
This volume addresses the growth in digital delivery of copyright-protected content in American higher education and is directed at faculty, librarians, e-learning directors and web-based training specialists. Despite its U.S. focus, several of the issues discussed are of interest in Canada and it should enjoy some attention from Canadian higher education librarians and those in the library community interested in attempts to reform our Copyright Act.

The book’s nine chapters cover the basics of copyright law in the U.S., the creation of instructional material, fair use, electronic reserves, the TEACH Act, the Digital Millennium Copyright Act (DMCA), digital rights management (DRM), and copyright education programs. In addition, several appendices contain important legal decisions and discussions (all American), as well as resources for copyright education.

Copyright is as American as football: in fact it may be more so, since football does not appear in the first article of the Constitution. The purpose of copyright then (and now), is to balance the preservation of the economic rights of ‘creators’ for a limited period, while promoting new knowledge and commerce. Since that time there has been little consensus on copyright protection and its extension to other forms of creation (performances, sound recordings, computer programs). The 1976 Copyright Act attempted to deal with these matters in a comprehensive manner, but it has been amended and extended by legislation to strike the proper balance between the rights of creators and demands of users. Each new piece of legislation has lead to greater efforts by both sides to expand their rights. If the debate could be reduced to a single phrase, it might be, “what constitutes fair use?”

Fair use (codified in the 1976 Act) exempts certain uses of a copyrighted product, such as criticism, private study and research, teaching, and scholarship from claims of infringing on a creator’s sole right to exploit her work. Unfortunately it can only be conclusively determined by reference to the courts. One exception to copyright, that the purpose of the use is a non-profit educational one, is the only educational exemption in the United States. Attempts to negotiate with producers for educational uses (the Classroom Guidelines Set, Principles for Licensing Electronic Resources) have not settled the matter as it relates to digital material and its delivery where such delivery is outside the traditional classroom. The TEACH (Technology, Education and Copyright Harmonization) Act sought to solve this dilemma, permitting use of more material formats in educational settings, including provision over networks outside classroom sessions, but, as Kimberly Bonner makes clear, fewer than 10% of higher education institutions make use of it (preferring the fair use standard). Similarly, the DMCA made provision for educational institutions to enjoy ‘safe harbour’ provisions for the
potential infringing actions of faculty and researchers, but they must now be pro-
active in informing users about copyright and policing infringing activities (like
P2P file-sharing networks in college dormitories).

Two issues of particular interest to academic librarians are e-reserves and digital
rights management. The first of these replays the old photocopy reserve question
which was partially settled by the 1976 Act and the agreed-upon Classroom
Guidelines, later enhanced by the ALA Model Policy for Higher Education, which
balanced user demand and owners’ rights. Attempts in the 1990s to embrace
digital content did not win the approval of ACRL or the ALA nor of the academic
publishers, and the latter is now in court challenging the e-reserve system at UC-
San Diego.

In the article on DRM, the authors produce results from a survey of American
schools that provide insight into the growing rift between owners and academic
users. The authors contend that librarians and administrators have gotten cold
feet over threats of legal action and have agreed to license conditions which
inhibit appropriate fair use practices. Yet very few schools have employed
technology measures that control re-use and retention of copyrighted materials
and many thought that course management software (which controls access
only) was adequate to their responsibilities under license agreements. The
authors admit they are not interested in rights management per se, but in content
management, because that is the turf on which the access war is being fought.

A final chapter, ‘Copyright, Intellectual Property Policy and Academic Culture,’ by
Clifford Lynch, a copyright reform advocate, attempts to dissolve the balance
between users and producers. Lynch believes that craven academic
administrators have succumbed to the threat of legal action and surrendered the
output of the academy to the marketplace. While admitting that universities are
divided on the issue (as creators of content and profitable patents and as users
of knowledge), he sees only the use side, going so far as to suggest that
universities should consider cutting ties with their university presses and with
scholarly societies if they do not permit open access to content. Likewise, library
special collections, campus museums and archives should digitize and make
freely available all of their content and not enter into production/distribution
agreements with profit-motivated outside parties.

Lynch considers that ‘fair use’ should be resolved into open access. The
academic community alone should determine the disposition of its intellectual
property, he thunders, and it should be freely accessible by all. Consider some
straws in the wind: the announcement of the Wellcome Trust’s intention to
compensate publications ($3,000 per article) for permitting published Wellcome-
funded content to be placed in open access archives, may signal one route to
scholarly open access;¹ likewise, recent reports that Google Book may agree to

¹ See ‘Guidelines for Contributors’, Bulletin of the History of Medicine, Johns Hopkins Press <
pay US publishers for the rights to include their content in the project, may provide the model of ‘balance’ in an ‘publicly available’ environment. Lawrence Lessig’s complaint, that such an arrangement is bad because it sets the precedent that “no one has a right to scan this material without their consent”, speaks more to the copyright crowd than to “everyone else,” who will have legal access to content online. ²

What interest do Canadians have in these issues? Canada is planning new copyright legislation that will, in part, bring us into line with international agreements.³ Canadian academic libraries want an educational exemption for digital material that will flow from the exception enjoyed under section 29 of the Copyright Act. The Supreme Court decision in the Law Society of Upper Canada case (2004 SCC 13) has been hailed as an important victory for research interests, and it influenced a later case (BMG vs John Doe), which spoke to issues concerning infringement by providers of internet services: taken together, these legal decisions may mark out Canadian law as moving away from a perceived bias towards copyright owners⁴. The last copyright go-round featured a report from a Parliamentary Committee that recognized educational needs, DRM and access to publicly available content, and proposed licensing agreements with appropriate bodies (ACCESS COPYRIGHT) to facilitate educational use. This was denounced as pandering to corporate interests. Some commentators, like Michael Geist, now claim that they would prefer ‘fair use’ to Canada’s ‘fair dealing,’ hoping it will open more materials to Canadians. No one wants term extension (which would align Canada with the US and the European Community). Given the reports in this volume, Canadians may well want to be careful what they wish for in the coming copyright reform.


