Proposed Solutions to Problems with Academic Copyright

Denise Troll Covey
Principal Librarian for Special Projects
Carnegie Mellon University Libraries

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Scholarly communication is broken

- Price increases by for-profit publishers are forcing journal cancellations, robbing monograph budgets, and reducing access to information at a time when technology enables distribution to be less expensive and more efficient.
Copyright is broken

• Unintelligible hodgepodge of conflicting interests
• Fair use is uncertain and risky
• Works are orphaned
• Clearance culture is a nightmare
• TEACH Act failed; DMCA is problematic
• Termination of © transfer is a joke
• Greed undermines perception of © legitimacy
• © is not achieving purpose of promoting progress
The problems …

• Threaten academic and intellectual freedom
  Jim Neal, Columbia University, Fall 2009

• Prevent education from realizing the potential of technology
  The Berkman Center for Internet & Society,
  Harvard Law School, August 2006

• Cripple digital library development
  – Expensive licensed access
  – Uncertainty and risk of digitizing collections
  – Fracas over e-reserves
  – Convoluted publisher open access policies
Many proposed solutions

• Legislative
• Judicial
• Grassroots
Legislative solutions

• Languishing
  – Library / archives exceptions – March 2008
  – Orphan works – Sept 2008
  – FRPAA – June 2009

• Proposed by scholars
  – Abolish © for new academic work
  – Create Fair Use Board in the Copyright Office
  – Clarify privileged uses in fair use statute
Abolish © for new academic work

- Publishers will charge publication fees
- Academics will produce without © if university or funding agency subsidizes publication fees
- Change will yield social and economic benefits
- Supported by universities, faculty and students
- Resisted by for-profit publishers, some learned societies and those concerned about slippery slope

Steven Shavell, Harvard Law School, July 2009
Create a Fair Use Board

• Power to declare a proposed use fair use
  – © owner receives notice and opportunity to challenge
  – Favorable opinion immunizes user from liability

• Rulings would be non-precedential
  – © owner can challenge same / similar uses by other users

• Rulings subject to administrative and judicial review

• Not likely to be supported by the Copyright Office or the Librarian of Congress

Michael W. Carroll, Villanova University School of Law, April 2007
Clarify privileged uses

• Identify privileged uses based on social practices that society values above © owner interests

• State that use in these practices does not infringe ©
  – E.g., criticism, news, teaching, scholarship, research

• Currently not feasible to change the statute

• Possible to apply in court rulings

Michael J. Madison, University of Pittsburgh School of Law, 2005
Judicial solutions

• Social practices approach to fair use

• Rehabilitate the 2\textsuperscript{nd} fair use factor

1. Purpose and character of the use
2. Nature of the copyrighted work
3. Amount and substantiability of portion used
4. Effect of the use on the potential market
Social practices approach to fair use

- Don’t associate the 4 factors with the market for a work
  - Fair use is fair because it generates social benefits that the market can’t otherwise produce

- Use the 4 factors to determine if use conforms to a valid and valued social practice
  - Examine the language, activity and social context of use
  - Is the user doing what society wants done?
  - If so, the use is fair

Michael J. Madison
Rehabilitate the 2\textsuperscript{nd} factor

- 2\textsuperscript{nd} and 4\textsuperscript{th} factors are typically conflated, confusing author’s and subsequent © owners’ interests
  
  2. The nature of the copyrighted work
  4. Effect of the use upon the potential market

- Scrutinize the work used as much as the new use
  
  - If use does not interfere with the author’s incentives or market expectations, it is fair use
  
  - Example: Copyright Clearance Center’s license is not a market relevant to the creation of academic work

Robert Kasunic, Washington College of Law, American University, 2008
Rehabilitate the 2nd factor

• More leeway should be accorded academic work than other types of work because the economic model of © is not what drives faculty productivity

• Courts need to decide
  – What markets are relevant to creating academic work
  – How many times a subsequent © owner should be paid for work freely given as a gift

• *But the current situation is unlikely to change*

Robert Kasunic
Who can assert fair use rights?

- Gatekeepers prohibit reliance on fair use
  - Actual damages + statutory damages + court costs
  - Courts decisions are unpredictable and inconsistent
    - Use the 4 factors to support foregone conclusions
    - Each case is unique: no common law

- Only wealthy users can afford to assert fair use rights
Google asserted fair use

• Scanning to index is **fair use** (Dec 14, 2004)
  – Authors Guild charged © **infringement**; some publishers joined lawsuit 5 months later (Sept 2005)
    • **PERMISSION REQUIRED**

• **Publishers Weekly survey** (July 16, 2009)

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<th>890 responses</th>
<th>Overall</th>
<th>Publishers</th>
<th>Authors</th>
<th>Librarians</th>
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<td>49%</td>
<td>55%</td>
<td>62%</td>
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<td>Oppose</td>
<td>15% (use is fair)</td>
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Google and class-action settlement

