

SEMLOL
Annual Fall Meeting Minutes
“For Educational Purposes Only: Copyright for Libraries”
November 16, 2012
Oakland University

Introduction:

Adriene Lim, Dean of Libraries, welcomed the SEMLOL members to Oakland University. SEMLOL Chair Margaret Danowski also welcomed everyone to the Fall 2012 SEMLOL meeting.

Fall Program Presentations:

Julie Gotch, Director of Library Systems and Technical Services, Davenport University, “Copyright in the Digital Environment”

Julie Gotch introduced the topic of copyright to the group and gave an overview. She began her presentation by asking for a show of hands on who was from an academic library vs. a public library. The majority in attendance worked at academic institutions. She pointed out that she was not a lawyer, and that while faculty often ask for a yes/no answer, copyright is not black and white. She was simply sharing what she has learned.

Most of the knowledge that we want to use is current and copyrighted. The copyright owner's rights are to

- 1) Reproduce
- 2) Prepare derivative work
- 3) Distribute copies
- 4) Perform publicly
- 5) Display works

There are a few considerations to think over before using something that is copyrighted:

- 1) Is it in the public domain?
 - Check the dates
 - Did the government publish it?
- 2) Is it covered by Fair Use, TEACH Act, or a license?
- 3) If it is covered by Fair Use, do I need permission?

While it can be difficult to determine which umbrella to use (Fair Use, Public Domain, TEACH Act, Permission, License), using information from the public domain or getting permission is always the safest bet. However, getting permission can cost money and may be the most expensive way to go. Licenses can be more restrictive. Links to a database are run through an authentication system, so they are often a preferred method.

There are several tools available online to help tell if something is in the public domain:

ALA's Digital Copyright Slider
Copyright Genie

Lolly Gasaway's chart (University of North Carolina)

The TEACH Act addresses distance/online education. However, it will cover you only if you comply with requirements:

- Institutional copyright policy is adopted
- Copyright materials are regularly distributed to faculty & students
- Students are notified that the materials posted are protected by copyright and cannot be copied or distributed elsewhere
- Access is limited to enrolled students
- Steps are taken to prevent further dissemination
- Only limited amounts of analog can be converted to digital

The University of Texas has a checklist developed by Georgia Harper. This checklist can be used to determine compliance with the TEACH Act.

Fair Use Guidelines include the following concepts:

- 1) Purpose and character
 - a. Transformed? Is it new?
 - b. Was value added?
 - c. Parodies are ok; they are different enough
- 2) Nature – Factual vs. creative; non-fiction is seen as for the public good
- 3) Amount – The amount of the portion used in relation to the entire work is important. Less is better; essential is best. Use due diligence.
- 4) Effect – The monetary effect on the copyright holder. What is the effect on the potential market? Will the copyright holder lose?

When weighing Fair Use, Gotch suggests first weighing the four factors. The factor of whether or not the author will perceive that he/she is losing sales will weigh heaviest. Make sure everything is documented to show that steps were taken to determine the best route to take. While documentation may not save you from being sued, it may well save you from damages. Use Fair Use Evaluators, Checklists, and Exceptions for Instructors e-tool (see links at end).

Gotch referred to Carrie Russell's article "Understanding and Promoting Fair Use" in the September/October 2003 issue of *Public Libraries*. Russell stated that Fair Use is not a strict formula. It's really up to one's judgment, and people can disagree about the same fair use situation.

Gotch used a Disney clip on YouTube to make a point. Eric Fadden produced a video on YouTube titled "Fair(y) Use Tale" which takes clips of various Disney films to discuss copyright. Under Fair Use guidelines, this is allowable. It was transformed. It was creative. Only a small portion of each movie was used; the copyright holder did not lose monetarily.

Recent headlines such as the Authors Guild and the Association of American Publishers v. Google (AAP settled), Harry Potter *Lexicon*, and Turnitin.com were

discussed. Both the Harry Potter case and the Turnitin.com case were decided by the transformative portion of Fair Use (*Lexicon* was not transformative enough; the critiquing tool in Turnitin.com adds a further purpose, thus transforming it). The Georgia State University case reiterated many of the TEACH Act requirements. It also helped to define a “reasonable amount.” The case pointed out that entire paragraphs (versus truncated paragraphs) can be used as they make more sense. In addition, articles can be used in subsequent courses.

