

OPEN ACCESS: OPPORTUNITIES & OBSTACLES

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OVERVIEW

- How some degrees of open access have been achieved in the past
- Why © has become an obstacle to library activities
- Why open access has become a popular concept in the current era
- What obstacles besides © impede open access
- How those obstacles might be overcome so that promise of open access can be realized

OPEN ACCESS IN THE PAST

- Copyright used to be an “opt-in” regime
 - Works of authorship were in the public domain unless authors complied with formalities (e.g., registration and notice on copies)
 - Public domain works can be made freely accessible
- Now it’s an “opt-out” system
 - Rights attach automatically by operation of law
 - Last life of the author + 50 or 70 years
- Some works ineligible
 - Lack of originality; US gov’t works ineligible; laws, etc.

ROLE OF LIBRARIES

- Libraries have traditionally been sites at which patrons can have an open access experience
- Repositories for collections often developed over considerable time
- Qualified persons are eligible to come and examine resources, use for research, borrow some resources for a period of time
- Some special rules for libraries in © laws
- Mostly stable situation for many decades

SPECIAL RULES

- ©'s exclusive rights have generally been limited in scope so that lending was not within rights holders' control
- Nowadays © regulates the distributions of copies, but the “1st sale” or “exhaustion” rule generally allows lending
 - © owner is entitled to control the 1st sale of works to the public, after which distribution right is said to be “exhausted”
 - Countries vary on national, regional, or int'l exhaustion
 - In some countries (e.g., UK), © laws regulate public lending
- Most countries have special rules to protect library activities (e.g., preservation copying, ILL)
- Some countries (e.g., the US) have fair use, fair dealing rules that allow some copying for research purposes

FAIR USE

- Fair uses are not infringements
- 4 factors typically considered:
 - Purpose of D's use
 - Nature of ©'d work
 - Amount & substantiality of taking
 - Harm to actual & potential markets for the work
- Favored uses include research, scholarship, & teaching
 - “Productive” uses favored over “consumptive” uses
 - Noncommercial uses favored over commercial uses

COPYING FOR PATRONS

- One flashpoint historically has been photocopying by patrons in libraries, or library photocopying for patrons
 - Some countries handle this through levies (i.e., OK to copy but have to pay fee)
 - Fair use litigation in the US:
 - Williams & Wilkins v. U.S. (1973): Fair use for NIH to make photocopies for researchers
 - American Geophysical Union v. Texaco (1995): Copying for archival purposes was unfair

CURRENT LITIGATION

- Electronic reserve policies at universities are under challenge in *CUP v. Becker*
- Library digital preservation practices are also under challenge in *AG v. HathiTrust*
- Ability of libraries to lend foreign books is at stake in *Kirtsaeng v. Wiley*
- Whether exhaustion rules apply to transfers of digital copies tested in *ReDigi*

CUP v BECKER

- Cambridge University Press sued Becker, who works for Georgia State University, over GSU's policy & guidelines for uploading of in-© materials for electronic course reserves
- Becker raised fair use defense
- Trial judge in 350 pg opinion ruled in B's favor
- CUP has appealed with amicus briefs filed in support by the Authors Guild & AAUP
- Matter now before an appellate court

BECKER'S FAIR USE

- + Purpose: educational, noncommercial
- + Nature of works: most written to promote learning, not to make \$
- + Amount: less than 10%, 1 chapter from books (although not textbooks)
- + Harm: no existing convenient licensing system

CUP's RESPONSE

- Purpose: non-transformative, consumptive use
- Nature of work: texts created and disseminated for educational markets
- Amount: substantial amounts taken; often the “heart” of the work
- Harm to the market: willing to license through CCC; equivalent to coursepacks
- Anything beyond §108 bears heavy burden of proof that the use is fair

