Libraries as Creatures of Copyright: Why Librarians Care about Intellectual Property Law and Policy

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Copyright as a balancing of interests

The roles libraries play are shaped by copyright law. Copyright in its origins and in the way it has evolved in the United States has always involved a balancing of interests. Authors and creators are granted certain monopoly rights in order that an adequate return stimulate the creation of intellectual works, but those rights are limited in various ways in order, in the Constitution's phrase, to promote science and the useful arts. Thus authors are granted rights, and through limitations and exceptions such as fair use, users have rights. The Copyright Act also provides that authors may transfer their rights to publishers in order to bring their works to market.

So there are really three groups -- creators who are granted legal rights under the Constitution and the Act, publishers who have legal rights by transfer, and users (or institutions such as libraries and schools) who have legal rights through exceptions and limitations to creators' rights. In practice, creators' rights are almost always transferred, and the interactions between creators and publishers, and between publishers and users, are governed by contract. Focusing on three groups is a convenient simplification. In the digital age, many more industries, innovators and creators, institutions, and groups of users are affected by the outcome of intellectual policy deliberations.

A crucial function of the Copyright Act, and one of the principles underlying copyright, is to help equalize the bargaining leverage among the three groups. If copyright owners' (most often the publishers) rights were too strong or unlimited, authors and creators might be little rewarded for their efforts, and public access could be inhibited through monopoly pricing or other monopoly-like practices.

Monopolies in intellectual property in a democracy can also be in tension with the First Amendment. The First Amendment protects the right to speak and to publish as well as the right to read and to hear. Some even see these rights implicit in the copyright clause of the Constitution stemming from its purpose of advancing knowledge and creativity.

Another part of the bargain or balance in copyright has historically been that in return for limited rights to exploit a newly created work, that work will eventually enter the public domain, thus enriching society's store of intellectual material.

Libraries as creatures of the balance in copyright law

Libraries are creatures of the historical and statutory balance in copyright law. Libraries lend materials based on the First Sale doctrine. Libraries share materials and preserve works under specific provisions for libraries in the Act. Libraries are often the only entities that provide access to the vast majority of

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copyrighted works that lose market vitality long before the expiration of the copyrights, and are often the only entities that preserve public domain materials. Libraries enable users to access copyrighted and public domain works and to exercise their rights under the exceptions and limitations to creators' rights in the law. The creation of new intellectual property building on the old is stimulated as a result of the existence of libraries. Libraries are places where the public and the proprietary meet. The multiple roles of libraries as social organizations address the balance in the law, and are shaped by it.

Because of their institutional roles, librarians and their associations pay close attention to that balance and to the need to promote users' rights as well as creators' rights. Librarians recognize that most users of copyrighted material are not aware of their dependence on balanced law and policy for access to information and for gaining knowledge. Members of the public take their rights for granted and generally exercise common-sense, but do not usually get involved in policy deliberations. Librarians take seriously their role as advocates for individual users of copyrighted materials.

Libraries are a small but significant market for published works. The vast majority of copyrighted works in library collections were purchased or were acquired through license agreements. Often libraries pay more for copyrighted works than would an individual. This is especially true of subscriptions to periodicals, to ongoing reference works, and to electronic information. These higher rates are presumably to account for multiple uses in libraries. Libraries often aggregate their purchases or licenses to enhance their buying power. In the electronic environment, this may mean that a consortium of libraries negotiates on behalf of all its members, or a state library agency may negotiate agreements on behalf of all the public libraries in a state.

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**What librarians seek in any copyright law revision or rulemakings**

What librarians seek as copyright law and related rules are being reshaped for the digital age is to maintain for users, and for libraries and educational institutions acting on their behalf, their rights to at least the same extent as they have enjoyed them in the analog environment. Should any new rights be granted to copyright proprietors in copyright law revision, they should be circumscribed in analogous and appropriate ways on behalf of users. Libraries and educational institutions expect the law to continue to equalize the bargaining leverage among the three groups -- creators, publishers, and users. This becomes even more important as licensing replaces purchasing.

Librarians also recognize that a key societal function of libraries -- the archival function -- is at risk because electronic information is so seldom actually available for purchase and permanent retention or preservation. Libraries play this archival role because history has shown that it is not economically viable for profit-based businesses to do so. The disappearance of much electronic information after a very short period of time, the fragility of digital bits, and the short life of hardware and software suggest that this role of libraries will be more needed than ever before, but harder and harder for libraries to accomplish. Librarians seek incentives under the law to be able, at reasonable prices, to maintain and preserve electronic information, most of which will not retain economic viability.

With a good balanced copyright law and intellectual property policy, there is no reason why the digital information environment should not increase the opportunities for creators, publishers, and users. Librarians do not see debate over intellectual property policy issues in terms of winners and losers. Debate on such crucial policy matters is healthy. Adapting policy to rapid technological change is never easy. It makes all parties nervous because they know they cannot accurately foretell the future. The difficulty and the complexity underscore the importance of a careful and thoughtful approach to copyright law revision and rulemakings.