Copyright Issues for Legislative Audiences: Copy Rights and Copy Wrongs

December 13, 2013

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Copyright Issues for Legislative Audiences: Copy Rights and Copy Wrongs

Sponsored by the
Legislative Research Librarians Staff Section
and the
Legal Services Staff Section

December 13, 2012
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Copyright Issues for a Legislative Audience: Copy Rights and Copy Wrongs

Kristin M. Ford, Idaho Legislative Services Office
NCSL Webinar
December 13, 2012
Why copyright?

“The goal of copyright law and policy is to foster the progress of science, the creation of culture, and the dissemination of ideas. Its best known feature is protection of owner’s rights. But copying, quoting, and generally re-using existing cultural and scientific material can be a critically important part of generating new research and culture and promoting intellectual exchange.”

History of Copyright

Georges Hurtrel, Scribe Writing and the Author Presenting His Book

*hCourtesy National Gallery of Art, Washington*
The “Statute of Anne Eight”

Passed in the 8th year of Queen Anne’s reign (1710), this law is considered a milestone in giving authors rights in their own works. Prior to this time, publishers would pay an author a set fee and then own all rights to the work thereafter, regardless of how many books sold.
The U.S. Copyright Act of 1790

Eighty years later, President George Washington signed into law the first federal Copyright Act in the United States. It mirrored the length of time England gave an author copyrights, but the U.S. extended the exclusive rights to the authors of maps and charts as well as books.
• Act protected book authors

1710

Maximum: 28 years

2012

Act protects original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works. (17 U.S.C. 102)

Maximum: life plus 70 years
(120 years for corporate authors)
Determining Copyright Status

http://librarycopyright.net/resources/digitalslider/

Directions:
- Set arrow at correct date
- Read information in windows
- Mouse-over any [notes] or asterisks [*] for clarifying information

Is it Protected by Copyright?
For works first published in the U.S.A.*

Maybe* Permission Needed?

Copyright Status/Term
Protected until 70 years after the death of the author [see note]

Unpublished Works (date of creation)

Copyright Term/Status

Date of First Publication
Before 1923
After 1922 & Before 1978
If published without © notice
After 1922 & Before 1964
If published with © notice, but not renewed after 28 years
After 1922 & Before 1964
If published with © notice & renewed after 28 years
After 1963 & Before 1978
If published with © notice
After 1977 & Before 2003
Created (unpublished) before 1978 & first published before January 1, 2003
After 1977 & Before March 1, 1989
If published without © notice & without subsequent registration
After 1977 & Before March 1, 1989
If published without © notice but registered within 5 years; or published with © notice
On or after March 1, 1989
Published with or without © notice
Published after 2002
Created before 1978 and author died more than 70 years ago

Created by Individual or Joint Authors
Created under Corporate Authorship
Google’s Scanned Copyright Catalog

Searching Google’s Scans of the Catalog of Copyright Entries

The Catalog of Copyright Entries is the U.S. Copyright Office’s official publication of copyright registrations and renewals, organized into categories of works. Part I includes registrations for books and pamphlets, including serials and contributions to periodicals. For books registered from January 1, 1978 to the present, the Copyright Office maintains a searchable database that can be searched online at http://www.copyright.gov/records. For books registered before 1978, the Catalog of Copyright Entries can be manually searched. Hard copies can be found at the Copyright Office located in the Library of Congress, James Madison Memorial Building, 101 Independence Ave SE, Washington, DC 20559-6000, and at a number of different libraries throughout the U.S., including Stanford, University of Michigan and University of California.

In order to provide Rightsholders with another mechanism for confirming whether books were registered with the Copyright Office before 1978, Google has scanned 91 volumes of the U.S. Copyright Office Catalog of Copyright Entries (including works registered from 1923 up to 1978) and made those volumes searchable online through Google Books. In determining the registration status of your work, you may want to check both the Copyright Office’s online database and Google’s searchable scans.

There are two ways to search Google’s scans of the volumes of the Catalog of Copyright Entries. You can search over all 91 volumes that have been scanned, or you can search over individual volumes covering registrations in or around a particular year. Many times, books were registered shortly after publication (within a year or two), so the book’s year of publication could be a good starting point for searching individual volumes covering a year.
Public Records & Copyright

- Copyright may, but will not always, trump public records laws. If a public record contains a copyrighted work, the agency must still do the copyright analysis and determine whether fair use or any other exemption applies, when determining whether to allow a member of the public to copy the work. May be appropriate to restrict further distribution of the work. See, e.g., County of Suffolk v. First American Real Estate Solutions 261 F.3d 179 (2001); Lindberg v. County of Kitsap, 948 P.2d 805 (1997).
Steps to Determine Fair Use

A Fair Use determination is not necessary if the work’s copyright has expired, or if the work is not covered by copyright because it is not a creative work, or because the proposed use is not subject to copyright restrictions.

