

Professional Associations and Issues:

Free Use

Rebecca J. Thompson

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## INTRODUCTION:

Over the last half of the quarter we have discussed many interesting and complicated issues, but the one that has continually come back to me is the topic of intellectual freedom. While I had some knowledge of trade publishing, the issues raised about the cost of academic publications, problems and benefits of open-access journals, and, specifically, free use opened my eyes to the complexities of this topic. As academic librarianship is my area of interest this is a particularly pertinent issue as well. I had never considered the legalities of posting articles or scanned book chapters on Blackboard and wondered if the other English faculty in my university have considered it either. In order to better understand the issue I felt this was an important topic to examine, particularly in connection to the Association of College and Research Libraries (ACRL). Since ACRL is the branch of the American Library Association (ALA) focused on academic librarianship, it was a fitting organization to pair with this topic. Since the topic is so varied and complex I chose to focus on the particular issue of free use and the Technology, Education and Copyright Harmonization (TEACH) Act.

## ISSUE AREA & BACKGROUND:

The 1976 Copyright Act was the first to acknowledge the need for a slightly different application of copyright laws in regards to libraries. Fair use “allowed the copying of limited amounts of copyrighted material for scholarly purposes,” which was the first exception, and “Section 108 granted to non-profit libraries copyright exceptions that went beyond fair use” (Bernfeld, 2006, p. 2). The question that was raised then and is still being raised today is when the copying and distribution of articles or parts of monographs crosses the line from fair use or academic copying to copyright infringement. How many copies can be made and for how many

people or institutions before it becomes more than just a sharing of academic information covered under the Copyright Act? This becomes even more difficult as more information is produced. If number limitations are set on, for example, journal articles, how would the institution keep track of how many times a particular article had been photocopied for Inter-Library Loan (ILL) or for local patrons? Add to this the ready access to many full-text journals on-line and through databases and the issue becomes even more complicated.

Bernfeld (2006) references the *Williams & Wilkins Co. v. United States* court decision in 1968, which had a direct impact on this issue. When the National Institutes of Health (NIH) and National Library of Medicine were found guilty of copyright infringement from the large amounts of copies they provided, even though what might have been considered reasonable measures had been taken to avoid such, it raised many questions as to where the line of academic photocopying should be drawn. In Judge David's ruling on the case, he pointed out that "[t]he introduction to the marketplace of the office copying machine made photocopying rapid, cheap and readily available. The legitimate interests of copyright owners must, accordingly, be measured against the changed realities of technology" (as cited in Bernfeld, 2006, p. 16). When the decision was repealed in 1973, it was based on the fact that the articles were being photocopied for non-profit, academic use and that the organizations had instituted reasonable measures to avoid copyright infringement. While library photocopying is, in many ways, less of an issue, this debate is the foundation of the discussion over the access to digital material. In her conclusion, Bernfeld points out that "[t]echnology is definitely changing at a much more rapid pace than human conflicts are being resolved" (2006, p. 37). The debate has moved from paper copies to online access and cost/value remains the major point which creates tension between proponents of free access and many publishers.

King (2010) addresses this issue in his approach to open access when he suggests that government funding be provided to cover publishing costs, particularly in relation to studies funded by the government already. However, he also argues for government funding of all science journal articles stating that “a large proportion of published research is not externally funded, and many funded researchers no longer have access to financial support by the time their paper is finally accepted for publication” (King, 2010, p. 2). Many useful studies and findings are then lost to the academic community, simply because the authors do not have the funding available to publish their work. King focuses on the sciences and, within this context, the argument is reasonable. As the entire population could benefit from a more open exchange of information and knowledge in the sciences, government funding sounds like a logical answer. However, with many budget cuts and variations in funding and availability of resources, there is a question as to whether money is available through the federal government to fund open-access publishing. This ongoing debate continues to raise more questions than it answers.