IMPLICATIONS

- A win for Becker would enable educational uses of materials by research libraries
 - It would also help with other educational uses of in-© works
 - It would help with fair use for digitization of orphan works
- A win for CUP will help CCC's strategy to license all uses of ©'d works in university settings
 - Never followed up on *American Geophysical Union v. Texaco* vs. universities, but it's always been a goal

AUTHORS GUILD v. HT

- HathiTrust is a consortium of research library partners of Google
- HathiTrust is the repository of library digital copies (LDCs) that Google supplied to its partners of books from their collections scanned for the Google Book Search (GBS) project
- Authors Guild has sued HT & UC, among others, claiming that the LDCs are infringing copies
- HT won at trial court on fair use; AG has appealed

AG: NOT FAIR USE

- Purpose: commercial, non-transformative
- Nature of work: creative works of all genres,
- Amount: whole works copied, systematically, stored permanently, copies given to library partners
- Harm: Presume it because lack of control, risk of loss from inadequate security; plus we want to license such uses
- Very nature of © to require users to get permission in advance

WHY HT WON FAIR USE

- Purpose of use = “transformative”
 - Preservation of works in research library collections
 - Computational research (e.g., digital humanities)
 - Enhanced access for print-disabled persons
- Nature of ©’d works: mostly nonfiction
- Amount copied: reasonable in light of purposes; sometimes necessary to copy whole works for purposes
- Impact on market: no quantifiable harm to date
 - Harm to future licensing markets = speculative
 - Prohibitively expensive to license on book-by-book basis for preservation, computational research & disabled access

MASS DIGITIZATION AS FAIR USE?

- Google aimed to bypass © obstacles to mass digitization of in-© books through fair use
 - Fair use to scan for purposes of indexing
 - Fair use to scan for purpose of providing snippets
 - With links to sources from which the books could be purchased or borrowed
 - No advertising unless RH agreed
 - Willing to exclude works if RHs asked for this
 - Implicitly also claiming fair use to make non-expressive uses, such as analytics aimed at improving search and translation tools
 - Fair use to give LDCs to library partners for preservation, privileged uses
 - Over time, G might have been willing to make the full texts of orphan books available, either as fair uses or on terms authorized by Congress through orphan works legislation

GOOGLE: FAIR USE

- + purpose: transformative because promotes public access to information
- + nature of work: most books in GBS are scholarly nonfiction & out-of-print
- + amount: whole thing, but necessary to index; only snippets available unless RH agrees to more
- + harm: transactions costs problems with clearing rights = market failure; GBS enhances market for many books (we'll link to where you can buy them); not serving ads
- + we'll take your book out if you don't want it in GBS

IMPLICATIONS

- If appellate court affirms in HT, this would mean that other nonprofit libraries & educational institutions would be free to scan works for similar purposes
 - It would help G's fair use defense as well
 - It would also strengthen fair use argument for making orphan works available
 - It might also support library lending of ebooks (scanned from their collections)
- If AG wins on appeal, an invaluable resource (10M books in HT corpus) will be endangered
 - © owners entitled to impound & destroy infringing wks

KIR TSAENG v. WILEY

- Kirtsaeng's family bought copies of textbooks lawfully made and sold in Thailand, shipped the books to him at Cornell, where he resold them on eBay; this helped him pay his graduate school expenses
- Wiley sued K for infringement alleging that he unlawfully distributed copies of its works
- K raised 1st sale/exhaustion defense; lost at trial; \$600K judgment vs. him (statutory damages)
- Wiley claims 1st sale only applies to copies lawfully made on U.S. soil
- SCT will decide by June

CAPITOL v REDIGI

- ReDigi developed software to enable a market for “resale” of digital music
 - Resale of ebooks in contemplation also
- Capitol sued for © infringement because copies made using R’s sw in course of resale
- ReDigi raised 1st sale defense
- Capitol argues inapplicable because only limits distribution right, not reproduction right
- But Court of Justice of EU: exhaustion applies to “licensed” SW