- **Examples:**
  - Work is before 1923
  - Work is just a list of materials
  - Desired use is simply to read the work, not copy or distribute it
Allowable Statutory Uses under the U.S. Copyright Act

- If you have a more specific statutory exception, use it instead of Fair Use. Other allowable uses under the federal copyright law are:
  - Library copying for:
    - Preservation copying
    - Private research and study
    - Interlibrary loans
  - First Sale Doctrine
  - Public Displays where work is located
  - Face-to-face teaching and distance learning
  - Computer software backup copies
  - Photos of architectural design
  - Special formats for blind or disabled persons
1. Purpose or character of the use.
   ◦ Is it for a commercial purpose, or is the use for nonprofit educational purposes?
   ◦ Transformative uses are looked upon favorably by the courts. A transformative use means the work is not merely being represented, but is being altered into a new work. Parodies and song-sampling are examples.
2. Nature of the Copyrighted Work
   ◦ Unpublished or already published? Unpublished works receive more protection.
   ◦ Nonfiction is more likely than Fiction to be found as Fair Use because of the original purpose of the copyright law: to foster knowledge and learning.
3. Amount of the Work Being Used
   ◦ Many people think this is dispositive, and that if you only use 10% of the work, you are safe. This is only one factor out of four. There are situations in which it is fair use to use the entire work, so don’t be misled into blindly relying on a random number. Excerpts or thumbnail photos may be more likely to be fair use than the full amount, but if the excerpt encapsulates the heart of the work, it may be found to violate fair use.
4. Effect on the Market
   ◦ Does the use serve to replace a marketplace purchase? Or is the material out-of-print or otherwise unavailable on the market?
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For detailed information about the National Gallery of Art, including location and hours, please visit the Gallery’s website at www.nga.gov

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http://www.ulib.org/
GUIDE TO FINDING INTERESTING PUBLIC DOMAIN WORKS ONLINE

http://publicdomainreview.org/guide-to-finding-interesting-public-domain-works-online/
Flickr Commons collaboration

http://www.flickr.com/commons

Welcome!

The key goals of The Commons on Flickr are to firstly show you hidden treasures in the world’s public photography archives, and secondly to show how your input and knowledge can help make these collections even richer.

You’re invited to help describe the photographs you discover in The Commons on Flickr, either by adding tags or leaving comments.*

Participating Institutions
FAQ
Rights Statement
Dipity Timeline:
http://www.dipity.com/creativerrights/The_History_of_Creativity_Copyright/#timeline
The Public Domain
by James Boyle

http://www.thepublicdomain.org/download/
To encourage fresh thinking and innovation, we want creators to share their works. If we want them to share their works, we must offer them the chance to profit by doing so. If creators have no incentive to publicize their work, the creative flow in society will be stifled and will not in turn stimulate new creators. These two forces support and complement each other. Librarians have a duty to support both copyright protections AND fair use exemptions equally.
You can do it!
Amazing and Problematic Resource

- Originally a clipping repository
- LRL started printing copies for the legislature in 1976
- Clippers arrive at work at 4:30 a.m.
- Clips distributed by 7:30 a.m., five days per week
- Paper distribution list of several hundred until mid-2000s
Curated clips consolidate information across the state
Organized in a predictable format (front page, metro, editorials, etc.)
Impractical for each member to subscribe to dozens of newspapers
Taxpayer savings
Pressure to Modernize

- Paper distribution limited due to copyright concerns
- Paper distribution eliminated due to cutbacks
- Electronic versions only available “on campus”
- Request to receive via e-mail
- Request to receive “off campus”
- Distribution would no longer be “limited”
So, How Bad Is It?

17 U.S.C. Section 511

Any State . . . and any officer or employee of a State . . . acting in his or her official capacity, shall not be immune . . . from suit . . . for any . . . violation under this title.
Fair Use?

Standard four-element fair use test.

• No.
Fair Use?

1961 Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law:

“[Fair use includes the] reproduction of a work in legislative or judicial proceedings or reports.”

• No.
Fair Use?

17 U.S.C. Section 108, Library Exception

(a) . . . [I]t is not an infringement of copyright for a library . . . to reproduce no more than one copy . . . of a work . . . or to distribute such copy . . . if—

(1) the reproduction or distribution is made without any purpose of . . . commercial advantage;
(2) the collections of the library . . . are
   (i) open to the public, or
   (ii) available not only to researchers affiliated with the library . . . ; and
(3) the reproduction or distribution of the work includes a notice of copyright . . . .


17 U.S.C. Section 108, Library Exception

(d) The rights of reproduction and distribution under this section apply to a copy . . . of no more than one article or other contribution to a . . . periodical issue . . . if—

(1) the copy . . . becomes the property of the user, and the library . . . has had no notice that the copy. . . would be used for any purpose other than private study, scholarship, or research; and

(2) the library . . . displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

• No.
Call NCSL?

