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Current Issues with Copyright and Higher Education: Lawsuits, Legislation, and Looking Forward

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Electronic reserves, digitization, streaming videos, and first sale were the topics of recent copyright lawsuits: respectively, Cambridge University Press v. Mark P. Becker (2012), Authors Guild Inc. v. HathiTrust (2012), the Association for Information Media v. the Regents of the University of California (2011), and Kirtsaeng v. Wiley (2013). Outcomes related to libraries are discussed in this essay, along with such amendments to the Copyright Act as the Technology, Education and Copyright Harmonization Act (TEACH Act) and the Digital Millennium Copyright Act (DMCA) and the possibility of revisions.

Keywords: copyright, digitization, electronic reserves, fair use, first sale, education, lawsuits, libraries

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For years, academic librarians have counted the numbers of interlibrary loan articles by journal, and added and removed reserve articles by the score, in order to keep their libraries on the straight and narrow regarding fair use of copyrighted material. Librarians have explained that while faculty may be able to show a film in class, they cannot show the same film to the campus unless a public performance fee has been paid. On many campuses, librarians became the answerers of all things copyright—no matter how comfortable they felt in the role that came their way by default and has grown increasingly more complex within an online environment. Now, librarians arrange for login protocols for off-campus use of their electronic resources. They explain how to use direct linking in course management systems, and they wonder what can be posted, digitized, and streamed while avoiding copyright infringement.

Historically, copyright infringement cases were between two authors or lodged against commercial entities. The Georgia State, HathiTrust, and UCLA cases were different, however, as they were filed against educational, nonprofit institutions. The full case names are Cambridge University Press, et al., v. Mark P. Becker, et al.; Authors Guild Inc., et al., v. HathiTrust, et al.; and the Association for Information Media, et al., v. the Regents of the University of California, et al. Each was important for issues involving fair use, academic libraries, and higher education.

The outcomes of the Georgia State and HathiTrust cases—along with the dismissal of the suit against UCLA—amounted to stunning affirmations of the fair use principle and its importance for libraries and educational institutions. Add Supap Kirtsaeng, d/b/a Bluechristine99, v. John Wiley & Sons, Inc. to round out the major copyright cases of recent years that were important for libraries. Along with Kirtsaeng's application of the first-sale principle to imported works, these copyright infringement cases helped clarify what academic libraries

and educators can do with copyrighted works in their collections, in electronic reserves and courseware, as digitization projects, to stream online, for keyword indexing, and to serve the visually impaired. Fair use resided at the core of the decisions.

Copyright is complex and likely to grow more so. The copyright activities of multimedia conglomerates may seem far removed from the academic arena, but their activities affect everyone involved with copyright in any manner. Copyright is pervasive; there is little it does not touch—or cannot be made to touch. Of all the intellectual property rights, it is the easiest to acquire. Consider this: virtually everything in the United States is copyrighted—at least everything in a fixed form created since 1978, excepting most government publications. Everyone is an author. Everyone has copyright in something, such as a six-year-old kid's drawing, a high-school term paper, and photographs from that trip to Pensacola. Furthermore, copyright lasts a very long time—the life of the author plus 70 years. In short, if that artistic six-year-old lives to be 99, the copyright on his refrigerator-mounted art will not expire for another 163 years. Except in parental eyes, most six-year-olds do not grow up to be the next Picasso. Regardless, his yet-to-be-born great-grandchildren can rest easy with the assurance that their rights to his efforts with the crayon will be protected.

As copyright grows more expansive in its coverage, it has also become the right of choice for corporate interests to pursue, defend, and litigate. Further, the nature of copyright is fluid; lawsuits and legislation will continue to take note of this. This article aims to provide an overview of recent legal decisions related to copyright and libraries—the Georgia State, HathiTrust, UCLA cases, and Kirtsaeng—as well as such additions to the Copyright Act as the Tech-

nology, Education and Copyright Harmonization Act (TEACH Act) and the Digital Millennium Copyright Act (DMCA) and the possibility of copyright reform. Due to the recent nature of these cases, most of the literature reviewed has been drawn from legal documents, news, and commentary. Moreover, as two of the cases may move to courts of appeal, be aware that situations described here may change at any time.

