies for Making Collections of Unpublished Materials More Accessible."[10] Experts from archives, special collections, and the law convened at this event to discuss strategies for analyzing and developing acceptable risk behaviors. Their recommendations were documented in *Well-Intentioned Practice for Putting Digitized Collections of Unpublished Materials Online*.[11] This document offers guidance for selecting collections, seeking permissions, establishing policy, and working with future donors. It may also be useful in determining whether a collections is suitable for digitization. The document also offers model language for deeds of gift to ensure that future donations can be put to as many uses as possible.[12]

Leaders of the *Well-Intentioned Practice* initiative see a community of practice forming around their document. For example, members of the Triangle Research Libraries Network have developed and published their own rights strategy based on the approach.[13] Additionally, the *Well-Intentioned Practice* document has been supported or endorsed by several professional organizations, including the Art Libraries Society of North America and the ACRL Rare Books and Manuscript Section (RBMS), and has been implemented by more than a dozen library deans and directors. It will be shared with the archival community at the 2011 Society of American Archivists conference.[14]

Expanding the Public Domain with Hathi Trust's Copyright Review Management System

The Copyright Review Management System (CRMS) offers a reliable and streamlined method for reviewing works with ambiguous copyright status held in the HathiTrust digital library. The ultimate goal of this initiative is to make available online, in unrestricted fashion, as many full-text works as legally possible. At present, the project focuses on establishing the public domain status for digitized books published in the United States between 1923 and 1963. All

books ingested into the HathiTrust system are reviewed in the Copyright Review Management System and, if determined to be in the public domain, are immediately released to the public in full-text format.[15]

CRMS is included as a copyright self-help project because it relies on "library crowd sourcing" to remove copyright uncertainty. While initiated as an IMLS-funded initiative of the University of Michigan, the project involves the participation of librarians from across the HathiTrust collaborative. Partners share responsibility for submitting digitized volumes to the HathiTrust system and for providing accurate cataloging to facilitate detection of those books eligible for CRMS review.[16] Additionally, several partner institutions contribute staff time and expertise to assist with the copyright review process. In this way, CRMS serves as a community-based registry of copyright evidence available to any decision maker looking to clarify the copyright status of a U.S. published book.

As of May 1, 2011, nearly 135,000 volumes have been reviewed for copyright status in the CRMS with more than half (72,000+ volumes) determined to be in the public domain. Additionally, at the time of this writing, University of Michigan announced plans to expand their efforts to clarify the copyright status of HathiTrust books. Their new orphan works project will expedite the process for identifying works with no extant copyright owner. The library will publicize bibliographic information about the orphan works identified, "providing 'parents' the opportunity to claim them."[17]

Conclusion

The copyright self-help movement empowers librarians and their campus constituents to make day-to-day copyright decisions with greater clarity, confidence, and wisdom. As a result, our communities can become better equipped to advance their work of scholarship, teaching, learning, and innovation. In this way, copyright self-help enables libraries and the institutions they serve to fulfill the true purpose of American copyright: the sustained creation of knowledge and culture for the advancement of all society.

Notes

1. B. Depoorter, "Technology and Uncertainty: The Shaping Effect on Copyright Law," *University of Pennsylvania Law Review* 157 (June 2009): 1,831-1,868.

2. Scholarly Publishing and Academic Resources Coalition (SPARC) "Author Rights initiative," accessed May 30, 2011, www.arl.org/sparc/author/; Association of Research Libraries (ARL), Author Rights in Content Licenses Working Group, accessed May 30, 2011, http://authorrights.wordpress.com/.

3. Peter Jaszi, communication to ARL Best Practices Focus Group, January 7, 2011, San Diego, CA. ; P. Aufderheide, B. Butler and P. Jaszi, "Judges Ask: Did you transform the use?," *Fair Use in Research Libraries* (November 13, 2010), accessed May 9, 2011, www.arl.org/bm~doc/mm10fall-butler-jaszi.pdf.

4. Center For Future Civic Media, *Recut, Reframe, Recycle: An Interview With Pat Aufderheide And Peter Jaszi* (Part One), accessed May 9, 2011, civic.mit.edu/blog/henry/recut-reframe-reccle-an-interview-with-pat-aufderheide-and-peter-jaszi-part-one.

