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Legal Issues Arising from New Technologies

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ABSTRACT

As the United States has moved from an industrial to an informational center, the problems associated with management of this information have become increasingly complex. New technologies have made it much easier to reproduce and distribute information without providing any safeguards to protect trade secrets or copyright interests. In drafting the 1976 Copyright Act that went into effect in 1978, Congress attempted to meet the challenges dictated by new technologies. The balance created between the rights of copyright proprietors and the needs of users forms the core and framework of the 1976 Act. The Copyright Act not only sets out the exclusive rights of authors, but also limits these rights by permitting users certain exemptions to these rights. Ten years after this Act went into effect, we can measure its success by looking at specific equipment - recorders, photocopiers, and computers - where technological advancements have pushed the law to the cutting edge. Certainly, advances in technology have exposed gaps in the 1976 Act, but some solutions have been devised by legislation, judicial decisions, administrative regulation, or agreement between the parties. Others can be resolved through collective associations and contractual agreements.

The world is moving from an industrial to an informational age. This produces some problems for libraries which have always served as information centers. Traditionally librarians have supplied information to patrons free of charge and without a number of restrictions on the use of this material. But now librarians are faced with a two-edged sword since information is more than ever a product that must be paid for. In fact, the protection of intellectual property rights goods has become a major issue in America's attempt to balance trade. On the one hand, there is the library's goal to disseminate information, and, on the other hand, there is the proprietor's interest in protecting copyright. This is complicated even further by new technologies that make it easier to copy protected works without being detected.

The librarian is faced with the question that Congress constantly faces: how to balance the proprietor's right to control dissemination - reproduction, distribution, performance - of a copyrighted work and the user's need to have immediate access to a work. Congress attempted to meet this challenge when it revised the Copyright Act in 1976.[1] The Copyright Act begins by setting out the basic rights that an author has and then providing exemptions or limits to these rights for the benefit of the user. Section 102 grants the author protection for an original work of authorship; Section 106 gives the copyright proprietor certain exclusive rights:

(1) To reproduce the copyrighted works in copies or phonorecords.

(2) To prepare derivative works based upon the copyrighted work.

(3) To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.

(4) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.

(5) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

In order to give users direct access to these works, the copyright law contains some limitations or exemptions on these exclusive rights. These exemptions are found in Sections 107-118. The two of most concern to librarians are the Section 107 fair use exemption and the Section 108 library photocopying exemption.

Section 107, the fair use exemption, is really directed to the user of copyrighted works. It permits fair use copying for purposes of scholarship and research. In considering whether or not a use is "fair," one considers

1. The purpose and character of the work.

2. The nature of the copyrighted work.

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

4. The effect of the use upon the potential market for or value of the copyrighted work.

In Section 107 Congress worked to balance the copyright owner's right to an economic return and the public's right to use the work for scholarship or research.

Section 108 is also an attempt to establish a balance between the rights of creators and the needs of users. A complex provision, 108 is the result of prolonged negotiations between the interested parties. It permits librarians in libraries or archives that meet the conditions set out therein to make no more than one copy or distribute no more than one copy of a work. In order for a library to even fall under the 108 exemption,

1. The reproduction or distribution must be made without any direct or indirect commercial advantage.

2. The library or archives must be open to the public or to researchers other than those associated with the institution to which the library is affiliated.

3. The reproduction or distribution must include a notice of copyright.

If a library meets all of these criteria, then and only then can it reproduce or distribute one copy as specifically detailed in 108.

The 1976 Act was the first major revision of the United States Copyright Act since 1909. In adopting the new law, Congress wanted to ensure that it was both durable and flexible enough to cover future works and accommodate new technology. The drafters of the 1976 Act were quite aware that new technology had made the copyright law obsolete and that the process of revision would take a long time. Congress intended to draft a statute that would accommodate new technologies, one that would not only balance existing interests, but also protect author's rights.

Ten years after the 1976 Act went into effect, there are problems, as further technological advances have

made it even easier to impermissibly reproduce, distribute, or perform protected works. We can judge the success of the 1976 act by how well it can be used to solve these problems. Some of these problems may intensify as technology continues to outpace the adaptation of legal doctrine and principle. Others have already been solved or diminished by Congressional amendment, judicial decision, administrative regulation, or negotiated guidelines. An examination of two areas of interest to librarians where technological advances have presented legal confusion, the taping of audio and video materials and photocopying, reveals how some of these problems have been resolved and what else needs to be done.

One major area of concern for copyright proprietors has been the taping of audio and video materials that substitutes for a purchase and continues to increase as audio and video recorders become more accessible to the public. In 1976, several motion picture companies brought a law suit against the makers and distributors of a video cassette recorder for copyright infringement. While the Betamax[2] case was making its way to the Supreme Court, Congress was considering several bills that either exempted home taping or exempted it, but required a royalty. They were also considering bills covering the rental of these materials.

In 1984 the Supreme Court ruled that home taping was a fair use; it agreed with the district court that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity. But the Court did not directly address the off-air taping of cable transmissions and subscription television, nor the case of taping for purposes of "librarying." The practical effect of the Betamax decision leaves unresolved the full range of personal, private copying and the copying done in schools, libraries, and other public institutions.

