Copyright, Licenses, Treaties…

The Law of ILL in Transition

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Interlibrary Loan in Transition

- Section 108 Revision
- Expansion of Licensing
- Open Access and Creative Commons
- E-Books and Google Books
- Georgia State University
- HathiTrust
- Treaty Negotiations in Geneva
- Threats of Lawsuits

It’s All Built on the Past

- Rights of Copyright Owners
- Transfers to Publishers
- Permissions and Fees
- Licensing of Publications
- Fair Use
- Section 108 and the Study Group
- CONTU Guidelines (1979)
- CONFU (1998)
Today's Challenge

- How best to fulfill the library mission to preserve and provide optimal access to information resources
  - Diversity of Media
  - Diversity of Technologies
  - Diversity of Legal Rights
  - Diversity of Originating Sources

In Legal Terms:

- Who Holds the Rights?
- What Rights of Use are Granted by Law?
- What Rights of Use are Granted by License?
  - Acquisition License
  - Permission and Creative Commons

The Big Picture:
Structure of the Law of Copyright

- Eligibility for Copyright Protection  Go!
- Securing Copyright Protection/Formalities  Go!
- Ownership of Copyright  Go!
- Rights of the Copyright Owner  Go!
- Duration of Copyrights  Go!
- Exceptions to the Rights of Owners  Go!
Beginning the Copyright Trail

Eligibility for Protection:
- Original Works of Authorship
- Fixed in a Tangible Medium of Expression

Securing Protection
- Automatic Protection
- No Requirement of Formalities
- Formalities Yield Some Legal Benefits

Ownership of the Copyright

Creator of the Original Work
Transfers of Copyright
- Required Formalities
- Termination of Transfers
Work Made for Hire
- Employees
- Independent Contractors
Owners as Licensors
- Permissions and Contracts
- Open Access and Creative Commons

Rights of the Copyright Owner

Fundamental Rights
- Reproduction
- Distribution
- Derivative Works
- Public Performance and Display
Recent Additions
- Moral Rights (§106A)
- Digital Transmissions of Sound Recordings
- DMCA Provisions
Duration of Copyright Protection

- Work Created During or After 1978
  - Life of Author Plus 70 Years
  - Work-For-Hire: 95 Years from Publication
    - 120 Years from Creation
- Work Published Before 1978
  - Generally Maximum of 95 Years/Since 1923
  - Possibly Short Term If No Notice or Renewal
  - Foreign Copyrights May Be Restored
- Work Created But Not Published Before 1978
  - Life of the Author Plus 70 Years
  - Effective Starting Jan 1, 2003

Exceptions to the Rights of Copyright Owners

- Section 107: Fair Use
- Section 108: Library Copying
- Section 109: First-Sale Doctrine
- Section 110: Displays and Performances
- Section 114: Transmissions of Sound Recordings
- Section 120: Architectural Works
- Section 121: Persons with Disabilities

What Are the Rights to Use Copyrighted Works?

- Section 107: Fair Use
  - Purpose of the Use
    - Education vs. Commercial
    - Transformative
  - Nature of the Work Used
  - Amount Used
  - Effect of the Use on Market or Value
- Our Story Begins with Photocopying....
Fair Use: Reality Check from the Courts

- Purpose: Commercial/NonTransformative
- Nature: Nonfiction book chapters
- Amount: 5% to 25%
- Effect: Displaces sales of textbooks

American Geophysical Union v. Texaco
- Purpose: Commercial
- Nature: Nonfiction Science Articles
- Amount: Entire Article
- Effect: Displaced Licensing Market

- Purpose: Scholarly and "Transformative"
  - Good!
- Nature: Art, but historically important
  - Bad! Wait, Maybe GOOD!
- Amount: "Thumbnail"
  - Good!
- Effect: May help market; does not compete
  - Good!

http://nokohaha.com/
The Next Case: Georgia State University

- Electronic Reserves
- Blackboard and CMS
- Books and Chapters
- Publishers as Copyright Claimants
- Fair Use for Libraries and Universities
  - Interpretation of Fair Use
  - Balancing of Factors
  - Guidelines
  - Checklist

The Next Cases: Google Books and HathiTrust

- Scanning of Millions of Books
- Access to “Snippets”
  - Or More, or Less
- Reliance on Fair Use
  - Interplay with Section 108
- Google Books: Settlement Possible
- HathiTrust: Motions files with the Court

The Threatened Case: International ILL

- Threatening Letters from Lawyers
- Legal Assertion by STM Publishers
- Response by ARL
- Some Main Points:
  - Copyright Protection for Foreign Works
  - Restrictions on Imports/Exports
  - Cases on “First Sale” of Foreign Works
  - Nevertheless: Domestic Law Applies
The International Response: WIPO and Treaties

- Initiated by Proposal from Chile in 2004
- Widened Recognition of Copyright Exceptions and Limitations
- WIPO Studies delivered in 2008
  - Including Study on Library Exceptions
- Agenda for WIPO Discussion:
  - Visually Impaired
  - Libraries
  - Education

What Are the Rights to Use Copyrighted Works?

- Section 108: Library Copying
  - Eligible Libraries
  - Preservation
  - Copying for Personal Uses
  - Interlibrary Loans
- Section 109: First Sale
  - Sales, Rental, Lending
  - Public Display

Interlibrary Loans: The CONTU Guidelines

- Commission on New Technological Uses of Copyrighted Works (1979)
- Interpreting § 108(g)(2)
  - Builds on rules for “Private Study”
  - Bar on “systematic” copying
  - Allows ILL w/o “purpose or effect” that receiving library is substituting for purchase or subscription
Interlibrary Loans: The CONTU Guidelines

“Rule of 5s”
- Not More Than 5 Copies Received in One Year
- From Single Journal Title
- Published Within Last 5 Years

Interlibrary Loans: The CONTU Guidelines

Do Not Address:
- Non-journal Publications
- Materials Older than 5 Years

The Conference on Fair Use (CONFU):
- Also Failed to Address ILL

Hitting the Ceiling

- Do you need uses beyond Fair Use?
  - Multiple Copies?
  - Whole Copies?
  - Online Delivery?
- Do you need more than Section 108?
  - Quantity limits on ILL?
  - Expansive preservation programs?
Hitting the Ceiling -- Redux

- The language of Section 108(g):
  "Provided, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work."

Hitting the Ceiling -- Redux

- What to exclude from the "Quantity"?
  - Public Domain works
  - Open Access works
  - Creative Commons works
  - Licensed works
  - Library’s copy is not Available

Hitting the Ceiling -- What to Do?

- The Ceiling:
  - A quantity that would substitute for a purchase or subscription.
  - What do your ILL requests indicate to you about demand that justifies purchase?
- Isolated wave of Requests?
- Distinct need of One User?
- Obscure publication not on the Market?
- Large demand, but Exorbitant Price?
Where Do We Go from Here?

- Get Involved
- Negotiate Licenses
- Promote Open Access Publishing
- Interpret Fair Use Fairly
- Interpret Section 108 Flexibly
- Keep All Options Open
- Involve Your Colleagues

Thank You!

www.copyright.columbia.edu

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Thank You!

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http://www.mnterritorialpioneers.org/info/stamps.htm