Lawsuits

Cambridge University Press, et al., v. Mark P. Becker, et al. (2012)

In April 2008, Cambridge University Press, Oxford University Press, and Sage Publications, with the support of the Association of American Publishers (AAP) and the Copyright Clearance Centers (CCC), brought suit against administrators at Georgia State University for copyright infringement over the posting of their copyrighted material in the school's electronic reserve system. Georgia State claimed the use was acceptable under fair use. The publishers objected to the use of electronic courseware and electronic library reserve systems, which involve scanning and online distribution of material. Indeed the AAP held that electronic reserves, by their very nature, were infringements of copyright law (McDermott, 2012). In addition, the publishers alleged that the administrators used electronic reserves at Georgia State to encourage faculty in the systematic infringement of their publications (Pike, 2010). The case was heard in the United States District Court, Northern District of Georgia, Atlanta Division, with Judge Orinda Evans presiding.

Although prior decisions touched on issues being litigated in the Georgia State case, those earlier cases had involved commercial entities (Pike, 2010), not nonprofit, educational ones. The publishers wanted to connect the concept of photocopied course packs to that of electronic reserves, claiming that both infringed in the same way (Smith, 2013a). While the production and selling of course packs are commercial activities, an electronic reserves system—indeed the concept of reserves—is purely educational; libraries do not profit from them. In the Georgia State case, every aspect of copying for electronic reserves was for educational use (Pike, 2010).

At stake in the Georgia State case was the definition of fair use in the digital environment. A decision for the publishers could have had severe consequences for the university, if not all universities. The publishers were not merely seeking damages; they also wanted a permanent injunction against Georgia State that would affect all copying done on campus and severely restrict what could be used in teaching (Pike, 2012; Smith, 2011). Requiring that Georgia State's administration keep extensive records, the proposed injunction would have given the publishers monitoring authority over not only Georgia State's electronic reserves, but over individual faculty member's decisions regarding documents used in the course management system as well (Albanese, 2012c; Smith, 2011). Furthermore, only 10% of any class readings could have been acquired without permissions being paid, and the Copyright Clearance Center was the only source mentioned for gaining those permissions. The possibility of such demands being granted was truly frightening to librarians and educators and was described as "disastrous," "a nightmare" (Smith, 2011) and "catastrophic" (What's at Stake?, 2011).

However, when a decision was handed down in 2012, Judge Evans essentially sided with Georgia State. While the judge found the university at fault in five specific instances, the remaining 94 claims were not considered infringements on the grounds of fair use. In her decision, described as "careful, even fastidious" (Smith, 2013a), Evans provided 350 pages of detailed analysis of the works under consideration. She evaluated the use of each work against the four factors of fair use: character of the use, which was nonprofit educational; nature of the work; amount of the work; and effect of the use on the market (*Cambridge v. Becker*, 2012). A sample of Judge Evans' reasoning follows:

As to the fourth fair use factor, effect on the market, the Court first looks to whether Professor Whitten's use of *A World of Babies* affected the market for purchasing the book as a whole. Students would not pay \$30.99 for the entire book (or \$55.99 for the hardcover version) when only 23 pages were required reading for Professor Whitten's course. Neither would a professor require students to purchase the entire book in such an instance. Therefore, the court rejects any argument that the use of the excerpt from *A World of Babies* had a negative effect on the market for purchase of the book itself (*Cambridge v. Becker*, 2012).

In addition, she made assessments of the acceptable amount of material that could be used. Although the publishers had contended that each chapter should be treated as a whole, the judge was fairly specific regarding the amount that constituted fair use: 10% of a book with fewer than 10 chapters and one chapter out of a book with more than 10 chapters (Pike, 2012).

The decision was a setback to the plans of the publishers, who had hoped to use the Georgia State case "to lay the groundwork ... to stop or dramatically limit the practice of unlicensed e-reserves

on college campuses” (Albanese, 2012c). The judge distinguished between cost savings springing from use of technology and cost savings through the avoidance of fees (Pike, 2010). Most surprising was Judge Evans’ order that the publishers pay Georgia State’s legal cost, “a sharp rebuke,” according to Albanese (Albanese, 2012c).