A more recent piece of legislation, the 2002 TEACH Act, addressed many of the issues of copying and posting information in relation to academic and research libraries. ALA and ACRL were supporters of the overall purpose of the TEACH Act as it “offers many improvements over the previous version” of the law (American Library Association, “Distance,” n.d.). However, they also caution that the Act must be understood and applied properly in order to gain its full advantage. In his summary of the background to the TEACH Act, Crews (n.d.) states the difficulty of controlling copyrighted works “when the materials are uploaded to websites, transmitted anywhere in the world, and are easily downloaded, altered, or further transmitted by students and other users.” The TEACH Act addresses the very real concerns about copyrighting when it comes to long-distance education and the uploading and downloading of

information via tools like Blackboard. While there are some benefits to the TEACH act, there are also many requirements that need to be met in order for educators to receive the full use of those benefits.

Fair use, the TEACH Act, and understanding of copyright laws in regards to academic libraries is a complex issue that will continue to shift and change. It is important for information professionals, particularly those who work in an academic setting, to make themselves familiar with the basic tenets of legislation in order to know which laws apply in which situations, to avoid copyright violations, and to understand when they need to stand up for intellectual freedom.

#### ACRL'S STANCE:

The ACRL is actively engaged in the ongoing struggle between the protection of information and the free dissemination of information. The organization regularly articulates its goals in a legislative agenda, addressing current concerns and how they could impact the effectiveness of college and research libraries. They also write letters to House and Senate members, work together with other organizations to support or oppose legislation, and provide education on these topics to their members and the public.

The Resolution in Support of Academic Freedom is a key document that provides the foundation for the ACRL's stance on many of these issues. The ALA also adopted the resolution in response to the Academic Bill of Rights. The resolution declares that "libraries in academic institutions guarantee that a wide array of ideas that promote academic discourse are available" and therefore the ALA and the ACRL "opposes any legislation or codification of documents ... that undermine academic and intellectual freedom, chill free speech, and/or otherwise interfere

with the academic community's well-established norms and values of scholarship and educational excellence" (ALA Council, 2006).

The ACRL also has an Intellectual Freedom Committee which works with the ALA Intellectual Freedom Committee and strives "to prepare and gather materials which will ... support both in formulating policies of intellectual freedom and for resisting any pressure or action designed to impair the rights of users" (Intellectual Freedom Committee, 2012). The committee has been active in promoting intellectual freedom for academic and research libraries and in 1999 developed an interpretation of the ALA's Library Bill of Rights specifically focused on Intellectual Freedom which was then adopted by the ALA as a whole. This statement includes the important point that "licensing agreements should be consistent with the Library Bill of Rights, and should maximize access" (Association of Academic and Research Libraries, 1999).

The ACRL's (2012) Guidelines for Media Resources in Academic Libraries adopted this year make a point to state that staff members dealing with media resources must have a "comprehensive understanding of copyright law, fair-use, the TEACH Act, and recent developments regarding copyright and circumvention technology." With the rapid changes in technology the ACRL acknowledges how important it is for information professionals to keep up to date on the legal aspects and implications of these issues and the ACRL strives to make this information available.

In regards to the issue of course reserves and fair use, the ACRL "Statement on Fair Use and Electronic Reserves" (2003) addresses the multiple views on this topic. After the Conference on Fair Use (CONFU) in the 1990's "[s]ome libraries chose to follow the CONFU guidelines that did emerge even though those guidelines ... do not have the force or effect of law" while "[o]ther libraries chose to address reserve practices based on the fair use doctrine" (ACRL, "Fair

Use,” 2003). With the complexity of the law, many libraries are struggling to find the balance between applying fair use, the TEACH Act, and avoiding copyright infringement.