  - Florida refuses to negotiate with Seminole Tribe under the Indian Gaming Regulatory Act.
  - HOLDING: The Eleventh Amendment to the Constitution prohibits Congress from using its Article I powers to abrogate states’ sovereign immunity.
- Article I powers:
  - Regulate the Indian tribes
  - Provide and maintain a navy
  - Establish copyrights, trademarks, and patents
Call NCSL?

  - NJ bank patents method of administering education savings plan, which FL copies
  - Sues under Fourteenth Amendment
  - HOLDING:
    - Eleventh Amendment requires Congress to intend to abrogate state immunity
    - Must be pursuant to a valid exercise of power
Call NCSL?

- *Chavez v. Arte Publico Press*, 139 F.3d 504 (5th Cir. 2000)
  - Denise Chavez
  - University of Houston publishing division
  - 1986—*The Last of the Menu Girls*
  - 1991—Chavez attempts to prevent additional copies of book from being published
  - 1993—Chavez sues
  - HOLDING:
    - Relied on *Seminole Tribe* and *Florida Prepaid*
    - Eleventh Amendment protects states from Article I
    - No proof of pattern of state infringement to justify remediation under Fourteenth Amendment
    - Fifth Circuit dismisses due to Eleventh Amendment immunity
Law of the Land?

- Courts using Chavez analysis:
  - InfoMath, Inc. v. Univ. of Ark., 633 F. Supp. 2d 674 (E.D. Ark. 2007)
  - Salerno v. City Univ. of N.Y., 191 F. Supp. 2d 352 (S.D.N.Y. 2001)
States can own and protect their own intellectual property:
Soooo...

No liability for copyright

Can sue to enforce own copyright
INJUNCTIVE RELIEF MAY STILL BE AVAILABLE UNDER Ex Parte Young (MAYBE)

- No further publication
- Possible destruction of infringing material

STATE COPYRIGHT PROTECTION?

SUPREME COURT MAY CHANGE ITS MIND

- Infringing provides evidence to justify reversal or re-enactment of copyright/trademark/patent law

HARASSMENT SUITS

BUT CONSIDER

• Contractual remedies
• Refusal to contract with your state or your agency
• Can’t transfer or license copyright
• Public perception
• Unethical and unfair to infringe
LRL OK?

- Members of the legislature are opinion leaders
- Publication is excellent
- Copyright holders beg to be included
Being Proactive

- Copy library exemption to extent possible
- Reduce copies where possible
- Use technology to minimize or avoid infringement
Branch to speak at Texas State commencement

Legislative Reference Library of Texas

Posted On: Mon 12/10/2012 6:50 AM
Feed: LRL Daily Clips

12/10/12 Austin American Statesman, Svoboda, H.
Texas Rep. Dan Branch of Dallas will give the keynote address at one of Texas State University’s four commencement ceremonies.

Branch will speak at the commencement ceremony for graduates from the College of Education and the College of Health Professions at 10 a.m. Dec. 15.

Texas State President Denise Trauth will give the keynote address at the university’s three other commencement ceremonies. All four ceremonies will take place at Strahan Coliseum.

This fall, the university has 2,924 candidates for bachelor’s, master’s and doctoral degrees. University officials will live stream the ceremony at www.txstate.edu/commencement for any family members or friends unable to attend the ceremony in person.
Cortez: New university is McAllen's top legislative priority
5 hours ago
riograndeguardian.com • EDINBURG, December 10 - The City of McAllens No. 1 legislative agenda item is a new university and a school of medicine, Mayor Richard Cortez has announced.

The change in priority was made as soon as the UT System announced plans to turn UT-Pan American, UT-Brownsville, and the Regional Academic Health Center into an emerging research university that will, within a few years, include a four-year medical school.

I cannot speak for the other communities but I can assure you this will be the number one legislative agenda item for the City of McAllen. Creating a new university is huge, Cortez told the ...
Get it done: East Texas roads cooperation is a model for rest of the state

Longview News-Journal

Gregg County residents might be forgiven some confusion as they hear talk leading up to the state legislative session about how woefully Texas has under-funded transportation.

It's true, in much of the rest of the state, that road building and maintenance has gone wanting.

But that's certainly not the case around here.
Being Proactive

- Fair use checklist?

<table>
<thead>
<tr>
<th>Published work</th>
<th>Unpublished work</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factual/informational and educational in nature or nonfiction work</td>
<td>Fiction or highly creative work (art, music, novels, films, plays, poetry)</td>
</tr>
<tr>
<td>Non-consumable work</td>
<td>Consumable work (workbook, test)</td>
</tr>
</tbody>
</table>

http://www.usg.edu/images/copyright_docs/fair_use_checklist.pdf
COPYRIGHT ISSUES

Questions?

Type your question in the chat box on the lower-right corner of your screen.
Copyright Issues for Legislative Audiences: Copy Rights and Copy Wrongs

To access the archived webinar, visit
http://www.ncsl.org/?TabId=21921

For additional information, please contact
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or call (303) 364-7700.