Cambridge University Press, Oxford University Press, and Sage Publications Inc. have elected to appeal Judge Evans’ ruling, disagreeing with her interpretations of fair use. They filed their appeal in January 2013, objecting to Evans’ failure to equate course packs with e-reserves, her evaluation of the 99 alleged infringements on a case-by-case basis rather than evaluating the overall impact, and her failure to recognize how e-reserves harmed their market, and insisting that the Guidelines of the Copyright Act of 1976 be interpreted strictly (Smith, 2013a).

Despite what appears to be a sound affirmation of fair-use rights in higher education, the appeal of the Georgia State decision suggests the role of fair use in electronic reserves will continue to be debated for years. Kevin Smith delivers a hopeful estimation that the ruling will be upheld, considering the thoroughness of the judge’s analysis and the weakness of the appeal (Smith, 2013a). Librarians should be reassured that the fair use of unlicensed material in e-reserves remains an acceptable practice (Albanese, 2012d).

Authors Guild Inc., et al., against HathiTrust, et al. (2012)

HathiTrust was an outgrowth of the Google Books Project, wherein academic libraries allowed Google to digitize books in their collections. Google provided participating libraries with copies of the digital book files, and these

copies were then added to the HathiTrust collection. Pooling the collection among the libraries generated benefits, particularly a simultaneous search interface and the ability to share storage. In September 2011, the Authors Guild filed a suit in New York Southern District Court against HathiTrust and five academic libraries, Cornell University and the presidents of the universities of Michigan, California, Wisconsin, and Indiana, involved in the project (HathiTrust Digital Library, 2013). The initial scanning, duplication of files, and mirror storage at HathiTrust involved copying books and were the grounds for infringement (Authors Guild v. HathiTrust, 2012; Crews, 2011).

In addition, the Authors Guild took issue with HathiTrust’s intention to include orphan works in the database. Orphan works are those works still under copyright for which copyright holders cannot be found. Orphan works are not commercially available and have little monetary value; this does not mean that they lack value for researchers. The Google Books Project ran afoul of orphan works in its scanning efforts, but the nonprofit institutions making up HathiTrust, in their Orphan Works Project, thought they could avoid Google’s problems, considering that their use of scanned orphan works would be noncommercial and limited to on-campus usage (Pike, 2011). Ultimately, HathiTrust elected to suspend the Orphan Works Project, leading the court to drop orphan works from the suit.

The case was heard in United States District Court, Southern District of New York, with Judge Harold Baer Jr. presiding. His decision, handed down on October 10, 2012, was a victory for HathiTrust and the principles of fair use, particularly regarding what libraries are allowed to do under fair use: making copies for preservation, mak-

ing copies for the visually impaired, retaining scans for text searching, building databases for data-mining. According to Baer, all fell within the limits of fair use (*Authors Guild v. HathiTrust*, 2012; Crews, 2012). Specifics of the decision included a clarification of whether an academic library had the right to make copies of works for use by the visually impaired, which had been unclear heretofore. Although there was no ruling on orphan works, the judge's decision that keyword indexing was not a violation will enable those works to be included in search engines. Using digital copies to create a keyword-searchable index was held to be "transformative enough to be a fair use, even ... on a large scale" (*Unlocking the Riches*, 2013). Notably, the orphan works were not singled out regarding digitization; instead the ruling applied to all books regardless of status (Grimmelmann, 2012). Being able to search digital works serves scholarship, as does storage of digital works—even when entire works are being saved. The decision cleared the path for more data-mining projects, especially in the humanities (*Unlocking the Riches*, 2013).

The HathiTrust ruling is important, and not just for HathiTrust libraries. Judge Baer analyzes fair use in such a way that it will be helpful in evaluating future digital projects (Crews, 2012). James Grimmelmann says, "...this decision is a big deal," and it "could well become a landmark in copyright" (2012).

The Authors Guild filed their appeal against the decision on November 8, 2012. The Guild holds that Judge Baer's ruling was in error on the following points: that HathiTrust's Orphan Works Project was not subject to judicial scrutiny because it had been suspended, that HathiTrust's mass digitization project with Google constituted fair use, that the Guild lacked the statutory standing to bring the suit, and

that HathiTrust's mass digitization was permissible under the section of the Copyright Law that deals with reproducing material for the blind and disabled (Albanese, 2012a).

