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Copyright Law: Fact or Fiction?

Janice M. Krueger, University of the Pacific
Reported by Jennifer Duncan

Because copyright law is notoriously difficult to interpret, **Janice Krueger's** program on this topic drew a large and engaged crowd. Krueger, the Electronic Resources and Serials Librarian at the University of the Pacific, became interested in copyright when her institution implemented an openURL-enabled linking service and she began to wonder what kind of implications the Digital Millenium Copyright Act (DMCA) might have for open linking. Krueger began the program with a broad overview of how the Copyright statutes of the U.S. Code (Title 17) govern many of the day to day activities of any library. The statute protects the copyright holder by providing a marketing monopoly; however, this monopoly does not extend to copies sold, and this exemption provides libraries the right to lend materials (Section 109 includes the rights of "first sale"). Krueger further distinguished between rights granted to the end-user for teaching, scholarship, and research (Fair Use as established in Section 107) and rights granted specifically to libraries (as established in Section 108). With regard to Fair Use by library users, any use of materials in copyright is subject to the test of the "four factors": purpose and character of the use (educational/research purposes vs. commercial use); the nature of the work (creative vs. facts or directory type information); amount and substantiality of the portion copied in relation to the entire work; and effect of the use on the potential market for or value of the work. Whether use of copyrighted materials is infringement is determined by examining an individual use against each of these four factors.

Libraries as institutions also have unique rights to make archival copies (including of digital works) as well as the right to make single copies for patrons, but only according to the following restrictions: The library must be a nonprofit institution that is open to the public; copies must be made on the request of a specific individual user; items to be copied must be owned by the library and included within the library's collection; any copy must become the property of the person who requested it. The library is responsible for placing copyright notices at the service points where users request copies, on any forms used to make such requests, and on the copies themselves. The principles of first sale, fair use, and library copying have governed many of the key activities of libraries and their patrons, from lending materials, to interlibrary loan, to publishing research results. However, Krueger pointed out that although libraries are rapidly transforming many of their collections and services to adapt to a digital environment, issues related to the electronic access of library materials have not been fully explored. Specifically, she asked, when libraries license rather than own materials, do the protections of sections 107, 108, and 109 apply? Regrettably, she noted that the license rather than the statues becomes the guiding document. Thus, the successful negotiation of an agreement that meets the needs of a library is absolutely critical. Two new statutes have also come into play in the digital arena: the Digital Millennium Copyright Act and the "Teach Act." The DMCA has several implications for libraries. It prohibits acts of circumvention and distribution of tools/technology for circumvention; generally outlaws code-cracking devices; limits liability of institutions or faculty using educational facilities for electronic publishing; and limits liability of Internet Service Providers (ISP) by providing a "safe harbor" under limited circumstances. Krueger discussed the fact that because libraries are now performing the role of an Internet Service Provider (ISP), they have to be wary of what patrons do with the access that is provided to them. In order to claim the "safe harbor" exemption, the library has to be *unaware* of what students and faculty are doing. The Teach Act (included as section 110(2) of Title 17) provides guidelines for the use of digital materials in distance education. Generally speaking, instructors, information technology officials, and the library must all fulfill certain requirements. Materials under copyright supplied electronically via a distance education site must be password protected, available only to enrolled students, and protected with anti-copy technology. Two useful sites for further examination are: http://www.copyright.iupui.edu/dist_learning.htm

(Kenneth Crewes) and http://www.unc.edu/~unclng/TEACH.htm. (Laura Gasaway). It is also important to keep in mind that the Teach Act only governs the use of materials specifically for a distance education class. Use of digital materials for non-distance education courses is still subject to the license agreement.

Krueger concluded the program by providing the audience with a few scenarios for discussion, which provided an opportunity for lively debate about various questions: whether adjuncts should be allowed to link from a course management system such as Blackboard to specific articles in aggregator databases; whether a link or URL is copyrightable; whether a professor was allowed to copy excerpts of documents for coursepacks; and whether libraries were allowed to charge for cost recovery of copies. Not surprisingly, opinions on whether each action was permissible were varied. Krueger made the astute observation that libraries are facing the unique situation of having our patrons coming to us wanting advice about how to proceed in this confusing new arena, but librarians are, of course, unable to give legal advice. The best we can do is to become informed and give our patrons the available information.