• Market a library and bookstore (Oct 28, 2008)
  – As solution to orphan and out-of-print book problems
  – PERMISSION ASSUMED unless opt out

• Publishers Weekly survey (July 16, 2009)

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<td>23%</td>
<td>26%</td>
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• ALPSP survey (summer 2009) – 400 respondents
  – 5% opted out; 31% opted in to Google books settlement
  – 61% assumed to opt in = windfall $$ to registered © owners
Official brouhaha over class-action

- 435 responses, mostly by class members, filed by deadline (Sept 8, 2009)
  - 90% oppose
  - 2% have reservations
  - 8% support

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<th>92%</th>
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<td>Competition</td>
<td>22%</td>
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<td>Rightsholders</td>
<td>51%</td>
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<td>Users</td>
<td>27%</td>
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Brandon Butler, Association of Research Libraries, 2009
DOJ statement of interest

• Proposed settlement is legally problematic (Sept 18)
  – Inadequate representation of class members
  – Non-compliance with tenants of © law
  – Issues under anti-trust law

• Did not address concerns about
  – User privacy
  – Intellectual freedom
  – Pricing for institutional subscribers
If a settlement is approved without significant changes

- Will we trade our integrity (e.g., upholding © law, protecting privacy and intellectual freedom, valuing metadata and equitable access) to fulfill our desire for online access and a solution to the orphan and out-of-print books problems?
- Will we rob the serial budgets to license Google’s big deal?
- Will advertising change the academic library experience?
- Will we lose the possibility that scanning to index is fair use?
- Will we leave other orphan works in limbo?
- Will we imply that Google is a library?
Copyright scholars agree

• No currently proposed reform seems feasible

• We’re in the early stages of a major © reform that will take 18 to 20 years
  – Remove obstacles for creators and users
  – Reduce incentives that encourage distributors to
    • Artificially constrain outlets for © works
    • Create barriers to entry for competitors
    • Use their political clout to expand copyrights
  – Rebut notion that subsequent © owners speak for authors and that their interests are aligned with author interests

Pamela Samuelson, Jessica Litman
What do we do in the meantime?

Grassroots solutions
Challenge Google books settlement

• Rebut notion that subsequent © owners speak for academic authors and that interests are aligned
  – Authors Guild and AAP want to maximize profit, not maximize access to knowledge
  – Monitoring use is inconsistent with academic practice

• Educate the faculty
  – Producers and consumers of Google books
  – Do not understand the implications of the proposed settlement
Know and exercise author rights

- **Open access movement** – assert and protect author interests in transfers to subsequent © owners

- **Creative Commons licenses** – signal what rights are granted and what rights are reserved
Open access is growing

• More OA journals, repositories and mandates
• More OA material and material with CC licenses
• Obstacles continue
  – Publisher resistance to changing business model
  – Faculty concern about prestige of OA journals
  – Faculty and institutional apathy and inertia

Peter Suber, *SPARC Open Access Newsletter*
Heather Morrison, *The imaginary journal of poetic economics*
How did we get into this mess?
Moral hazard

• Faculty produce knowledge, but do not experience the direct consequences of market failure
  – Consumption of a good by those insulated from its cost leads to high demand and high inflation

• Faculty rights compete with university expense of buying back their work
  – Faculty see it as the library’s problem
  – But “the linchpin is the sacrosanct politics and processes of promotion and tenure”

  Tracy Mitrano, Cornell University, October 2009
Academy bears some responsibility

- Assess value based on volume of work and prestige of publication venue
  - For-profit publishers formed to handle the volume after the tradition of © transfer to the publisher

- Many faculty don’t understand or appreciate ©
  - Though they value academic exception to work for hire

- University needs to protect faculty © and to secure the right to provide access to their work
  - Difficult to reclaim something traditionally given away
Reform within the academy

- Teach faculty the benefits of ©, OA and CC licenses
- OA prior license to the institution, with opt-out provision
- Value peer-reviewed OA journals same as traditional J
- Subsidize publication fees in immediate OA journals
  - Level the playing field and help publishers convert
- Use new metrics to measure quality
  - E.g., immediacy index, cited half-life, h-index, usage factor
End the moral hazard

• The crisis in scholarly communication is not just the library’s problem

• Faculty need to consider the financial and moral impact of their choices
  – Example: Subsidizing and capping OA journal publication fees will force faculty to consider the tradeoffs between the cost of publication and the services and prestige provided by the publisher

  *Compact for OA publishing equity*
  Cornell, Dartmouth, Harvard, MIT and UC Berkeley
References – all OA

References – all OA


• Neal, Jim. “ACRL-IFC speaker lists threats to IF in Academia,” Intellectual Freedom Round Table Report, 72 (Fall 2009): 8, 10.


• Shavell, Steven. “Should copyright of academic works be abolished?,” July 2009.

• Shieber, Stuart M. “Equity for open-access journal publishing.” PLOS Biology 7, 8 (August 2009): 1-3.