The Association for Information Media and Equipment, et al., v. the Regents of the University of California, et al. (2011)

The California Board of Regents and the University of California at Los Angeles were sued by the Association for Information and Media Equipment (AIME) over their project involving the digital conversion of videos owned by UCLA in order to stream the videos for classroom use. The project began in 2005. UCLA initiated its film digitization project at a time when few streaming products were available. Those that were available were bound by overly complicated licensing requirements and limited in what they delivered. The actions that UCLA took seemed to be in line with the requirements of the Technology, Education, and Copyright Harmonization Act of 2002, otherwise known as the TEACH Act. The posted videos were password-protected on the university website, and copying and retention of the videos was blocked.

Fair-use practices in the physical classroom have been established over time and are understood relatively well. Distance education, however, has no classroom. The TEACH Act was Congress's attempt to bring the rights of the physical classroom to its online equivalent and to balance the prerogatives of the rights holders with exemptions for online and distance education classes that fall more closely in line with the those historically exercised in the traditional classroom. The TEACH Act de-

scribes specific actions an institution must take to be in compliance with the law. These requirements go beyond the work of the library and are related to the activities of institutional officers, technology offices, and academic instructors (Nelson, 2009). The TEACH Act includes the following requirements:

1. The institution must have a copyright policy.
2. Copyright notices must be provided to students regarding materials used in online courses.
3. Access to material must be controlled (that is, only students enrolled in a class can view material).
4. Unauthorized distribution of the material must be prevented.
5. There can be no storage of material on the system.
6. Material can only be displayed as part of a class session overseen by the instructor.
7. Material must be related to the content being taught.
8. Only governmental bodies or nonprofit and accredited educational institutions are eligible to claim rights under the TEACH Act (Nelson, 2009; TEACH Act, 2002).

In 2009, while the project was still ongoing, UCLA was approached by a vendor offering to sell streamed content. In the discussion, UCLA expressed interest in the product but mentioned their scanning practices. Shortly thereafter, they were approached by AIME regarding their alleged infringements (Dougherty, 2010). UCLA

argued that the rights of the classroom extended to online classrooms. The case came before Judge Consuelo Marshall in California's Central District (AIME v. UCLA, 2011).

AIME v. UCLA (2011) was dismissed on two grounds: first, AIME lacked the legal standing to bring the suit, and second, defendants had immunity in their roles as state officials. Because of this, no particular judgment regarding fair use can be drawn from the suit (McDermott, 2012). Despite the lack of a decision, an important point worth mentioning is Judge Marshall's assertion that she saw no difference in market effect between streaming a film and showing it in a classroom (Smith, 2012a). Also notable is the fact that the dismissal only applied to the specific defendants of the case; and while there can be no refiling of charges against UCLA, other institutions could be sued should a plaintiff with acceptable legal standing choose to do so (Smith, 2012a).

Supap Kirtsaeng, d/b/a Bluechristine99, Petitioner v. John Wiley & Sons, Inc. (2013)

The Kirtsaeng case did not deal with fair use but with another of the limitations of copyright, the first-sale doctrine. Student Supap Kirtsaeng was sued by publisher John Wiley & Sons, Inc. for his practice of buying foreign editions of Wiley textbooks and reselling them in the United States. First-sale rights allow individuals or institutions that have legally purchased copyrighted material to dispose of material however they will, whether by selling it, giving it away, throwing it away, etc. Wiley objected because Kirtsaeng sold imported editions of its works. These were less expensive editions designed for other markets. At the core of the argument was the interpreta-

tion of particular wording in the Copyright Act: “lawfully made under this title” (Copyright Act of 1976, 17 U.S.C.). Wiley argued, and lower courts agreed, that this meant the geographic area where the U.S. Copyright Act held sway and so, first sale did not apply to imported works. Found in violation of copyright by lower courts, Kirtsaeng appealed his case to the Supreme Court (*Kirtsaeng v. Wiley*, 2013). The case had the attention of the library community because of the troubling implications for libraries, among others, of that geographic interpretation:

Libraries are arguably engaged in the distribution of copyrighted works whenever they acquire materials for the collections and permit patrons to check them out. Distributions are often a core function of libraries, and many works in library collections are made outside U.S. borders. In fact, everyday life in the U.S. is rich with foreign made works that could be hamstrung by the decisions of the lower courts: American novels outsourced for printing, foreign movies on DVDs, letters mailed home from Europe, software inside an iPod or mobile phone, semiconductor code on computer chips, and even the computer programs embedded in the workings of a Honda, Toyota, Volkswagen, or other imported car. Regardless of where the copyright work originated, the constraint applied if the specific copy had been produced outside American borders (Crews, 2013).