IMPLICATIONS

- A win for Kirtsaeng would put libraries at ease
- A win for Wiley would mean that foreign-published books in library collections could not be lawfully lent to patrons
- Legislation to address exhaustion seems likely
- A win for ReDigi would mean 1st sale/exhaustion is applicable in digital environment
- License v. sale issue not posed in *ReDigi*, but also unsettled in the U.S.
- Some libraries have been digitizing out-of-print books in their collections, lending them with DRM
 - Victories in *CUP* & *ReDigi* would help with their fair use defenses

“ORPHAN WORKS”

- Millions of works are still in-© but rights holder is unknown or unfindable after a diligent search
- Copyright Office study in 2006 recommended legislation to limit liability for those who reuse orphan works (OW) after search attempt; renewed interest in this in 2013
- Recent EU Directive would authorize libraries to make some types of OWs available
- Berkeley Digital Library Project has five “white papers” on OW subjects
- Especially troublesome to track down foreign works
 - In the U.S., ©s were “restored” for works long thought to be in the public domain for failure to comply with formalities (required notices on copies)

FAIR USE FOR OWs?

- Purpose: transformative because increased access to knowledge
 - Nonprofit libraries could emphasize benefits to research & learning as favored uses
- Nature of work: orphans; out-of-print
- Amount copied: whole thing cuts vs. but should not be given too much weight
- Harm to market: none because RH not there to establish a market for these works

WHY OPEN ACCESS NOW?

- In part this is because new opportunities for sharing have been opened up by the Internet
- In part this is because many creators are more interested in sharing than in restricting access
- In part this is because conventional publishers are not needed to disseminate knowledge much as in the past
- Creative Commons has developed a series of licenses to accommodate open access
 - Building off open source software licensing concepts

OBSTACLES

- Legacy works
- Mindsets of authors & others
- Special problems for some creators
- Sustainability
- Preservation

LEGACY

- Many works were published before open access norms & practices were developed
- Libraries house many of these legacy artifacts
- Many libraries would like to digitize collections and make them available online
- © may stand as an obstacle to this
- Some authors could exercise reversion & termination rights to make past works available on open access basis, but inertia slows this

MINDSETS

- Many academic authors are used to the status quo, have benefited by it
- Academic advancement often depends on publishing in proprietary journals, presses
- © is unfamiliar terrain, & authors don't want to think about it or be bothered by it
- Scholarly societies may depend on journal subscriptions to support services

OTHER PROBLEMS

- Some academic authors find open access mandates to be objectionable interferences with their freedoms
- Some academic authors have special difficulties because they have to clear rights to images or photographs for their publications
 - Not in a position to agree to open access

SUSTAINABILITY

- Open access publications still cost money
- PLOS, for example, has staff of 200 people to manage the flow of manuscripts
- Scientists can often pay fees from grant money to fund open access publications
- But how are humanities & social sciences scholars going to manage the economics of open access?
- Who will preserve these works for the future?

HOW TO MAKE PROGRESS?

- Promoting open access policies with repositories
- Convincing faculty not to assign ©s
- Adopting policies for university retention of a license to make faculty work available for educational uses
- New business models for university presses and journals, perhaps becoming parts of libraries
- Role for Authors Alliance
- Pressing JSTOR, et al., to broaden access

OTHER MOVES

- Work with professors, academic presses, universities, other open access advocates
 - Professors can insist going forward that their books be available in digital libraries, can request their publishers to agree to library licenses for past books, particularly OOP
 - Professors may well have e-book rights under the *Random House v. Rosetta* decision to make available in digital libraries
- What if major university presidents announced that their university presses would allow CC-licenses for all OOP books & encouraged faculty to do this?
 - Might set good example for others to follow
 - Send link to faculty to click here “I agree to CC license for the following books for a digital library repository”

CONCLUSION

- Open access has attained considerable momentum in recent years
- Open access provides opportunities for libraries to make many artifacts more widely available, fulfilling their missions better than ever before
- Some obstacles exist to open access, but with careful leadership, these can be overcome