The problem with guidelines, as Gotch pointed out, is that they are not the law. They are simply guidelines. If it goes to court, Fair Use will be used to evaluate, not the guidelines.

In response to audience questions, Gotch clarified that the TEACH Act allows copyrighted materials to be shared as long as it was limited to enrolled students and password protected. Fair Use is more open ended and requires the institution to document and do due diligence in complying with Fair Use.

Mike Priehs, Copyright and Scholarly Communications Librarian, Wayne State University, “Establishing a Copyright Team and Building a Copyright Toolkit”

Mike Priehs from Wayne State University discussed copyright roles in academic libraries and shared a Copyright Checklist and Decision Tree created for Wayne State.

Out of the two hundred and fourteen respondents to the survey he is currently conducting on copyright, 93% stated that faculty believe that the library is expected to have the answers on copyright! (Really? Is that what 93% believe??)

When Wayne State first began their intensive copyright work, they had just done away with e-reserves and began using Blackboard, a course management system. They had two copyright specialists, and there was sparse information available online. The copyright specialists built a website with all of the information they had gathered and helped WSU become TEACH Act compliant. They expanded upon the 101-type questions to more in-depth questions.

When the University restructured, staff changed and chaos ensued. There was a loss of copyright expertise. It was time to assess and re-build. Enter the Copyright Project Team, of which Mike is the chair. This is a collaborative effort with others in the offices of Teaching & Learning and online programs. They brought new perspectives and new types of questions to the table.

The main projects completed were the new WSU Copyright website, the Fair Use Checklist, and the Decision Tree. These items should answer 80% of copyright questions. The team also created a Persistent Link Request Form. Instructors can request that a persistent link be created for an article from a database. Important to note is the copyright disclaimer found on the website (all faculty are encouraged to

include this on their syllabi) and the fact that they obtained permission from Georgia State University to borrow and adapt the Fair Use Checklist.

Future enhancements and additions are planned. Additions include incorporating the Association of Research Libraries' Code of Best Practices in Fair Use published in January 2012, as well as adding/editing the content. Enhancements include making the website and its resources compatible to iPads and iPhones and working with general counsel. The team would also like to further develop marketing and branding and create an identity. They would like to be a standalone entity, not only a part of the library.

The Wayne State copyright website is open to all. The path is:

- <http://www.lib.wayne.edu>
- Services
- Faculty/Grad Research Support
- Copyright Guidance

Mike answered questions at the end of his presentation. Audience members wanted to know how to get faculty to comply with copyright law. The answer? Get department buy-in.

After Mike's presentation, members were invited to enjoy the refreshments provided during the break.

Business Meeting:

Margaret Danowski demonstrated SEMLOL's new website (<http://www.semlol.org>) and gave kudos to Joshua Neds-Fox for his work on it. Presentations and minutes from previous meetings are in the process of being added, as well as photographs of SEMLOL member libraries. She also promoted SEMLOL's Facebook page. When we get more participants we could have discussions of upcoming or potential workshops. The SEMLOL mailing list has been updated and is being transformed into a listserv. Margaret encouraged anyone wanting on the mailing list/listserv to let her know.

Jack Bernard, Attorney, Office of the Vice President and General Counsel, The University of Michigan, "Copyright and the Modern Library: All Rights Reserved"

As an attorney, Jack Bernard provided an update on Fair Use and the implications of recent decisions.

Jack began by giving the audience a multiple choice question of the purpose of U.S. copyright law. Generally, only about 3% of those asked this question correctly guess that the purpose of copyright law is to advance public learning (incorrect answers included rewarding authors for their creative efforts, providing an economic incentive to write or publish, and providing legal remedies for infringement). The purpose of

copyright in the constitution is to promote the progress of science and useful arts. Copyright also provided unintentional results: rewarding authors, providing incentive, and providing legal remedies; these three results promoted progress.

Jack noted that copyright law codifies a constant balancing act of rights, needs, and desires among authors and copyright holders; publishers and distributors; and users and the public. He went on to say that copyright requirements state that the original work cannot be simply copied; a minimal degree of creativity must be utilized. This includes not only written works but also musical, dramatic, choreographic, pictorial, graphic, sculptural, audiovisual, and architectural. It must also be fixed in a tangible medium of expression – its embodiment is sufficiently permanent to permit it to be perceived for a period of more than transitory duration.