In its decision on March 19, 2013, the Supreme Court overturned the lower court ruling and held that first sale applies to copyrighted works produced outside of the United States. Justice Breyer listed even more items that could be implicated had they supported the lower court:

... millions and millions of dollars’ worth of items with copyrighted indications of some kind in them that we import every year; libraries with 300 million books bought from foreign publishers that they

might sell, resale, or use; museums that buy Picassos that now, under our last case, receive American protection as soon as that Picasso comes to the United States, and they can’t display it without getting permission from the five heirs who are disputing ownership of the Picasso copyrights . . . (Before the Court, 2012).

With this far-reaching decision, libraries need not worry about the origins of material in their collections, nor need they limit purchasing decisions based on the where materials were physically manufactured. Note that libraries are only one of the beneficiaries of the decision; it affects the work of bookstores and museums as well as the activities of anyone who buys or sells copyrighted material. It truly has the potential to affect everyone (Crews, 2013).

Of the four legal cases presented before the courts, only *Kirtsaeng v. Wiley* (2013) has been settled. Even in relation to *Kirtsaeng*, failure in the courts may lead publishers to increase their reliance on licensing to control their publications or to lobby Congress to change laws related to international business and imports (Crews, 2013). Regarding the other lawsuits and their impact on libraries, the outcomes were positive, to varying degrees, regarding the posting of material on electronic reserves and course management systems, digitization, database building, copying for the blind and for preservation, and the online streaming of videos. Most importantly, these three instances in which academic libraries were accused of infringement were all defended and decided to be fair use (Smith, 2012a). The courts have recognized the importance of fair use in libraries and education. Commentator Kevin Smith celebrated “a pretty convincing victory in the Georgia State e-reserves case, a sweeping one in the HathiTrust case, and a tepid affirmation of fair use (probably!) in

this streamed video case” (Smith, 2012a). Andrew Albanese wrote that the “fair use decision for the HathiTrust was emphatic” (Albanese, 2012b), and Karen Coyle said, “Fair use . . . has been reaffirmed, with some eloquence, as a necessary social compact to further the creation of new knowledge” (Unlocking the Riches, 2013). The judiciary continues to treat fair use as important. As of this writing, the judges of a federal appeals court had unanimously decreed that a lower court had to consider whether Google’s scans were such before allowing class certification to a group of authors (DeSantis, 2013). Fair use, however, has long been a target of corporate interests and will continue to be so.

Legislation

A long-standing principle in United States law, fair use was articulated and codified with the Copyright Act of 1976, which, with its amendments, remains the current law of the land. Fair use in education is only one aspect of the principle. That aspect of fair use was under consideration in the Georgia State case. Although this aspect of fair use is the one most familiar to librarians, classroom teachers are not the only people who can take advantage of this limitation to copyright.

As Aufderheide and Jaszi explain in *Reclaiming Fair Use*, unlicensed access to copyrighted work encourages new creation by new creators, who “inevitably need to access culture as they add to it” (p. 17). For the public, there are two kinds of fair use: private, personal, and (pre-Internet) unmonitored use and reuse of material to make something else (Aufderheide & Jaszi, 2011). By and large, fair use has been taken for granted by the majority of its users; many are probably unaware of their rights in this matter. Individuals have a variety

of rights: personal study and research—whether by taking notes or photocopying—quoting from a work, selling or gifting purchased books and recordings, reusing facts and ideas, and recording television shows to watch later. The growth of digital culture has fueled corporate attitudes against any free use of copyrighted products, fair or otherwise, hence licensing agreements of all sorts, digital rights management software, and more (Aufderheide & Jaszi, 2011).

Copyright law in the United States has always encouraged the creation of new works by providing monopolies of limited times to authors. Article I, Section 8 of the Constitution states, “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” (Copyright Act of 1976, 17 U.S.C.). The limited time was only 14 years originally, with an option to extend for another 14 years. Authors’ interests were important, but the public interest was vital as well, hence the limitation. Unending monopolies would have failed to promote progress because science and the useful arts would have been locked down. The creation and growth of culture is a public good that requires encouragement.