5. ALA Video Round Table, accessed May 9, 2011, vrt.ala.org/wiki/index.php?title=VRT_Best_Practices_for_Fair_Use_and_Video_Working_Group.

6. P. Adler, B. Butler, et al., *Fair Use Challenges in Academic and Research Libraries* (December 20, 2010), accessed January 14, 2011, www.arl.org/bm~doc/arl_csm_fairusereport.pdf.

7. Association of Research Libraries, "Code of Best Practices in Fair Use for Academic and Research Libraries," accessed May 9, 2011, www.arl.org/pp/ppcopyright/codefairuse/index.shtml.

8. OCLC, "Well-Intentioned Practice for Putting Digitized Collections of Unpublished

(continued on page 415)

process and something I'm still working on.

Audience building is altogether a different topic, and I won't fully address it here. Briefly, however, I noticed that while using Twitter, the more you post the more people find you and follow you. The system I described above ensures that your account will be regularly active and that people will notice you. This is akin to talking louder and more often than other people in a meeting; more people listen to you. Additionally, your RSS items/tweets/Facebook posts might not get click-throughs right away, but these clicks can accumulate over time. Tweets, indeed, automatically become searchable as they are posted, hence forming a giant pool of information, a catalog of public consciousness, if you will—as if the things you had screamed at that meeting were somehow searchable. Looking at the Twitter Feed stats, for instance, I initially recorded very few click-throughs on these items, but I later discovered that they had subsequently been used. My only explanation is that people on Twitter somehow found them while searching the platform. Twitter being used as a search engine was something new to me, but it makes sense. After all, lots of people share interesting resources on there.

Ultimately, I believe that this 2.0 marketing is beneficial to our library since it raises awareness of our collections outside the immediate Yale environment. It should be said, however, that many of our followers are Yale people and/or Yale institutional bodies. Hence, our setup also increases their awareness of local resources. Yale libraries have unique collections and raising awareness ultimately results into more "foot" traffic at our premises or electronic traffic (i.e., reference questions via e-mail).

In this social media world I once heard, "showing up is half the work," but posting frequently is also key to building an audience and attracting people to your unique resources.

Note

1. twitterfeed.com.

("The copyright..., cont. from page 407)

Materials Online," accessed May 10, 2011, www.oclc.org/research/activities/rights/practice.pdf.

9. OCLC, "Undue Diligence: Seeking Low-risk Strategies for Making Collections of Unpublished Materials More Accessible," accessed May 10, 2011, www.oclc.org/research/events/2010-03-11.htm.

10. Ibid.

11. See Note 8.

12. OCLC, "Introduce Balance in Rights Management," accessed May 10, 2011,

13. *The Triangle Research Libraries Network's Intellectual Property Rights Strategy for Digitization of Modern Manuscript Collections and Archival Record Groups,* accessed May 31, 2011, www.trln.org/IPRights.pdf

14. Society of American Archivists, "Session 204: Rights, Risk and Reality: Beyond "Undue Diligence in Rights Analysis for Digitization," accessed May 10, 2011, saa.archivists.org/Scripts/4Disapi.dll/4DCGI/events/231-Thu.html?Action=Conference_Detail&ConfID_W=231.

15. "HathiTrust Rights Status Assignment Process, Updates and Recommendations, April 12, 2010," accessed May 16, 2011, www.cdlib.org/services/collections/massdig/docs/Rights_Assignment.pdf; "CMRS Project Description," accessed May 16, 2011, hathi.vufind.lib.umich.edu/imls-national-leadership-grant-crms.

16. "US Federal Government Documents in Hathi Trust, Challenges and Opportunities," accessed May 16, 2011, www.arl.org/bm~doc/mm11sp-wilkin.pdf.

17. "MLibrary Launches Project to Identify Orphan Works," accessed May 16, 2011, www.lib.umich.edu/marketing-and-communications/news/mlibrary-launches-project-identify-orphan-works. Individual quoted is UM lead copyright officer Melissa Levine.