Works don't have to be published in order to be copyrighted. Copyright applies to email, photographs, videos, drafts, notes, texts and letters, in addition to books and articles. Copyright, Jack stated, attaches automatically upon creation. It is not necessary to include the © symbol or even register the piece of work. Simply by being created, it is copyrighted. However, registering does provide certain advantages, such as proof of copyright.

By default, the creators are the copyright holders. For example, the author of a biography holds the copyright of the work, but not the ideas. Ideas cannot be copyrighted. Exceptions to the rule regarding the copyright holder are *work for hire* (when something is created by an employee for an employer, the employer is the copyright holder, unless prior arrangements were made) and independent contractors (i.e.: student interns). When trying to track down the copyright holder to gain permission to use, begin with the author.

Copyright holders hold exclusive rights to

- Reproduction of the work in whole or in part
- Preparation of derivative works (e.g. translations, musical arrangements, dramatizations, sound recordings, and second editions)
- Distribution of copies of the work to the public by sale, gift, rental, loan or other transfer
- Public performance of the work
- Public display of the work

Copyright protection extends to all original works of authorship, including unpublished works, from the moment they are fixed in a tangible medium of expression for the life of the author plus 70 years OR 95 years for “works for hire.” Once the life of a copyrighted work has passed, it falls into the public domain. The copyright holder's rights no longer attach to the work. The work remains in public domain forever, Jack stated, unless Congress subsequently changes the rules. Works that are not copyrightable are in the public domain from the start.

It is not copyright infringement if

- You are the copyright holder
- You have express permission
- The work you are using is uncopyrightable or otherwise in the public domain
- There is a specific statutory limitation authorizing your use (e.g.: Fair Use)

Jack then noted the Fair Use Factors:

- Purpose and character of the use
 - Personal/educational/transformational v. commercial use
- Nature of the work being used
 - Factual v. creative
- Amount and substantiality of the portion used in relation to the whole
 - Small v. large, both quantitatively and qualitatively
- Effect on the market for the original
 - Not of your individual use, but of the type of use

There are three cases to consider when determining copyright:

- Association for Media and Equipment (AIME) and Ambrose Video Publishing (AVP) vs. UCLA [streaming video]
- Cambridge University Press, Oxford University Press, and Sage Publications vs. Georgia State University [e-reserves]
- Authors Guild vs. HathiTrust [digital library]

Jack included a flow chart of the Google Library Project in his PowerPoint to demonstrate the timeline of events.

Questions from the audience were taken at the end of the meeting. Points were made that libraries can make unprecedented uses of works for preservation or the visually impaired without copyright liability.

The meeting adjourned at 4:20pm.

Submitted by: Michele M. Pratt
January 22, 2013

Useful Links

ALA's Copyright Genie

<http://librarycopyright.net/resources/genie/>

ALA's Fair Use Evaluator

<http://librarycopyright.net/resources/fairuse/>

ALA's Exceptions for Instructors e-tool

<http://librarycopyright.net/resources/exemptions/>

ALA's Public Domain Slider

<http://librarycopyright.net/resources/digitalslider/>

ALA's Section 108 Spinner

<http://librarycopyright.net/resources/spinner/>

Lolly Gasaway's Public Domain Chart

<http://www.unc.edu/~unc1ng/public-d.htm>

University of Texas TEACH Act Compliance Checklist

<http://copyright.lib.utexas.edu/teachact.html>

ARL's Code of Best Practices in Fair Use

<http://www.arl.org/bm~doc/code-of-best-practices-fair-use.pdf>

Wayne State University's Decision Tree

<http://www.lib.wayne.edu/services/research/copyright/decisiontree.php>

Wayne State University's Fair Use Checklist

<http://www.lib.wayne.edu/services/research/copyright/checklist.php>

Columbia University's Fair Use Checklist

<http://copyright.columbia.edu/copyright/files/2009/10/fairusechecklist.pdf>

University of Georgia's Fair Use Checklist

<http://copyright.columbia.edu/copyright/files/2009/10/fairusechecklist.pdf>