Several problems exist with copyright law—problems that have been aggravated by technology and time. The Copyright Act of 1976 was an attempt to bring copyright in line with technological developments of its day, such as television, photocopiers, and recording devices. Reform was then driven by corporate interests, particularly those with large copyright holdings. Taking effect in 1978, the revised law granted longer protection for works and stronger penalties for infringement. Works were protected from the moment of their creation; there was a single longer term

for all new works; renewal was no longer a necessity; registration was no longer required; the copyright notice was no longer required (Aufderheide & Jaszi, 2011). Some of these changes may have seemed innocuous, but among their long-term effects have been the creation of orphan works and all problems related to them (McDermott, 2012). After the law took effect, no effort was necessary to acquire copyright, unlike the trademark or patent process, both of which ask the entity hoping to benefit from the rights to do considerable work. Because of the efforts of educators and libraries, however, legislators recognized the need to protect fair use and incorporated it into the law (Aufderheide & Jaszi, 2011).

As copyright has expanded, it has come to be viewed as a property right, esteemed more and more for its economic value alone. Never mind public culture; property rights are absolute. From this perspective, limitations like fair use are akin to taxes or subsidies taken from the copyright holder (Boyle, 2008). Copyrighted properties also are inheritable. Terms can be so long that control over works will likely fall into the hands of grandchildren, who may not even have been alive when the works were created. A particular problem is that heirs may choose to suppress works for any reason, including the desire to protect a forebear's image in the case of controversial material, a dislike of the work, the belief that they are the experts regarding the family member, or the feeling that somehow they are being cheated by someone. Some art historians of the author's acquaintance have dealt with just such a situation. They became the latest in a line of scholars attempting to study the work of a deceased 20th century American architect to find themselves stymied by offspring hoarding the parent's papers in a garage. It is not a climate-controlled garage either.

Excessive terms were accompanied by excessive damages ranging from \$750 to \$150,000 per work infringed. Material is under copyright longer, requiring permissions and the creating fear of infringement for longer periods of time. The potential for damages frightens most people from taking any risks involving copyrighted material, even when the material could be used fairly. The number of people facing potential lawsuits is increasing as the number of copyrighted works increases.

Since 1976, there have been legislative attempts to adjust copyright law to the digital world. The aforementioned TEACH Act was one such patch, and the Digital Millennium Copyright Act of 1998 (DMCA) another. Where the TEACH Act was an effort to expand access through fair use, however, the intent of the DMCA was to limit access. The DMCA made tampering with digital rights management software illegal and criminalized the sale of circumvention technologies (McDermott, 2012). DMCA forbade the circumvention of such copyright protections as encryption or password protection and imposed limits on what can be done with a file once it has been accessed—"the digital equivalent of barbed wire" (Boyle, 2008, p.86). While the act of copying a file may be legal according to fair use, breaking through any digital rights management technology that prevents that copying is forbidden (McDermott, 2012).

Another 1998 amendment was the Sonny Bono Copyright Extension Act, which established the copyright terms of the life of the author plus seventy years, or ninety-five years for works for hire (Copyright Extension Act, 1998). Even this is a simplification. See Cornell's web-based chart, "Copyright Term and the Public Domain in the United States," for every possible iteration of terms (Cornell Copyright Information Center, 2013).

Protecting the interests of publishers has increased at the expense of the public domain and even many authors. The point should be made that those who fight the hardest against fair use often try to garner sympathy for their cause by claiming they are only protecting authors. Cambridge, Oxford, and Sage did just that in their appeal of the Georgia State decision (Howard, 2012). Copyright holders are often corporations. Many authors sign their rights away. Some, such as academic authors facing a publish-or-perish situation, do so knowingly, valuing publication in a journal and the potential to be cited more than a monopoly on their work. This is unfortunate as “much scholarly work, work created for a social benefit and usually with costs underwritten by taxpayers, is turned over gratis into the hands of commercial entities. And those entities have proven that they will not shrink from fundamental attacks on teaching and research in order to squeeze every penny they can from that work” (Smith, 2013a).