During the copyright law revision period, guidelines were negotiated between the interested parties that cover off-air taping; these guidelines permit an individual teacher to request the recording of a television broadcast program for his or her own professional use, subject to the limitations found in the guidelines. No case has arisen testing the guidelines, but a school system's routinely and systematically making videotapes and retaining them for long periods of time has been held not to be a fair use. In 1983 the court acknowledged the off-air taping guidelines, but based its decision on timeshifting not being fair use under the circumstances of the case. In effect, because of the defendants' past practices of massive and systematic copying, the court placed them outside the negotiated guidelines.[3]

None of the legislation offered on taping or rentals has been passed except a bill that gives the copyright proprietor the right to license record rental; this bill was recently extended. Royalties on home taping may be a dead issue. In practice, contractual agreements now cover video rental stores; they do not yet cover the individual renting a video cassette and using it outside the home. This has to be covered by licensing systems; one now exists to license the use of video cassettes in public institutions.

Undoubtedly, librarians are still left with questions on what uses to make of audio and audiovisual materials, since neither the Betamax or Boces decisions or any of the negotiated guidelines directly address their uses. This is still an area where guidelines need to be provided.[4]

Unlike the 1909 Act, the 1976 Act contains a specific library photocopying exemption. Although librarians and publishers had operated on a "Gentlemen's Agreement" prior to that time, the exact parameters of the new provision were being debated in the courts at the same time Congress was wrestling with the issue. The courts were considering whether a library's massive photocopying in response to patrons' requests violated fair use. Williams and Wilkins was another case where the court had trouble drawing lines; in fact, the court noted that issues involving copyright and photocopying were more properly resolved by Congress than by the court.[5] In 108, Congress attempted to resolve the photocopying questions. Concerned that the balance it intended to create had not been met, Congress required the Copyright Office to submit, at five-year intervals, reports that summed up whether 108, the library photocopying provision, "achieved the intended statutory balancing of the rights of creators, and the needs of users."

The Copyright Office submitted its first report in 1983. In that report the Office concluded that 108 provided a workable structural framework for achieving balance and that, on the whole, the provision was working, but that there was still some confusion as to what constituted systematic copying and the exact relationship between 107 fair use and 108 library photocopying and some areas of non-compliance. The report went on to make some specific recommendations to clarify the law and to encourage compliance.

It urged all parties to participate in existing collective arrangements, such as Copyright Clearance Center (CCC) organized in 1977, and to develop new collective arrangements. It also recommended the adoption of a provision that gives the proprietor a single remedy for the copying of scientific, technical, and medical journals or business periodicals based on a reasonable copying fee, unless the work is entered in the CCC.

The second photocopying report was issued in January 1988. The conclusion was basically the same one reached in 1983: 108 contains the framework for achieving balance, but there are still some problems with compliance. Although library groups made several recommendations for amending or implementing 108, the Copyright Office only supported one. It agreed with nine of the organizations who commented on library photocopying that the next report needed to explore more fully the effects of new technology. The Copyright Office recommended that Congress expand the scope of the report to include an in-depth study of the effects of new technology on copyright proprietors and 108 balance.

The second report contains a brief section on technology; this section discusses improvements in reprographic service capability and the demand for electronic delivery of documents and how this impinges on the rights of copyright proprietors. The photocopying report also contains a section reporting on international developments. This section reveals that foreign countries are experiencing the same challenges in protecting copyright proprietors in the light of electronic publishing. Some countries have responded with legislation similar to 108; some have provided a royalty on photocopying. There has also been an increase in collective societies, usually at the impetus of the foreign government. An international organization, the International Federation of Reproduction Rights Organization, now exists; fifteen countries, including the United States through the CCC, participate with reciprocal agreements for the use of works registered in each country.

Despite the two Copyright Office photocopying reports and studies done by other agencies and other countries, there are a number of unresolved photocopying issues. In part this is due to our failure to complete obvious solutions. For example, the parties have failed to agree on guidelines that would cover photocopying or the library use of computer programs and videotapes. Also, although the CCC now covers 75,000 titles and provides a simpler annual reporting system, it has not been widely accepted, particularly in the academic community. This may change since the CCC is embarking on a two-year data collection project with a number of universities. This pilot project should encourage universities to join the CCC.

Another reason is that as soon as one problem is solved, new developments produce others. For example, through satellite the British Library Document Supply Centre now sends copies of protected works all over the world without permission of the copyright proprietor. American and international publishers have complained, asserting that this large-scale, unauthorized copying of scientific, medical, and technical journals is a violation of copyright and that payments could be made for this use through authorized clearance centers such as the CCC.

No doubt other questions will emerge as the current ones are being answered, since technology will continue to make it easier to create works but also easier to reproduce and distribute them. For now the best answer seems to be through collective organizations where a payment is made that goes to the copyright proprietors and the user is given immediate access to the work.

NOTES

[1]All citations to the Copyright Law are to 17 U.S.C. 101 et. seq. (1976).

[2]Universal City Studios, Inc. v. Sony Corp. of America, 464 U.S. 417 (1984), rev'g 659 F.2d (9th Cir., 1981), rev'g 480 F. Supp. 429 (C.D. Cal. 1979).

[3]Encyclopaedia Britannica Educational Corp. v. Crooks; 447 F. Supp. 243 (W.D.N.Y. 1978); 542 F. Supp. 1156 (W.D.N.Y. 1982); 558 F. Supp. 1247 (W.D.N.Y. 1983).

[4]Guidelines have been proposed but not accepted by librarians or publishers. Library and Classroom Use of Copyrighted Videotapes and Computer Software.

[5]Williams and Wilkins Co. v. United States, 487 F.2d 1345 (ct. cl., 1973) aff'd by an equally divided court, U.S. 376 (1975).