With the growth in long-distance education, this kind of information dissemination raises more questions. The Digital Millennium Copyright Act of 1998 included a section acknowledging the fact that distance education would need to be addressed in future including questions as to “which parties should be eligible for any exemption” and the “categories of works to be included in any exemption” (U.S. Copyright Office, 1998, p. 15). An important amendment was also made at that time to allow libraries or archives “to copy a work into a new format if the original format becomes obsolete” (U.S. Copyright Office, 1998, p. 15). Because of the rapidly changing world of technology, this kind of acknowledgment is an important step in making sure that information does not become lost as formats change.

In their extensive Standards for Distance Learning Library Services, the ACRL (2004) maintains that libraries from institutions offering distance learning courses “must provide or secure convenient, direct access to library materials in appropriate formats that are of sufficient quality, depth, number, scope, and currency.” Since the only way this can be fully accomplished in many cases is through academic copying, the doctrine of fair use and a solid understanding of the TEACH Act and its implications is even more important.

Since these issues are fairly complex and the TEACH Act, in particular, requires a better understanding of these laws, the ALA (linked to through the ACRL website) provides information on their website to help educators become familiar with the restrictions, requirements, and benefits. With the enactment of the TEACH Act, fair use actually becomes even more important. Certain limitations now more explicitly imposed makes the library’s role in providing access through reserves, monographs, and databases vital to the education process. In

addition, the ACRL statement on fair use, which was adopted the year after the TEACH act went into effect, highlights the importance of reserves and the growing use of e-reserves under fair use, which will help instructors to avoid copyright infringement in their courses.

The ACRL continues to work towards free access of information while acknowledging the complexities of copyright law and the rights of the creator. Most recently, they have been actively involved in writing letters and providing information about the Federal Research Public Access Act. This Act would provide free access to articles published about research that is federally funded. This is yet another piece of legislation that could have a significant impact on the free dissemination of information for which the ACRL stands so strongly. When the Fair Copyright in Research Act was being proposed, the organization worked to oppose it as it would overturn the NIH ruling that was rightly made in 1973. They continually work to ensure that copyright laws are understood and that legislation is not passed that would hinder or obstruct the roles of academic and research libraries.

#### QUESTIONS TO BE ADDRESSED IN FUTURE:

- As more and more journals and books become available in digital format how can copyright laws be enforced? Do they need to be adjusted? What other actions need to be taken to protect the authors and creators of digital information?
- How can Open-Access Journals be made more viable? Who will provide the funding?
- Should there be a difference between articles published in the sciences and those published in the humanities? How or why should this distinction be made?
- While these issues are raised in Information Sciences classes, they are often not addressed in faculty training. How can Information Professionals help educate instructors



and faculty on important copyright issues? What steps can be taken to ensure that instructors are using the TEACH Act and fair use properly?

- As Blackboard becomes more widely used how can it become a tool to help instructors and institutions follow the guidelines of the TEACH Act and fair use?

#### APPLICATION:

As a student and as an adjunct, I can ensure that I am paying attention to where information comes from, who is providing it, and how it is being used. I can address these issues in a basic way with my freshman English classes to make them aware of the copyright issues and challenges of making information available. I think it is very easy for me (and other students) to take the information so readily available for granted. When our institutions make databases and full-text resources available most people don't think about the cost and value of these resources or about the people that do not have access to these same materials. In addition, this issue has never been raised or addressed in any of the instructor orientations of which I have taken part. I plan on suggesting that it be a topic of discussion at a future faculty training or colloquium in order to better educate instructors on their role in copyright protection and the freedom and restrictions currently afforded them in regards to uploading and disseminating copyrighted information.

In the future I can continue to make Intellectual Freedom an important part of my consideration. If I am able to fulfill my goal to become a library/faculty liaison I can work with the institution to build awareness of these important issues. I can also help to ensure that librarians, faculty, and students are making proper use of the available resources in order to avoid copyright infringement. Most importantly, I can continue to keep myself informed of

important legislation and movements that will impact the freedom of information access and write letters or e-mails to legislators or organizations that can influence these decisions in positive ways.

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