Authors engaged in creative endeavors also have fallen into untenable situations with publishers. A current situation finds the first publisher going out of business and selling the contracts to a second publisher. The second publisher rewrites the newly purchased contracts, reserving 90% of the net sales for itself and 10% for the authors. The catch is if too few of the bartered authors agree to the new contract, the second publisher will declare bankruptcy, thus locking all the authors’ books into legal limbo and preventing the authors from reprinting, selling adaptation rights, or writing sequels to their works until the bankruptcy is resolved (Foglio & Foglio, 2013).

In addition, the whole work-for-hire concept is an issue emerging from the Copyright Act of 1976. Most works for hire are produced by employees in fulfillment

of their employment. Other works for hire may be contracted works, provided the contractor and the employer agree that the work is for hire. Oxford University Press (one of the plaintiffs against Georgia State) has begun requiring that authors contributing to their Handbooks sign a work-for-hire agreement. All rights then defer to the publisher, with none at all for the person who actually put fingers to keyboard (Shaviro, 2012). Typically, colleges and universities have not claimed work-for-hire rights over the scholarly output of their faculties, and they seem unlikely to risk inciting a faculty revolt by making such claims (Smith, 2012b). But with online instruction as a potential moneymaker, who knows what cash-strapped educational institutions may decide to try. Just this year, a school board in Maryland attempted to “claim copyright on the original creations of students as well as teachers” at an elementary school (Sainer, 2013). The hypothetical six-year-old artist is no joke.

Examples of more traditional work for hire are evidenced in Marvel Comics’ Avengers. As a group, the Avengers have appeared in comic books since 1963 with a rotating membership that expands and contracts according to the need of the story. Some of the characters pre-date the first appearance of the Avengers, a few by decades; many others have been added over the half a century of the Avengers’ existence. Some of the characters also support stand-alone series, but any and all of the characters, series, and stories could interconnect at any time. Some creators have agitated against the work-for-hire status with the publishers, but the Avengers are a corporate property. The Marvel Comics Universe, with its editors, writers, artists, colorists, letterers, inkers, gofers, and fans, was a crowdsourced creation before people knew what crowdsourcing was. With recent film productions,

add to that the work of performers, directors, special-effects artists, and filmmakers of all sorts. All of the pieces are works for hire. Who is responsible for the creation of the Avengers? Better to ask, who profits?

Looking Forward

What brings comic book superheroes into a discussion of copyright issues in higher education? The reason is that any copyright laws rewritten in the future will be written to protect the likes of the Avengers and their fellows. Librarians and educators should never forget that as important as fair use is for academics, it pales before the economic value of popular culture icons. Something like fair use is likely to be trampled to death in the rush to lock in continued exclusive rights to the world's mightiest heroes, unless someone is willing to stand up for it. Compared to the copyrighted and trademarked properties of Disney, Time Warner, and other media giants, even the products of the scholarly publishers that loom large in the academic world are rather small.

Fair use is already under assault. David Shulenberg considers the Georgia State case just such an example, "part of an undeclared war on academic fair use" (What's at Stake, 2011). The large media companies, with the most valuable copyrighted content, hold "that the very notion of private fair use disappears on the Internet" (Aufderheide & Jaszi, 2011, p.19). Expect the assaults to continue. The courts seem willing to rule for fair use, and as James Grimmelmann wrote regarding the HathiTrust decision, the year was "a very good one for universities putting copyrighted materials online for their students" (2012). However, the job of the courts is to apply the law as it exists. Laws can be changed.

Copyright law needs revision, but it needs wholesale revision, not just patchwork. The current law is not merely outdated. It has grown unbalanced, supporting certain kinds of rights while abridging others that are just as valid. The digital culture of reuse and remix has complicated matters. Take, for example, pinning, posting, liking, and sharing; in the pre-digital world, this sort of behavior caused no concern. On the open web, activities that had been private and personal have become public and could become actionable when copyrighted material is involved. There is a need to rein in "copyright laws to ensure that more of what we value doing with digital culture is legal and to expand rights to reuse and remix copyrighted works in non-commercial contexts" (Karaganis, 2013). Copyright is out of control; it does not need strengthening. As Barbara Fister says, "There is no lack of copyright. There is, in fact, far too much in the way of restrictions" (Unlocking the Riches, 2013).

Although recent attempts to address specific concepts such as orphan works failed to garner enough support for Congress to pass legislation (Albanese, 2013), there is some possibility for change in the future. Register of Copyrights Maria Pallante has urged a total revision of copyright law (Pallante, 2013a; Pallante, 2013b). One of her recommendations is a reduction in term, but she also calls for stronger enforcement (Masnick, 2013b). In addition to the Pallante's efforts, there have even been some sparks of bipartisan interest regarding copyright reform (Goodlatte, 2013).

Unfortunately, copyright-watchers fear that Pallante's interpretation of copyright too often overlooks the public good and hews too closely to that of corporate interests (Masnick, 2013b; Masnick, 2013c). She is not alone. Industry lawyers and lobbyists supply government officials with

most of their information about copyright (Smith, 2013a). Legislators on both sides of the aisle are likewise inclined to lean toward industry. Recent Congressional hearings on copyright reform illustrate problems with legislators misunderstanding the Constitution's actual words about copyright and the promotion of progress, suggesting that technology is the enemy of copyright and emphasizing the needs of certain classes of copyright holders (Masnick, 2013a).

Laws designed to strengthen the rights of copyright holders have proceeded out of Congress without much excitement since the 1970s. That is, until the Stop Online Piracy Act caused millions of agitated voters to call their representatives in protest, bringing to an abrupt end any sort of legislation to strengthen copyright. Post-SOPA, legislators seemed hesitant to do much else, the fear of constituents having had its effect, at least in 2012 (Lee, 2013). Likewise, consumer resistance to digital rights management has affected corporate behavior, but "since so much of the pressure to limit personal fair use comes from business practice, the continued resistance of consumers to limiting their personal fair use will continue to be important" (Aufderheide & Jaszi, 2011, p.19).

Cambridge University Press v. Mark P. Becker, Authors Guild Inc. v. HathiTrust, AIME v. UCLA, and Kirtsaeng v. Wiley were not the first cases about copyright limitations and copyright infringement, and they will not be the last. Coming conflicts over access to copyrighted material are just as likely to revolve around licensing, trade, and technological monitoring. K. Matthew Dames actually takes a jaundiced view of the future of copyright itself. Setting the recent court wins against the ability of licenses to override copyright, the establishment of the Digital Millennium Copyright Act, the growth of global media conglomerates,

and global standardization of U.S. copyright law by trade process, he views licensing and open access as the future battlegrounds, whether the battle comes in the courts or in Congress (2012).

Overall, what do these cases and laws mean for academic librarians? Regarding the cases, librarians can feel more at ease when it comes to creating copies for the visually impaired and for preservation as well as when posting material in courseware and electronic reserves, as long as the four elements of fair use have been applied.

The increasingly complicated copyright law has had greater impact on academic librarians. Because of it, librarians have defaulted to being the campus "de facto copyright expert[s]" (McDermott, 2012, p.11), whether trained as such or not. While some university libraries may be large enough to have a copyright librarian, most are too small for such specialization. Even in large libraries, most copyright management typically falls to the interlibrary loan staff or the reserves staff (Hansen, Cross, & Edwards, 2013). Sadly, unless they are specialists, many academic librarians can be far too passive when it comes to providing copyright information. Librarians comply with what the law requires by ensuring that signs are up and notices are affixed, and they may mount web pages that are typically a tedious collection of links and legalese. Every library need not duplicate such sites as the one belonging to the Columbia University Library Science/Information Services Copyright Advisory Office (<http://copyright.columbia.edu/copyright/>), to name a particularly useful resource for keeping up with news about copyright lawsuits and other issues. What a library should do is take into account the needs, degrees of understanding, and purposes of its users and develop their pages accordingly.

More aggressive educational efforts are needed—librarians need to learn more, and, possessed of knowledge, they need to provide more useful information to faculty and students. When faculty come to a library for an answer to a copyright question, the answer too often devolves into don't. And while don't may be the correct answer in many cases, there also may be legal options that librarians fail to explain due to either a lack of knowledge or a fear of infringement, residing as they do in what Aufderheide and Jaszi call a "culture of fear and doubt" (2011, p. 1).

It will become more necessary for librarians to explain infringement and fair use to faculty and students because both infringement and fair use are part of copyright. Being able to explain copyright law and its challenges is also important because copyright affects faculty, students, and library patrons alike, both in their use of copyrighted material and in their creation of copyrighted material. Not just users, they are makers and copyright holders themselves, and they need information to manage their work and activities in this digital world.

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